



# MTW TODAY

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It is with pleasure that Mullin Thwaites Ward, LLP takes this opportunity to publish the second of what is becoming a regular newsletter for our clients. We believe that it is important for us to communicate with our clients in an effort to keep them abreast of developments in the law touching their personal or business life or the life of the community. We invite our readers to contact us by telephone, fax or at our website to learn more about us and our practice. In this newsletter we are looking at Estate Planning issues.

## What is Estate Planning?

The phrase "Estate Planning" has been in the news recently and used to describe a number of situations. It is a broad term that encompasses many different aspects.

Traditionally it was thought that the only people who had a significant assets needed to think about an estate plan. Although that may be true, it is this writer's opinion that everyone needs to think about an estate plan even if they do nothing about it. Doing nothing is in itself an estate plan.

Many estate plans consist of the basic documents that most people are familiar with - a Will, Power of Attorney and Life Insurance. What we need to look at is what documents are needed for each person and what should be contained in them.

## The Basics

Most people are familiar with the basics of a Will. The question is does everyone need a Will? The answer will depend upon what you want to have happen to your

worldly possessions upon your death. This includes your personal items such as your stereo equipment and bank accounts as well as any property you may own.

The Government of Ontario has set out a scheme of inheritance in the *Succession Law Reform Act*. If someone dies without a Will, the *Act* states that if you are married at the time of your death, your spouse is entitled to the first \$200,000.00 worth of your estate. Anything over and above that amount is shared between your spouse and any children you may have.

By preparing a Will, you and not the Government can determine who is to receive the property that you have accumulated during your lifetime. Without one, although family members may benefit it is likely that a Court application for a Certificate of Appointment of Estate Trustee without a Will will become necessary which not only adds to the cost to administer the estate but could also benefit individuals that the deceased never intended to benefit.

## Other considerations

### a) Goals

Before you can articulate your estate plan and make decisions on how to carry it out you must determine what your goals are. For some people, their goal is to amass as much property as they can so that they can leave it to their children while for others the goal is to enjoy and make full use of their property during their lifetime.

An Estate goal can include the desire to minimize the tax to be paid on death or to ensure that provisions

have been made to pay the tax so that the beneficiaries can realize a larger gift.

A thorough review of all the assets and how they are owned can help determine what plan to put into place.

#### b) Ownership

There are other things to consider or ways to develop an Estate Plan to achieve the goals. One way is to look at how you hold your property ie. land or bank accounts. Do you own these items with someone else and if so as joint tenants, so that on the death of one owner the other takes sole title by right of survivorship, or as tenants-in-common so that upon death the property is dealt with in accordance with the deceased's Will.

Often, as between spouses, ownership of assets as joint tenants is the simplest of estate plans. This means that the asset will automatically become the property of the surviving spouse although there may be some paperwork to be completed to reflect the ownership.

Often parents will ask about putting their grown children on title in order to avoid the estate tax (formerly known as probate fees). Although there is nothing in law to prevent someone from doing this the following are things that should be considered:

#### i) Capital Gains Tax

As indicated, one reason to transfer the property is to reduce the amount of estate tax payable if a Certificate of Appointment of Estate Trustee is being applied for. This tax is based on the total value of the estate and as set out later in this newsletter is based on a sliding scale.

An individual is entitled to designate one property as their principal residence and shelter it from capital gains tax. If your child already has a home then they may be liable to pay capital gains tax on the property they own jointly with you based on their ownership of the property that could exceed the tax payable on death.

#### ii) Loss of Control

When you transfer title to someone else as a joint

owner, you also lose control over the dealings with that property. Even though it is your home and you decide that you may want to sell it or re-finance it you must now get the consent of the other person on title. If they do not agree with your proposal you could be thwarted in your plans.

#### iii) Financial Stability

A further consideration is the financial stability of the person to you wish to put on title. If they are vulnerable to claims by creditors, insolvency or bankruptcy they the creditors may look to your property to satisfy their claim. It may not matter why the property was put into joint names to the creditor. You could lose financially more that you stood to gain.

### **What is in a Will?**

A will sets out a number of things including the following (which is not meant to be an exhaustive list):

- appointment of Executor and Estate Trustee  
*This is the person who ensures that your Estate is finalized and carries out your instructions.*
- funeral instructions  
*Ideally these should be expressed during your lifetime as it may be too late if only mentioned in the Will.*
- Custody and Guardianship of Minor Children  
*Although a Court still retains jurisdiction this is a strong expression of your wishes.*
- Pets - *what is to happen to them upon your death*
- Gifts  
*-you may set out who is to receive what from your estate.*
- Trusts  
*- to carry out the estate plan you may find creating a testamentary trust suits your purposes*

For a more extensive review of this subject area, please obtain a copy of our Legal Update entitled "Do You Need a Will?" which you can obtain by calling our office

or visiting our website at the following address:

[www.mtwlawoffice.com](http://www.mtwlawoffice.com)

### **Powers of Attorney**

So far we have focused on an Estate Plan upon death - but what about when you are still alive but can not look after yourself. A Power of Attorney is intended to deal with this situation. There are two different types of Powers of Attorney - one that deals with your property ie. paying your bills and managing your investments and the other dealing with your personal care including making health care decisions.

You can only make a Power of Attorney when you are mentally capable. If you do not then the Public Guardian and Trustee will be in charge of administering your affairs unless someone comes forward and applies to take over.

A Power of Attorney is important even if you own all of your assets jointly with your spouse or someone else. If you become incapacitated the authority to deal with your interest in the property still remains with you. The other joint owner can not sell or mortgage the property without the consent of both joint owners. If you had granted a Power of Attorney to your spouse or someone else they could deal with your interest otherwise, as stated above, you will need to deal with the Public Guardian and Trustee.

For a more extensive review of this subject area, please obtain a copy of our Legal Updates entitled "Continuing Power of Attorney for Property" and "Power of Attorney for Personal Care" which you can obtain by calling our office or visiting our website at the following address:

[www.mtwlawoffice.com](http://www.mtwlawoffice.com)

### **Take the Quiz!! - Test your knowledge**

The following are some questions based on frequently asked questions by clients - test **your** knowledge.

1. Does every estate have to pay the Estate tax when an Ontario resident dies?

Yes \_\_\_\_\_ No \_\_\_\_\_

2. In order to save money, you purchased a "Do-it-Yourself" Will-writing kit, filled in the blanks and signed it without witnesses. Is the Will valid?

Yes \_\_\_\_\_ No \_\_\_\_\_

3. You made out a Will in 2000 and then got married in 2001. Is the Will made in 2000 still valid.

Yes \_\_\_\_\_ No \_\_\_\_\_

4. You hold title to your house in your own name but have heard that if you were to transfer it to your son as a joint tenant, the estate could avoid paying estate tax on death?

Yes \_\_\_\_\_ No \_\_\_\_\_

5. You have a Will in which you have named your brother to be the Estate Trustee. On your way home from work one day you were in a car accident and have been in a coma for over a month. Can your brother look after your business affairs on your behalf.

Yes \_\_\_\_\_ No \_\_\_\_\_

#### *Answers:*

1. No. The Estate Tax is only payable if a Certificate of Appointment of Estate Trustee is applied for.
2. No. A Will must be properly witnessed by two individuals to be valid, otherwise it must be complete in the testators own handwriting.
3. No. A will is automatically revoked upon marriage unless it specifically states it was made in contemplation of marriage.
4. Yes. The asset belongs to the joint tenant.
5. No. An Estate Trustee can only act upon death. The person named in a Continuing Power of Attorney for Property could act.

**FYI** - What follows is a brief summary of a case that we came across and thought our clients might find interesting.

## **MUSHROOM FARMER IN WHITBY CAUSES A STINK**

**W**hitby neighbours complained about the Greenwood Mushroom Farm on Heron Road. Readers who have on occasion been kept in the dark generally know how mushrooms are grown; you may not be aware of the extent of the odour emanating from some of these operations. The witnesses in the neighbour's action for damages for nuisance against Greenwood Mushroom Farm were graphic: "like a septic tank"; "rotten eggs, putrid, stink, rank and nauseating"; "decaying animals, cow manure"; "nauseating like rotten fish"; "like an outhouse, ammonia, sour, putrid, rotten vegetables"; "like ammonia or rotten meat and as bad, terrible and unbearable stench"; "having one's face buried in faeces"; "worse than a pig farm"; and unbelievably terrible".

**T**he Ontario Court of Appeal recently found that the operation was outside of Normal Farm Practices and therefore not entitled to the protection of *The Farming and Food Production and Protection Act* 1998, S.O. 1998 c1 which was enacted to protect and encourage the development of farm lands for the production of food.

**T**he Court of Appeal stated that *The Farming and Food Production and Protection Act* cannot be construed to take away the property rights of the long suffering neighbours and damage awards ranging from \$7,500.00 to \$35,000.00 were upheld for the unreasonable interference with the use and enjoyment of their property.

**T**he 19 Plaintiffs undoubtedly believed themselves to be vindicated at the conclusion of this action and probably resolved never to be kept in the dark or dumped on again.



This MTW *TODAY* is provided as an information service to our clients and is a summary of legal matters. It is not meant to be a legal opinion. Readers are cautioned not to act on information provided herein without seeking specific legal advice with respect to their unique circumstances. Comments and suggestions are welcome.



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