Estate Planning in the COVID Era

May 6, 2020

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LEGAL DISCLAIMER

- The presentation today is not intended as legal advice.
- Because this is a high level overview, it is impossible to cover all relevant details, and your available rights and remedies will depend on the unique facts of each situation, your applicable contract or subcontract, or the nature of your project.
- For specific advice, please contact your qualified legal counsel before making any decisions or taking any action. This is of particular importance as every province and territory has its own legal regime.
- As you know, the situation is extremely fluid and is changing on a daily basis. As things evolve, your best course of action could also evolve. Please follow up to date and reliable sources for your information.

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UPDATING YOUR WILLS

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WHAT IS A WILL?

A Will is a written document which expresses your wishes and intention regarding the transfer of your assets at your death.

ISSUES TO CONSIDER

- Selection of Executors
- Selection of Guardians
- Addressing Different Family Situations
- Testamentary Trusts for your Children

SELECTION OF EXECUTORS

There are six “A”’s to consider:

1. Age
2. Area
3. Aptitude
4. Appetite
5. Amount
6. Alternates

SELECTION OF GUARDIANS

Things to consider in your selection of Guardians of Minor Children are:

- Finances
- Personal Relationships
- Health
- Lifestyle
- Relationship with Children
- Relationship with Executors

ADDRESSING FAMILY SITUATIONS

Importance of:

- Asset Protection
- Obligations to prior Spouse
- Obligations to Children
- Obligations to any other dependents

TESTAMENTARY TRUSTS FOR CHILDREN

Some things to consider when setting up Testamentary Trusts for your Children:

- **How much?**
- **When?**
- **Additional Considerations?**

GUARDING AGAINST UNDUE INFLUENCE

SEAN SULLIVAN

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UNDUE INFLUENCE- GENERAL

- A testamentary disposition will only be invalidated on the basis of undue influence when the person challenging the document establishes, on a balance of probabilities, that the influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the influencer and not the deceased.
- Evidence of specific coercion at the time the testamentary document was executed is not required
- Court will look at surrounding circumstances in assessing whether undue influence exists

INDICATORS OF UNDUE INFLUENCE

- Testator is socially isolated
- Testator is dependent on influencer for emotional and physical needs;
- Testator has experienced recent family conflict;
- Testator has experienced recent bereavement;
- Testator has made substantial pre-death transfer of wealth to influencer;
- Testator has made new Will inconsistent with prior Wills;
- Testator has failed to provide a reason or explanation for change; and/or
- Testator uses a lawyer previously unknown to him or her and chosen by the influencer

SLOVER V. RELLINGER- OVERVIEW

- Wealthy 94 year old (Gertrude)- two children (Jim and Joan)
- Joan is primary contact until 2013
- 2013- Gertrude begins making untrue accusations against Joan (allegations of theft, abandonment) raising questions about mental capacity
- Will change in May 2013- change from 50/50 split to 75/25 split in favour of Jim
- August 2013 to September 2014, Jim moves Gertrude to a new city, replaces her financial and legal advisors with those he had retained and isolates Joan
- New Estate Planning Arrangements- assets transferred to joint account with Jim

SLOVER V. RELLINGER- DECISION

- Court found that Jim had unduly influenced Gertrude
- Gertrude socially isolated
- New estate planning arrangements prepared by lawyers chosen by Jim
- Significant sums paid to Jim during this period
- Gertrude entirely dependent on Jim
- Important evidence- the audio recording

UNDUE INFLUENCE- CONCLUSION

- Not all influence will rise to level of undue influence- high bar
- Undue influence must be so significant that estate planning documents do not express the testator's mind and intention
- Important for family members, legal and other professional advisors to be on guard for warning signs.

POWERS OF ATTORNEY

ALEX DEL BEL BELLUZ

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POWERS OF ATTORNEY

- **A Power of Attorney is a written document by which one person (the “grantor”) appoints another person (the “attorney”) to act as a substitute decision maker on the grantor’s behalf.**
- **There are two types of Power of Attorney:**

1. Continuing Power of Attorney for Property
2. Power of Attorney for Personal Care

POWER OF ATTORNEY FOR PERSONAL CARE

- **Decisions relating to Personal Care**
  - Includes health care, nutrition, shelter, safety, clothing, hygiene
- **Attorney has duty to foster contact with supportive family and friends**
- **Becomes effective when grantor becomes incapable**

CONTINUING POWER OF ATTORNEY FOR PROPERTY

- **Decisions relating to Property**
  - Cannot make a new Will or other testamentary disposition
  - Exercise reasonable care and skill in the performance of acts done on behalf of the donor, and account for all transactions
- **Generally becomes effective immediately upon execution**

CONSEQUENCES OF NOT HAVING A POWER OF ATTORNEY

- **In absence of Power of Attorney for Personal Care, appointment governed by statute:**
  - Spouse
  - Parent/Adult Child
  - Sibling
- **In absence of Power of Attorney for Property, appointment is <u>not</u> governed by statute.**
  - Court appointment

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CONSIDERATIONS IN POWER OF ATTORNEY APPOINTMENTS

- **Who to appoint**
  - Corporate trustee
- **Number of attorneys**
  - Joint or Jointly and Severally
- **Location of Attorney for Property**
  - Does the attorney reside outside of Canada

POWERS OF ATTORNEY ARE AN IMPORTANT PART OF YOUR OVERALL ESTATE PLAN

INCOME TAX AND PROBATE PLANNING

BRIAN EDWARD COHEN

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PROBATE – HISTORICAL CONTEXT

- Going back to 1998 Estate Planners were looking for a way to minimize the “probate tax” liability.
- In Ontario the liability was approximately 1.5% of the value of the Estate (high in Canada)
- *Granovsky Estate* was the test case as to whether multiple wills would work; as we know they did
- Now we have as a planning practice corporate/personal wills and seek to minimize the 1.5%
- Little did we know the litigation that would follow

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ESTATE ADMINISTRATION TAX – AN OVERVIEW

- It is due when you apply for the certificate.
- In order to obtain a Certificate of Appointment of Estate Trustee (with or without a will), an estate trustee must pay EAT at the rate of $15 per $1,000 (or part thereof) for the estate value in excess of $50,000 – if under $50,000 no EAT…. BUT….
- The Application for a Certificate is rather simple – just asks for value for personal and real property.
- Previously no inventory required

WHY DO YOU NEED A CERTIFICATE AT ALL?

- Obtaining an "estate certificate", also known as probate is "the judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court."
- It is a "pronouncement that the instrument represents the testator's true testamentary intentions and that the estate trustee has lawful authority to administer the estate."
- However, the deceased's personal representative derives their authority from the will - probate is only the evidence of the representative's authority to deal with the deceased's property.
- **If no one requires the evidence, probate is therefore not required*!***

WHY PROBATE PLANNING

- Since the rate was increased to 1.5% planning has increased substantially and actual Provincial revenues have decreased rather than increased

SIMPLE PLANNING SUMMARY

- No Estate Administration Tax on:
  1. Designated Benefits – RRSP, RRIFs, Insurance, Pensions etc.
  2. Jointly held assets transferred on death
  3. Corporate Assets Dealt with in Corporate Will

DESIGNATED BENEFITS – THE RISK

- Where you designate a beneficiary on an RRSP or an RRIF be careful – the tax liability may be borne by the wrong party.
- The tax liability will belong to the estate not the recipient of the funds (unless a spouse)
- This could leave one beneficiary bearing the tax liability for another – to avoid, you may need to include the RRSP or RRIF in the estate and pay the EAT to avoid litigation.

JOINT OWNERSHIP

- Joint ownership differs from a tenancy in common where particular interests are owned by each party (often 50/50) as in joint ownership each has an undivided 100% interest.
- Joint ownership is useful in probate minimization as there is a simple transfer on death (via right of survivorship)
- Most commonly found with bank and investment accounts as well as real property
- For real property be very careful not to affect a principal residence exemption of another generation.
- DO NOT PUT IN JOINT NAME WITH CHILD WHO ALSO OWNS A HOUSE WITHOUT PROPER LEGAL ADVICE!

JOINT OWNERSHIP V. RESULTING TRUST

- The general rule is that when there is a gratuitous transfer of property to an adult child, including transfers of property into joint tenancy or upon joint account, it is presumed that the transferee holds the property on a resulting trust for the transferor since equity assumes bargains and not gifts. The onus of proof is on the donee (i.e., the adult child) to rebut a presumption of resulting trust by demonstrating that the donor intended to transfer the beneficial interest in addition to passing the legal title to the property
- See *Pecore v. Pecore*, 2007 SCC 17 and also *Sawdon Estate v. Watch Tower Bible and Tract*, 2014 ONCA 101
- If not done properly EAT payable (as the property remains an asset of the deceased – see the bare trust discussion) and litigation is costly.

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MULTIPLE WILLS

- As noted you pay EAT on the total value of the estate placed in front of the court
- According to the Ministry of Finance this would include real estate in Ontario, bank accounts, investments, business interests, and insurance, if proceeds pass through the estate.
- Multiple wills are used to reduce EAT by reducing the value of the assets that require the certificate
- Multiple wills as a planning tool have been tested in the courts – *Granovsky Estate v. Ontario*, 1998 CanLII 14913

MULTIPLE WILLS CONT.

- The following assets may not require a Certificate to be administered and therefore may be disposed of under a secondary will:
  1. shares of privately-held corporations, related shareholders' loans and receivables – how far?;
  2. most household goods and personal effects;
  3. assets over which the testator has a power of appointment;
  4. partnership interests and related loans and receivables;
  5. beneficial interests in trusts or other estates; and
  6. unsecured debts.

COMMON RISKS AND ERRORS WITH MULTIPLE WILLS

- Where is the tax paid from – which estate?
- Double up of gifts or insufficient gifts
- Different trustees
- Codicils revoking everything?
- How many do you actually need? Art Will? Foreign Property?
- Assets being gifted in the wrong will – if put in secondary but gift in primary it fails.

OTHER PLANNING OPTIONS – CALL IF QUESTIONS

- Bare Trusts
- Corporate Transfers (s. 85 or otherwise)
- Joint Partner and Alter-ego Trusts

PRESCRIBED RATE LOANS

- Normally if you gift an asset to a spouse or related minor (under 18) or transfer to them via a trust the income from that gift is attributed back to the transferor
- Example
  1. I gift my gift my spouse $100,000 and she earns $10,000 of income on that loaned amount;
  2. I will have the $10,000 taxed in my hands even though the income is hers
- For spouses, attribution applies to income and capital gains; for related minors, just to income

PRESCRIBED RATE LOANS CONTINUED

- The foregoing rules don’t apply where the funds are loaned to the spouse or related minor and interest is paid at the prescribed rate in force at the time of the loan
- Currently it is 2%, but as of July 1, it is dropping to 1%
- Example:
  1. Wife in top tax bracket lends $100,000 to other husband who earns no income;
  2. Husband earns $10,000 on the loaned amount;
  3. Presuming loan was made after July 1, 2020 then:
     - Husband pays wife $1,000 in interest and wife pays $520 on that amount
     - Husband retains $9,000 and pays no tax because he is under the basic personal amount
     - If wife earned all income would have paid $5,200 in tax instead of just $520.

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ESTATE FREEZES AND BUSINESS SUCCESSION

- On death there is a deemed disposition of all assets (subject to transfers to spouses or a spousal trust);
- The higher the growth in private company shares during lifetime, the higher the gain;
- Due to the times, many family businesses have fallen in value
- Is it time to freeze the value of an owner's interest by exchanging growth shares for fixed value shares? Future growth would go to another generation
- Is it time to trigger the gain on the shares generally? Why would you pay tax early?
- Tune in on May19 from 1:00 to 2:00 pm EDT for a in=depth look at these topics.

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US TAX - PRINCIPAL RESIDENCE PLANNING WITH US CITIZENS

CHRISTINE A. PERRY

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TAXATION ON SALE OF HOME

A Canadian taxpayer who is also a U.S. person (U.S. citizen, green card holder, or U.S. resident) is subject to tax in two countries and must consider both Canadian and U.S. tax implications when selling his or her principal residence.

> **Principal Residence Exemption (Canada)** - A Canadian taxpayer can benefit from the principal residence exemption to eliminate or reduce the gain.
>
> **Main Home Exclusion (U.S.)** - A Canadian taxpayer who is also a U.S. person (a U.S. citizen, green card holder, or U.S. tax resident) can benefit from the main home exclusion to eliminate or reduce the gain.

MAIN HOME EXEMPTION VS. PRE

From a tax policy perspective, the U.S. **main home exclusion,** which is found at IRC § 121, is *similar* to the Canadian principal residence exemption.

However, the main home exemption is more restrictive than the principal residence exemption, both in terms of **qualifying for the exclusion** and in terms of the **amount excluded**.

QUALIFYING FOR THE EXCLUSION

Principal Residence Exemption	Main Home Exclusion
Will qualify as a principal residence if: • It is a housing unit; • Taxpayer owns the unit either alone, or jointly with another person*; • The taxpayer, his or her current or former spouse, or his or her child “ordinarily inhabited” the property at some point during the taxation year; and, • The taxpayer designates the property as his or her principal residence. * Ownership through certain trusts, generally lifetime interest trusts, will qualify	**Will qualify for the exclusion if:** • Taxpayer owned the home for at least 24 months (2 years) out of the last 5 years leading up to the date of sale; • Taxpayer used it as his or her residence for at least 24 months of the previous 5 years; and, • Taxpayer didn't sell another home during the 2-year period before the date of sale

AMOUNT EXCLUDED

Principal Residence Exemption	Main Home Exclusion
In simple terms, the full amount of the gain for each taxation year in which the property is designated as the taxpayer’s principal residence (plus 1) is excluded	In the case of a single taxpayer, or a married taxpayer filing as single, the amount of $250,000; and, In the case of married taxpayers filing jointly, the amount of $500,000.

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IMPLICATION – US TAX LIABILITY ON SALE

***Insufficient U.S. Exclusion*.** The main home exclusion may not be sufficient to shelter 100% of the gain on the property.

U.S. Tax Liability. The disposition of the home in that case generates a U.S. tax liability where there is otherwise no Canadian tax liability.

***Availability of FTCs*.** The taxpayer *may* have other foreign tax credits that can be used to offset the gain (given that the Canadian tax on that income will likely exceed the U.S. tax). Realistically, given that the gain from the sale of the home is usually much larger than any other income, the FTCs from other income are unlikely to be of much use.

OTHER OPTIONS – **Die owning the home** or have **home owned by Canadian spouse**

OPTION 1

Die while owning the home

- ***Why does this work?*** For U.S. purposes, at death the home forms part of the worldwide gross estate, and may be subject to U.S. estate tax (depending on the value of his or her estate) but there is no disposition of the home at death for income tax purposes.
- ***"US Angel of Death Loophole"*** In general, a U.S. estate less than the estate tax exemption amount (now $11.8M) will not generate an estate tax liability, will not generate an income tax liability (unlike in Canada), and the estate assets will receive a full basis step up.
- Not always ideal or practical, but effective

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OPTION 2

Have property owned by Canadian spouse

If the U.S. taxpayer is lucky enough to be married to a Canadian taxpayer who is not a U.S. person then the property can be:

- Acquired by the Canadian spouse in the first instance; or,
- Transferred to the Canadian spouse after the initial acquisition

IMPLEMENTING SOLUTION 2 - TRANSFER

This involves careful consideration of a number of issues and should not be undertaken lightly. In very simple terms:

Interest of U.S. spouse is transferred to the Canadian spouse:

- Transfer can occur on a rollover basis for Canadian tax purposes (consider attribution)
- Transfer is a taxable gift for U.S. tax purposes which may be sheltered by U.S. spouse’s lifetime unified credit (properly document and verify taxpayer’s available credit)
- Consider family law issues

Properly document the transaction and register the transfer

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FINAL PROBLEM – PROPERTY REVERTS TO US SPOUSE

Property is successfully titled to Canadian spouse but…….

If the U.S. spouse is also lucky enough to be the surviving spouse, the home may end up back in his or her hands.

What can be done? A number of considerations will guide the planning choices:

- Canadian income tax (generally straightforward)
- U.S. income tax
- U.S. estate tax

OPTION 1

Leave home outright to U.S. spouse

- For Canadian purposes, U.S. spouse may be able to use the principal residence exemption (if meets conditions)
- For U.S. purposes, U.S. spouse will be taxed on future gain but may be able to use main home exclusion (if qualifies)
- Property will be included in U.S. spouse’s worldwide gross estate for U.S. purposes, if retained
- Property will receive a basis step up at U.S. spouse’s death in both Canada and the U.S., if retained

OPTION 2

Leave home to a grantor trust* for U.S. spouse

- For Canadian purposes, principal residence exemption may be available (if meets conditions)
- For U.S. purposes, U.S. spouse will be taxed on future gain but may be able to use main home exclusion (if qualifies)
- Property will be included in U.S. spouse's worldwide gross estate for U.S. purposes, if retained
- Property will receive a basis step up at U.S. spouse's death in both Canada and the U.S., if retained

* Grantor trust for both U.S. income and U.S. estate tax purposes in this case; but can draft as a grantor or non-grantor trust for U.S. estate tax purposes

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OPTION 3

Leave home to a non-grantor trust for U.S. spouse

- For Canadian purposes, principal residence exemption may be available (if meets conditions)
- For U.S. purposes, U.S. spouse will not be directly taxed on future gain and trust cannot benefit from the main home exclusion
- For U.S. purposes, gain from the sale of the home will be “distributable net income” and undistributed gain will become “undistributed net income” – *could lead to unpleasant results*
- Property should not be included in U.S. spouse’s worldwide gross estate for U.S. purposes, if retained
- Property should receive a basis step up at U.S. spouse’s death for Canadian purposes but <u>not</u> for U.S. purposes, if retained

QUESTIONS?

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