

# ESTATE PLANNING TO AVOID ESTATE LITIGATION

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# KNOW IF YOUR CLIENT:



- **Has capacity (e.g. medications?)**
- **Is married, getting married, getting divorced**
- **Has children s/he is trying to exclude**
- **Has children in household that s/he does not legally parent**
- **Is straight or gay (if so, is there familial support or resistance)**

# WHY?

**Client service – ensure proper distribution of assets**

**Determine:**

- Suspicious circumstances
- Testator's capacity

**Ultimately:**

- Avoid litigation

# AVOIDING LITIGATION - NEGLIGENCE



## Solicitor's Duties:

*Instructions for a will should be taken from the testator himself [sic], and a full inquiry should be made as to his personal position and that of his family, and the objects of his bounty, and as to the nature and extent of his property.*

*Re Collicut, [1994] N.S.J. No. 21*

- **Develop an Intake Sheet and always use it:**
  - Legal marriages or partnerships
  - Citizenship
  - Insurance and RRSP beneficiaries
  - Names and ages of ALL children
  - Real property – who has an interest
  - Other advisors – to work as a team
  - Value of all assets – tax impact, bequests

# PRACTICE POINTS (CONT'D)



- Listen
- Ask questions to determine capacity
- Find out the testator's goals and wishes

# INTERNATIONAL ISSUES



- **Citizenship**
- **Residency**
- **Not just of testator, but of beneficiaries**

# INTERNATIONAL ISSUES



- **Testator**
  - Country of origin
  - Citizenship
  - Property
  - Beneficiaries



# INTERNATIONAL ISSUES



- **Testator**
  - U.S. citizenship = U.S. Estates Tax regime

# U.S. ESTATES TAX REGIME



<b>Calendar Year</b>	<b>Lifetime Exemption (U.S.\$)</b>	<b>Highest Estate Tax Rate</b>
2007	\$2 Million	45%
2008	\$2 Million	45%
2009	\$3.5 Million	45%
<b>2010</b>	<b>Taxes Repealed</b>	<b>0%</b>
2011+	\$1 Million	55%

# INTERNATIONAL ISSUES



- **How do U.S. Estates Tax regime and Canadian deemed disposition of capital assets mesh?**

# INTERNATIONAL ISSUES



**Life insurance = Asset of estate under U.S. Estates Tax regime even if directly designated to a beneficiary, if deceased is owner of the policy.**

**For U.S. citizens, life insurance planning is done very differently – often owned by inter vivos trust**

# INTERNATIONAL ISSUES



- **Beneficiaries**
- **Tax Planned / Trust Wills**
  - Typically trustee and beneficiary the same
  - Perpetual
  - Can be terminated at any time

# INTERNATIONAL ISSUES



## Issues:

- **What is residence of trust for tax purposes?**
- **Whether trust exists at all under the law of the beneficiary's jurisdiction?**
- **Tax treatment of trusts in that jurisdiction.**

# INTERNATIONAL ISSUES



- **Canadian Testator and Beneficiary in Canada**
  - Trust resident in Canada
  - Governed by ITA

# INTERNATIONAL ISSUES



- **German citizen Canadian resident testator and German citizen and resident beneficiary**
- **Death in Nova Scotia**
  - Jurisdiction – what laws apply
  - German International Private law says German courts have jurisdiction over all German citizens, including in probate matters
  - Nova Scotia probate law based on residency
  - Germany is a forced heirship jurisdiction



# INTERNATIONAL ISSUES

- **Trust resident in Germany**
- **Trusts not recognized; are subject to German succession laws**
- **Will be attempt to interpret trust in accordance with German laws of succession, but will likely look nothing like what intended, nor have the intended tax consequences**

# INTERNATIONAL ISSUES

- **Germany has signed on to the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions, but Canada has not.**

# INTERNATIONAL ISSUES - PRACTICE POINTS



- **Must ask testator**
  - Country of birth
  - Citizenship
  - Location of all assets
  - Residence of all beneficiaries

**Have your team in place – STEP, etc.**

# INTERNATIONAL ISSUES



- **If miss these issues, litigation that arises will be against the advisors**

# TESTATOR'S FAMILY MAINTENANCE ACT (TFMA)



- **Cannot write a spouse or child out of your Will (even independent adult children)**
- **Moral obligation to provide for spouse and children**
- **Allows court to re-write the will**
- **Used primarily by children**

# TFMA

- **If testator dies without having made adequate provision in will for proper maintenance and support of dependant, court has power, in its discretion (consideration all relevant circs of case) to order what it deems adequate out of testator's estate for proper maintenance and support of the dependant.**
- **Child includes:**
  - lawfully adopted by the testator,
  - not born at the date of the death of the testator,
  - of which the testator is the natural parent;
- **Dependant = widow /widower /child of a testator;**

# TFMA FACTORS

- **Character or conduct of the dependent / disentitle**
- **Amount received from other sources**
- **Amount gifted in life**
- **Competing claims**
- **Need relative to other beneficiaries**
- **Relationship between testator and beneficiaries**
- **Size of the estate**
- **\$\$ or services provided to the testator by the dependent**

- **Testator/father dies 1992**
- **Leaves 4 adult kids/3 mothers**
  - Brian and Bradley (twins), Barbara Jean,  
and Laurel Lee
- **Common Law Spouse**



# DAD'S ASSETS

- **Estate: approx. \$1,000,000.00**
- **Father left virtually everything to common-law wife except:**
  - \$5000.00 to twins
  - \$5000.00 to Barbara
  - \$15,000.00 to Laurel Lee

# BACKGROUND

- **Testator was married three times and was a workaholic.**
- **Brian & Bradley lived with their mother and eventually were adopted by their step-father.**
- **Barbara lived with her aunt since she was 18 months old.**

# What Did The Court Decide?

# BARBARA

- **Wanted a close relationship with her Father**

*“For Some particular reason, which will never be explained, the Testator made no effort to foster a loving relationship with this little girl”*

- **No conduct to disentitle her**
- **Her Aunt (raised Barbara) was financially strained**
- ***Herpes simplex* since she was 4 years old**
- **Judge awarded \$50,000.00**

- No conduct to disentitle them
- Not a close relationship but...father's work habits and unique personality caused this
- No high school diploma
- They hope to go into business together
- Judge awarded \$40,000.00 to each
- Court allowed application by natural child of the testator who was adopted by third party (recent case law in *Re Marshall* suggests adopted child is no longer the issue of natural parent)

# LAUREL LEE



- **15(b) of TFMA: application deemed to be made by all dependents unless the ct otherwise orders**
- **No conduct to disentitle her**
- **Continuous and affectionate relationship with father**
- **24 year old single mother with 4 children**
- **Limited Education/ Part-time retail clerk**
- **Judge awarded \$60,000**

# PRACTICE POINTS



- **Be sure to ask clients how many children they have,**
- **If client is leaving anyone out be sure to ask why,**
- **Ensure you advise on TFMA issues and document your file.**
- **Determine if the Testator is providing for the maintenance and support of the dependent by other means, and**
- **If dependent provided any services, money or property to testator, etc.**
- **Is dependent disabled or an infant.**

# SUSPICIOUS CIRCUMSTANCES

- Doctrine of suspicious circumstances applicable whenever a Will is prepared under circumstances which raise a “*well grounded suspicion*” that the will does not express the true will of the testator. (Eady v Waring (1974), 2 O.R. (2d) (Ont C.A.))



# SUSPICIOUS CIRCUMSTANCES

- Where the main beneficiary has been instrumental in procuring the will
- Where the testator is of advanced age or precarious medical condition
- Where there appears to be the influence of another on the testator
- Where significant changes have been made from previous versions of the will

# SUSPICIOUS CIRCUMSTANCES



- **Re: Collicut Estate** (1994), 128 NSR (2d) 82 (Prob Ct), aff'd (1994), 134 NSR (2d) 137 (CA)
- **Re MacLeod Estate** (1989), 94 NSR (2d) 148 (Prob Ct), aff'd (1990), 95 NSR (2d) 61 (CA)
- **MacKenzie v MacKenzie Estate** [1998] 125 DLR (4<sup>th</sup>) 431
- **Re: Praught Estate** [2002] P.E.I.J. No. 1.

# SUSPICIOUS CIRCUMSTANCES / BURDEN OF PROOF



- **Vout v Hay [1995] S.C.R. 876**
- **Scott v Cousins [2001] O.J. No. 19**
- **Cases provide a thorough summary of how suspicious circumstances affect the burden of proof**

# BURDEN OF PROOF

- **In a nutshell, presence of suspicious circumstances puts a higher burden of proof on propounder of Will.**

# SUSPICIOUS CIRCUMSTANCES – PRACTICE POINTS



- **Who is your client?**
- **Speak to your client alone for as long as it takes to satisfy yourself that he/she is not under anyone's influence**
- **Speak more than once if necessary**

# EXECUTOR'S COMPENSATION

- **76 On the settlement of an estate, the personal representative may be allowed, over and above all actual and necessary expenses as appear just and reasonable, a commission not exceeding five percent of the amount received by the personal representative and the court may further apportion the commission among the personal representatives as appears just and proper according to the labour bestowed or the responsibility incurred by them respectively. 2000, c. 31, s. 76.**

# EXECUTOR'S COMPENSATION

- **Personal representative's commission**  
**62 (1)** A commission paid to a personal representative of an estate pursuant to Section 76 of the Act is for all services performed by the personal representative to complete the administration of the estate including distribution of the estate.
- **(2)** A compensation agreement reached by a testator and a proposed personal representative is not binding on a court or the beneficiaries of the testator unless it is incorporated in the testator's will.

# EXECUTOR'S COMPENSATION

- (3) In deciding the amount of the commission to allow to a personal representative pursuant to Section 76 of the Act, a court may consider the following:
  - (a) the size of the estate;
  - (b) the care and responsibility involved in administering the estate;
  - (c) the time the personal representative was occupied in performing their duties;
  - (d) the skill and abilities shown by the personal representative;
  - (e) the success resulting from the personal representative's administration of the estate



# EXECUTOR'S COMPENSATION



- *Re Toronto General Trust and Central Ontario Railway* (1905), 6 O.W.N. 350 (H.O.C.) - leading case
- **Re Atkinson Estate** [1952] O.R. 685 (Ont. C.A.), affirmed (sub nom. *National Trust Co. v. Public Trustee*) [1953] 2 S.C.R. 41 (S.C.C.) – only case decided by Supreme Court of Canada on the specific issue of executor's compensation

# EXECUTOR'S COMPENSATION



- **Rustig Estate, Re** (2002), 208 N.S.R.(2d) 41 (ProbCt);
  - **Gerow Estate, Re** (1974), 8 N.B.R.(2d) 90 (ProbCt);
  - **Schroeter Estate, Re**, [2001] O.T.C. 873 (SupCt)
- Douglass Estate, Re**, [2002] A.R. Uned. 296 (QB)

# EXECUTOR'S COMPENSATION



- **Chappell Estate (Re)** [1992] N.S.J. No. 664
- **Byrne Estate, Re**, [2004] O.T.C. 563 (SC)
- **Fouillard Estate, Re** (1997), 122 Man.R.(2d) 47 (QBM)
- **Budd Estate, Re** (1994), 149 N.B.R.(2d) 266 (ProbCt);

# EXECUTOR'S COMPENSATION – PRACTICE POINTS



- **Solutions**
  - Clauses
    - Specify amount
    - in lieu or in addition
  - Compensation Agreements
    - Incorporate in to Will

**THE END**