Willful Neglect

You Can't Ignore the Inevitable - Estate Planning Should be a Priority for Brokers

By Steven Borlak

I recently attended an illuminating three-day conference, part of which was devoted to some impressive scientists who talked about exponential advances in technology – like the study and manipulation of genomes.

These experts are predicting that cell deterioration may eventually be eliminated as a result of research. They claim that many existing diseases will be avoided or curable and humans will be able to live much longer. It may soon be normal to reach 200 years. Indeed, some even suggest that death could become an option, not an eventuality. Perhaps some of us might hang on long enough to experience a Toronto Maple Leafs Stanley Cup parade!

As for me, based on my training as a lawyer, I resist the urge to think outside of the box. Until I see real evidence. I believe that we should still prepare for mortality: Taxes and death remain inevitable. Everybody should write a will.

If a person dies without one, this creates additional and unnecessary burdens as well as potential complications for that individual's estate. After an extensive (and possibly time-consuming) search to find a will and to then determine that there is, in fact, no will, someone must apply to the appropriate court for a Certificate of Appointment of Estate Trustee Without a Will.

This leads to extra costs and delays, including a period during which a surviving spouse and dependants may be without access to liquid funds and assets. This may also affect the ongoing management of a brokerage.

EXECUTORS

One of the many advantages of having a will is the ability to name one or more trusted and capable individual(s) to administer your estate. The choice of executors is very serious, particularly for business owners who may wish to influence the continuing operations through the selection of an executor.

If there is no will, the court will use its discretion to appoint an 'administrator,' and there is no guarantee that this individual will be the person that the deceased would have preferred.

DISTRIBUTION OF ASSETS

Many people misunderstand how an estate is distributed in circumstances where the deceased did not leave a will. Some believe that the entire estate goes to the Crown; others think that it is passed on to the surviving spouse (if any). However, in the absence of a will, an estate will be distributed pursuant to provincial statutes.

For example, a 'preferential share' is paid to the surviving spouse in Ontario. If the

value of the estate exceeds the preferential amount, that excess is divided equally between the spouse and any surviving children of the deceased. If the deceased has no spouse or surviving children, the estate is split among the next of kin, based on something called the 'table of consanguinity', which details degrees of relationship.

It is important to note that if the value of the estate does not top the preferential share, the deceased's children won't be entitled to any of the assets.

SURVIVORSHIP

Spouses often travel together. As a result, there is a reasonable likelihood that husband and wife could be involved in a common accident and die at the same time, or that one might perish shortly after the other. In a will, this possibility can be addressed in order to avoid the payment of double administrative fees on the estate – one fee when the estate passes to a spouse, and another when it passes out of the estate of that individual.

It is common to see language in a will to the effect that the spouse must survive the testator for a period of 30 days in order to be entitled to the gift. For instance, if the spouse survives for a brief period but not for 30 days, the gift will pass to an alternate beneficiary without the need to administer two estates.

CHILDREN

If you have children under the age of majority, the absence of a will can have serious consequences in terms of the appointment of a guardian and on any distribution of their inheritance.

Without a will, you will not be able to weigh in on the choice of guardians. Although a provincial court ultimately decides the designation of a guardian for minor children, the instructions in a will are usually very persuasive.

In the absence of a will, a public representative will hold any portion of the estate payable to a child until he or she reaches the age of majority. This means that permission from the court will be required in order to access such funds for the child's maintenance or education. Moreover, as soon as the child is of age, the entire amount will be paid out whether or not the young person is capable of handling such responsibility.

On the other hand, when there is a will a trustee can be appointed to hold property for the child, and discretion can be conferred upon the trustee to make payments for education and maintenance. The trustee can also be directed to release the funds to children at a more appropriate age, or even in installments at various ages.

PROBATE FEES

Estate administration taxes, or probate fees, are provincial taxes that are payable if – and only if – an application is made to the court for a certificate of appointment of estate trustee. The tax is payable on the value of the estate.

There are many techniques to reduce probate fees: Insurance that is payable to a named beneficiary does not constitute part of the value of the estate; property held jointly and passing by survivorship also does not form part of the value of the estate, and proceeds of RRSPs or RRIFs are excluded when there is a designated beneficiary.

In some cases, multiple wills can also achieve savings of probate fees, most notably when a person's assets include shares of a private corporation. In these circumstances, two separate wills may be prepared: A primary will that deals only with the assets that are subject to probate fees, and a secondary will that handles shares or debt in private corporations.

Upon death, only the primary will is submitted for probate, and fees are payable only upon the value of the assets that are covered by that document.

GET IT ON PAPER

Start with the preparation of a complete list of all of your assets and liabilities so that you and your accounting and legal professionals are well-informed and able to deal with your estate in an efficient manner. Further, you should consider having powers of attorney drawn up.

Many people believe that if something happens and they are unable to make decisions for themselves, family can step in. This is not necessarily true. For financial decisions, legal authority is needed.

A power of attorney for property is a legal document that names a party (possibly a lawyer) to make decisions about your money and other assets on your behalf. It is frequently used in instances where a person becomes incapable of directing his or her affairs, usually because of accident or illness; this incapacity can either be temporary or permanent. This ensures that someone you trust and who knows you and what you want will manage your property.

A power of attorney for personal care is a legal document that names a person to make decisions about medical and other care in cases of incapacity. A common feature is the 'living will' clause, which outlines the grantor's wishes about future health or personal care — such as limitations on treatment like artificial life support in the event of terminal illness.

People complete a living will for two main reasons: To gain control over their future health care, and to relieve their loved ones from the burden of making difficult decisions for them.

The concept of immortality may be appealing to some. Nevertheless, with apologies to those scientists who are convinced that they are on the cusp of discovering the fountain of youth, you should still cover your bases by planning for death and/or disability.