Estate and Will Planning

Markham-Stouffville

March 24, 2010

Rachel Blumenfeld
416.596.2105
rblumenfeld@millerthomson.com
Introduction

• Powers of Attorney:
  – Attorneys take care of your affairs during lifetime

• Wills:
  – Estate Trustees implement your Will following death
Powers of Attorney

- Continuing Power of Attorney for Property
- Power of Attorney for Personal Care
Acting under a POA

• POA-Property:
  – When you’re capable – your agent
  – When you’re incapable – fiduciary
    • Best interest of the incapable person
  – Joint tenancies

• POA-Personal Care:
  – Attorney makes personal care decisions YOU want
  – Only when you cannot make them
Powers of Attorney – Capacity

• When is someone “incapable”?
  – To manage property
  – To make personal care decisions
  – To make/revoke a power of attorney for property or for personal care

• Substitute Decisions Act

• Registered capacity assessors
What does an Attorney for Property do?

• Anything in respect of property that the grantor, if capable, could do, except make a Will

• The grantor’s property includes all assets and finances unless specific things are excluded from the POA document
What are an Attorney’s responsibilities?

The attorney is a fiduciary and must:

• Account to the grantor
• Use reasonable care in acting
• Not act in conflict with the grantor’s interest
• Not benefit personally
Compensation

• POA may specify the amount and mechanism for calculation of fees or that the Attorney is to act without compensation

• If POA is silent, Attorney may take annual compensation in accordance with legally prescribed fees:
  – 3% of capital and income receipts
  – 3% of capital and income disbursements
  – 3/5\textsuperscript{th} of 1% of annual average value
When does POA for Property take effect?

• Unless the POA document states otherwise, upon execution

• Usually, the lawyer acting for the grantor will keep the original and only release it on the incapacity of the grantor
POA for Personal Care

• Appoints an Attorney to make decisions for the grantor respecting the grantor’s “personal care”

• Personal care encompasses health care, nutrition, shelter, clothing, hygiene and safety

• Subject to conditions in the Health Care Consent Act, the POA for Personal Care places the attorney ahead of all the grantor’s relatives for purposes of giving or withholding consent for a treatment
When does POA for Personal Care take effect?

- Powers take effect when:
  - The *Health Care Consent Act* applies to the decision and authorizes the Attorney to decide
  - When the *Health Care Consent Act* does not apply and the Attorney has reasonable grounds to believe the grantor is incapable of making the decision, subject to any limitations in the POA document
Living Will/Health Care Directive

The POA for Personal Care can function as a “living will” by setting out instructions in the document as to what treatments may or may not be administered.
Wills

"Ocean view, or would you prefer to watch them fight over the will?"
Do I really need a Will?

- Intestacy rules
  - Appointment of Estate Trustee Without a Will
  - First $200,000 to (legal) spouse
  - Remainder – divided between spouse and children; if none – to parents, then siblings, then nieces and nephews
What is in a Will?

• Appointment of Estate Trustees
  – Chose wisely!
  – Primary, alternates

• Distribution to beneficiaries
  – Outright
  – Trusts for spouse, children, grandchildren
  – Disabled beneficiaries
  – Charitable donations

• Powers and authorities of Estate Trustees
What does an Estate Trustee do?

The Estate Trustee is in charge of administering an estate:

• Obligated to fulfill the terms of the Will

• Responsible for ensuring debts, taxes are paid by the Estate before distribution of the assets

• Account to beneficiaries and, if necessary, to the Court
Choosing an Estate Trustee

- Family member, close friend, advisor (lawyer, accountant), trust company
- Same jurisdiction – helpful!
- Trustworthy, will carry out wishes of the deceased
- Responsible, has time to devote to tasks
- Include alternates
Compensation

- An Estate Trustee is entitled to compensation for administering the Estate

- Generally, compensation is based on a formula:
  - 2.5% of receipts and
  - 2.5% of disbursements
  - But the Will or the Courts can vary the amount.
Considerations for Will planning

- You can leave your assets to anyone, but...

- *Family Law Act* considerations
  - Spousal election

- *Succession Law Reform Act*
  - Dependant’s relief
Tax considerations

• Deemed disposition of all assets
  – “roll over” to spouse
  – Tax on capital gains, except:
    • Principal residence
    • Capital gains exemption for certain business assets

• Tax on RRSP/RRIF
Probate planning

- Ontario – 0.5% on first $50,000, 1.5% on remainder

- Reduce value of estate through:
  - Designations (insurance, pensions)
  - Joint tenancies
    - BEWARE
  - Multiple Wills
    - Private corporation
    - Other Canadian jurisdiction
Considerations re beneficiaries

- Second spouse
- Minor children
- Disabled beneficiaries
- Citizenship and residency of beneficiaries
- Charitable donations
Testamentary trusts

- Spousal trust
  - Second marriage
  - Protection
  - Tax benefits
- Trust for minors
- Henson trust
Charitable bequests

- Specific legacy
- Percentage of residue
- Shares of appreciated stock
- Life insurance
Estate and Will Planning

Markham-Stouffville
March, 2010

Rachel Blumenfeld
416.596.2105
rblumenfeld@millerthomson.com
Estate and Will Planning

Rachel Blumenfeld
416.596.2105
rblumenfeld@millerthomson.com

This presentation provided as an information service to our clients and is a summary of current legal issues. © Miller Thomson LLP, 2009 All Rights Reserved. All Intellectual Property Rights including copyright in this publication are owned by Miller Thomson LLP. This publication may be reproduced and distributed in its entirety provided no alterations are made to the form or content. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP which may be requested from Miller Thomson.

www.millerthomson.com