

Estate Planning: What does your client need – and why?

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Introduction

- Your role as trusted advisor is to help clients achieve their goals.
- Estate planning can be difficult subject, but extremely important to raise it if any red flags.
- Today's presentation builds on Top 10 Red Flags hand out, with deeper understanding of selected issues.

Outline

- Intestacy
- Who is a spouse?
- Unintended consequences
 - wills variation
 - joint tenancy

Intestacy

- Intestacy: where the deceased dies with no valid Will
- Partial intestacy: where not all of the assets of the deceased are disposed of in the Will
- Distribution is pursuant to the Wills, Estates and Succession Act (“WESA”)

Intestacy

- Spouse but no descendants: all to spouse
- Spouse and descendants: spouse all household furnishings, preferential share, and $\frac{1}{2}$ residue. Descendants $\frac{1}{2}$ residue.
 - Preferential share where deceased and spouse share descendants: \$300,000
 - Preferential share where deceased's descendants not shared with spouse: \$150,000

Intestacy

- No spouse, but descendants: to descendants, equally. If three children, A, B, and C. If B predeceased but left children D and E, then:
 - $\frac{1}{3}$ to A
 - $\frac{1}{3}$ equally to D and E ($\frac{1}{6}$ each)
 - $\frac{1}{3}$ to C

Intestacy

- If no spouse and no descendants, then to parents
- If no spouse, descendants, or parents, then to descendants of parents (deceased's siblings/nieces/nephews)
- Ultimately, if no relations closer than the 5th degree, then all assets to the government

Intestacy

- How does this apply to your clients?
 - If any assets left in their estate (i.e. not in a trust or passing outside of the estate or through jointure), no control over who receives their assets
 - Not usually desirable – most prefer to plan

Who is a spouse?

- Since 2001 in BC: may be opposite gender or same gender
- Formally married
- Had lived with each other in a marriage-like relationship for at least 2 years

Who is a spouse?

- Re Connor Estate 2017 BCSC 978
 - plaintiff and deceased in relationship just over 2 decades
 - for 19 of those years, plaintiff married to another woman
 - 2012 plaintiff divorced wife, but did not live in same home as deceased

Who is a spouse?

- deceased had hoarding illness, and parties never lived together
- mostly separate finances, but deceased did pay for trips together and allowed him access to her bank account if he needed it
- evidence that she had made a Will in his favour, but it was not found

Who is a spouse?

- ultimately, Court found that despite not living together, there was a marriage-like relationship
- “Like human beings themselves, marriage-like relationship can come in many and various shapes.”

Who is a spouse?

- How does this apply to your clients?
 - Your client no longer there to provide evidence
 - May not consider plaintiff a spouse, and estate plans may be changed
 - Spouse inherits on an intestacy
 - Spouse has standing on wills variation

Unintended Consequences

- Wills Variation
 - spouse and/or children may ask Court to vary a Will
 - very common in blended families
 - marriage agreements are a factor, but not determinative

Unintended Consequences

- Wills Variation
 - unequal distribution amongst children may be challenged
 - Court considers legal and moral obligations and can completely change the Will if it considers doing so fair

Unintended Consequences

- How does wills variation affect your clients?
 - Court may order re-distribution of assets falling within the estate
 - Court may entirely change the plan made by client

Unintended Consequences

- Court may consider, but not re-distribute:
 - assets passing by designation (RRSP/RRIF/TFSA/insurance)
 - assets in an *inter vivos* trust
 - assets passing by right of survivorship (joint tenancy)

Unintended Consequences

- Joint tenants vs. tenants in common
 - joint tenant: each owns the whole of the property, so that when 1st dies, property does not fall into estate – it passes by right of survivorship
 - tenant in common: each only owns their stated share, and when die, passes to their estate

Unintended Consequences

- Common joint tenancy uses:
 - saving probate fees (\$14 per \$1,000)
 - allow access to bank/investment accounts for adult child to assist aging parent
 - estate planning where unequal distribution/expected wills variation claim

Unintended Consequences

- How does joint tenancy affect your clients?
 - in right circumstances, can be an effective planning tool

BUT

- can lead to resulting trust claims or fraudulent conveyance claims

Unintended Consequences

- Resulting Trust
 - claim that the joint tenant only holds legal title, and the beneficial title belongs to the deceased
 - *Pecore v. Pecore* 2007 decision of the Supreme Court of Canada (2007 SCC 17)

Unintended Consequences

- Fraudulent Conveyance Act
 - 2 sections in total:
 - s. 1 transfers made to hinder creditors or others of their remedies are void
 - s. 2 n/a to disposition for good consideration

Conclusion

- The title of this presentation is a question: “Estate planning – what does your client need?”
- At the end of the day, knowing your clients, the nature of their assets, and their family dynamics will guide you in recommendations on estate planning.

These materials are necessarily of a general nature and do not take into consideration any specific matter, client or fact pattern.

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THANK YOU