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Wills and Powers of Attorney: Key Considerations When Updating Your Estate Planning

In uncertain times, it's natural for people to turn their minds towards planning for illness, incapacity or death. Wills and powers of attorney (POAs) are the main documents that help families to plan for these events. Your will is the document that provides for what happens to your assets when you pass away. Your POAs are the documents that appoint persons to make your property and personal care decisions while you are still alive, but incapable of making those decisions yourself.

For some individuals and couples, it may have been many years since they've last updated their wills and POAs. For those who need or would like to update their estate planning documents, below is a summary of the items to consider as part of the process.

1. WHAT LIFE CHANGES HAVE OCCURRED SINCE YOUR LAST UPDATE?

There are many life events that can affect your estate planning, which may include, but are not limited to:

- the birth or adoption of a child or grandchild;
- a child or grandchild reaching the age of majority and/or marrying;
- entering into a common-law relationship or marriage;
- a separation or divorce;
- a change in family dynamics;
- a change in employment;
- a significant change in financial circumstances;
- an illness and/or disability;
- retirement; and
- the death of a close family member or friend.

Consider any new life events or milestones that may have affected you, your family or those whom you wish to benefit in your will since it was last prepared. In particular, consider how these changes affect your intentions with respect to decisions such as who your beneficiaries will be and how much each will receive, executor appointments, the use of trusts, whether to gift some of your assets during your lifetime, etc. These changes can also affect your estate planning when it comes to cross-border planning and multi-jurisdictional wills where you, your executors or your beneficiaries have changed residency. In many cases, it's advisable for a non-resident executor or beneficiary to obtain advice in their home jurisdiction.

You should also consider how significant life changes affect the choices you've made with respect to your POAs in terms of who you would like to appoint to make your decisions for you if you are incapable of doing so on your own. POAs should also take into account the terms on which such decisions should be made.

One life change to be particularly mindful of when thinking about estate planning is separation or divorce. Different laws apply in different jurisdictions, but generally speaking, across the various Canadian provinces, separation and divorce do not automatically revoke your will. However, in certain jurisdictions, such as Ontario, a divorce can remove a former spouse's entitlement to inherit and/or act as an executor.

> It's important to keep in mind separation and divorce do not revoke POAs, nor do they revoke beneficiary designations on registered plans and insurance policies.

For those going through a separation or divorce, we recommend reviewing your estate planning as soon as possible. If one or more of your beneficiaries is going through a separation or divorce, it is also advisable to review your estate planning documents to determine whether any changes need to be made (e.g., if an in-law has been named as an executor, trustee or beneficiary, is that still appropriate?).

On the other hand, marriage can revoke an existing will in many jurisdictions unless certain formalities are followed. Revisiting your estate planning is also important when entering into a marriage, especially if it isn't your first marriage. Any new or pre-existing pre-nuptial or marriage agreements, and any existing separation or divorce agreements, should also be reviewed as part of the update process to ensure your new or updated wills do not contain any terms that are contrary to your obligations under such agreements.

2. HOW HAVE YOUR ASSETS CHANGED SINCE YOUR LAST UPDATE?

When updating your estate planning documents, you should consider what has changed with respect to your assets since your last update, such as changes in value or how they are held. For example:

- If you've acquired a cottage, do your current estate planning documents make adequate provision for what you would like to happen to the property when you pass?
- If your net worth has increased significantly, how does that affect things like your probate planning and insurance needs?
- Have you considered the impact of your increased net worth on the share of your estate each of your beneficiaries could receive and whether your current documents still reflect your intentions and address any concerns you may have in this regard?

- You should also consider how the ownership of your assets is structured (e.g., are your assets held in your sole name or jointly with someone else? Are there assets in a family trust?) and whether that structure meets your current needs and future distribution wishes. For instance, it's common for business owners with non-business owner spouses to put homes and other assets in the non-business owner spouse's name for creditor protection purposes. On retirement, however, it may make sense to consider whether moving such assets into joint name for probate planning purposes and ease of administration makes sense.

3. WHAT IS YOUR POTENTIAL TAX LIABILITY ON DEATH?

On death, every individual is deemed to dispose of their capital assets at fair market value under Canadian tax law. Unless the assets are left to a surviving spouse or common-law partner, or a qualifying trust for the benefit of a spouse or common-law partner, capital gains tax will apply to any accrued gains on those assets and the tax will be payable by the deceased individual's estate.

In addition, any registered plans (for example, registered retirement savings plans, registered retirement income funds, specified pension plans, etc.) held by an individual will be de-registered and the fair market value of the plan will be included in the terminal tax return and subject to tax at the deceased's marginal tax rate. This income inclusion can be avoided when the deceased's spouse or financially-dependent child or grandchild is the beneficiary of the plan.

As the value of your assets changes over time, the tax liability associated with those assets may also be changing. To the extent that the amount of accrued gains on your assets has increased, the tax liability that may be due on your death (or the death of your surviving spouse), will also increase. The payment of this liability could result in the erosion of expected inheritances, create the need to liquidate estate assets to pay the taxes and, at worst, push an estate into insolvency.

A common strategy for addressing these risks involves the use of life insurance. Understanding how your tax liability has changed since your last update and what it is projected to be over your lifetime can help you to gauge whether you have an insurance need or want and the optimal level of coverage. If the decision is made to pursue life insurance coverage, it should be incorporated into your estate plan and addressed as appropriate in your estate planning documents (e.g., by way of beneficiary designation or life insurance declaration).

4. ARE BENEFICIARY DESIGNATIONS UP TO DATE?

A critical item to review when updating your estate planning documents is the beneficiary designations that you have made (or haven't made, as the case may be) on your registered plans, including retirement plans, tax-free savings accounts (TFSAs) and life insurance policies. When you designate a beneficiary on a plan or policy, on your passing, the plan or policy will pass directly to the beneficiary you have designated outside of your estate. The two main benefits of designating a beneficiary are it allows the plan or policy proceeds to be received by the beneficiary without having to wait for your estate to be administered and probate fees will not apply to the value of the proceeds.

The appropriate beneficiary designations on a particular plan or policy will depend on the particular circumstances and life stages of you and your intended beneficiaries. For instance, if the intended beneficiaries are minors who cannot hold assets in their own names, it may be advisable to allow the plan or policy to fall to the estate instead of designating the beneficiaries directly, or designate a trustee to hold the value of the plan or policy for the benefit of the minor beneficiaries.

The implications of designating particular beneficiaries should also be considered. For example, where an individual has remarried and has children from their first marriage, the individual may wish to designate the children on their retirement plan as part of their estate plan. The individual in this situation should keep in mind, however, that while the children will receive the full value of the retirement plan, the taxes associated with the de-registration of the plan on death will be borne by the individual's estate and reduce the after-tax amount available from the estate to the estate beneficiaries, which may include the new spouse. Whether or not this is desirable will vary from situation to situation.

As mentioned above, marriage, separation and divorce do not revoke existing beneficiary designations and so it's particularly important to review your beneficiary designations when undergoing one of these life events.

When it comes to registered education savings plans (RESPs), the considerations are somewhat different. With RESPs, one or more children will remain the beneficiaries of the plan. Typically, for RESP subscribers, the issue to consider is who should be appointed as the successor subscriber to continue the plan in the event the subscriber(s) passes away before the plan finishes funding a beneficiary's education.

5. ARE THE PERSONS APPOINTED AS EXECUTORS AND ATTORNEYS STILL APPROPRIATE?

An executor is the person responsible for administering your estate and distributing your assets to your beneficiaries in accordance with your will when you pass away. An attorney is the person responsible for making your property and personal care decisions for you if you are incapable of doing so on your own.

The persons you appointed to be your executors and attorneys when you last updated your estate planning documents may not be the persons you would choose today.

For example, parents will often appoint a relative or family friend who is close in age to the parents to be an executor and attorney when their children are still young. However, once their children are grown, such parents will often wish to appoint one or more of their children instead. In addition, the relative or family friend that is currently appointed may not be a suitable choice any longer as they could predecease the parents or may no longer be capable of acting when the time comes.

It's also important to revisit executor and attorney appointments when the persons appointed have changed residency. Having a non-resident executor could give rise to bonding requirements and the risk of your estate becoming non-resident, which can lead to undesirable tax consequences. A non-resident executor or attorney for property may have reporting requirements in their home jurisdiction, which could be an issue for those who do not wish to provide foreign governments with information about their estate assets. From a practical perspective, appointing an executor or attorney who lives at a distance from where the estate is being administered or where the incapable person resides can present significant challenges and it may better in such cases to appoint someone who lives closer.

In some cases, you may wish to consider appointing a corporate executor (i.e., a trust company that provides estate and trust administration services), particularly where the estate assets are expected to be complex or there are challenging family dynamics. The main disadvantage of appointing a corporate executor are the fees they charge for the services they provide.

6. HAVE CERTAIN PERSONAL ITEMS OF YOURS INCREASED IN SENTIMENTAL VALUE?

The sentimental value of personal items to your loved ones often changes over time. When children are young, going through adolescence and beginning their adult lives, they often place less sentimental value on their parents' personal items, which can include things like art, jewelry, family heirlooms, etc. However, these items may increase in sentimental value for children as their parent's age, become ill or pass away. Legacy considerations for their own children can also become a factor as they start families of their own.

When updating your estate planning documents, it's important to consider whether there are any specific personal items that should pass to specific individuals. It's common for these items, as opposed to money and other assets, to become the focal point of disputes between beneficiaries. We strongly recommend everyone review with their families whether there are any specific personal items of theirs that have particular value to certain family members and determine how best to distribute such property on the basis of those discussions as part of the update process.

7. ARE THERE UNNECESSARY TRUSTS OR TRUST TERMS THAT NEED TO BE UPDATED?

Trusts, which are legal relationships in which someone (a trustee) holds and manages assets for the benefit of one or more other persons (the beneficiaries), are often used in wills for asset protection and tax planning purposes.

For parents with young children, trusts are often used in wills to provide coming-of-age protection. For parents with adult children, trusts can be used to provide asset protection where there are concerns about a child's ability to manage his or her inheritance, as well as a measure of matrimonial protection to protect a child's inheritance from a divorcing spouse. When updating your wills, it's important to review the terms of any trusts created in your current documents and determine whether they are still appropriate in light of the age and stage of your children or other beneficiaries.

Historically, trusts have also been used to hold assets for a surviving spouse for tax reasons (i.e., testamentary trusts created in one's will could access graduated rates in the same way an individual can until the law changed to eliminate this benefit in 2016). Now that the graduated tax rate benefits of creating trusts to hold assets for beneficiaries have been taken away, many wills drafted before the rule change in 2016 create testamentary trusts that may no longer be necessary or desirable.

While access to graduated tax rates for a testamentary trust has been curtailed, there are still some potential remaining tax benefits if a trust is used in your will to provide for a beneficiary. In particular, if an adult child earns significant income such that they are taxed at the top marginal rate (or close to it), and they have children for whom they are still providing financial support, a testamentary trust can still be used to split income between the adult child and their children if the children are included as beneficiaries. Thus, in some cases, it may be desirable to update a will to create testamentary trusts for adult children and their families.

8. DO YOU HAVE U.S. CONNECTIONS?

If you or any of your beneficiaries has become a United States person (a "U.S. person"), which includes:

- U.S. citizens;
- U.S. residents; and
- U.S. Green Card holders,

or you hold U.S.-situs assets, which include:

- real estate located in the U.S.;
- shares of U.S. corporations;
- loans to U.S. persons;
- and more,

you should review your estate planning documents to ensure that all potential U.S. tax issues are addressed. In particular, U.S. connections can result in unintended U.S. estate and gift tax, as well as U.S. income tax, consequences. Careful cross-border planning is often required to deal with these issues. Planning involving U.S. persons should also be carefully monitored as U.S. laws, particularly with respect to U.S. estate and gift tax, are continuing to change and evolve.

9. FOR BUSINESS OWNERS, DO YOUR BUSINESS SUCCESSION PLANS ALIGN WITH YOUR ESTATE PLANNING DOCUMENTS?

If you are a business owner, a lot may have changed in your business since the last time you updated your will. The business may have grown, your corporate structure may have changed and new business partners may have come into the picture. When revisiting your estate planning, it's important to consider what the plan is for your business when you pass away and ensure your estate planning documents properly reflect, and do not conflict with, those plans.

For businesses with multiple owners, it's common to have a shareholders agreement (or other operating agreement as the case may be), which provides for, among other things, what happens to an owner's interest in the business when they retire, become incapacitated or pass away. Your will should align with the terms of any such agreement. Any ancillary arrangements, such as putting life insurance policies into place to facilitate any necessary buyouts, should also be coordinated.

Where the business has gone through a reorganization since your last will update (e.g., an estate freeze), you will want to ensure that the terms of your will and any applicable agreements adequately provide for all of the assets involved in the business.

For business owners in certain jurisdictions who own private corporation shares, the value of which have increased significantly since they last updated their wills, probate planning strategies, such as the use of multiple wills, should be considered if not already in place.

10. HAS THE "WORST CASE SCENARIO" BEEN PROVIDED FOR?

Given how unpleasant it is to think about, it's perhaps unsurprising that many wills do not address what a person would want to happen to their assets in the "worst case scenario" – all of the person's intended beneficiaries predecease them or their surviving spouse. While the chances of it coming to pass are often very remote, it's important to consider what you would like to happen in the "worst case scenario"

as, if you do not provide for it in your will and none of your intended beneficiaries survive you, your assets could pass in accordance with the intestacy laws in effect in your jurisdiction, which may not be desirable.

> Intestacy laws provide a set of default rules that govern the distribution of your estate if you pass away without a will. In Canada, the rules vary from province to province.

If you can't think of anyone who you'd like to have benefit from your assets in the worst case scenario, it may be worth considering whether there are one or more charities whose causes you support that you would want to benefit from your assets.

11. HAVE ANY GIFTS OR LOANS BEEN MADE THAT SHOULD BE EQUALIZED?

In many cases, parents who have more than one child want to ensure their children are treated equally when it comes to their estate planning. It's also common these days for parents to assist adult children with expenses such as weddings, home purchases and education for grandchildren. If you have made unequal gifts or loans to your children and want to ensure that they are treated equally in your estate planning, you may wish to consider including an equalization clause in your will, which would allow your executor to adjust each child's share of your estate to account for any gifts or loans made to that child during their lifetime. For such a clause to work effectively, all gifts or loans that you would like to be equalized should be documented and the documentation should be maintained with your wills or in another place where your executor will know to access it.

12. WHAT WILL HAPPEN TO YOUR PETS?

An often overlooked question when preparing wills is who will take care of your pet if you were to pass away prematurely. Given how much love and affection our pets provide us, and their status as members of the family, it's important to consider what will happen to your pet if they were to outlive you. In some cases, pet owners will also provide for a stipend in their wills for the chosen caregiver to cover life and medical expenses for their pet. If you have acquired a pet since your last will update, or your current wills do not make provision for your pet, it's a good idea to consider including a pet clause in your updated documents.

13. WHAT WILL HAPPEN TO YOUR DIGITAL ASSETS?

Based on their relatively recent development, digital assets are another item that is often overlooked when preparing wills. Digital assets include assets such as software, social media accounts, intellectual property, blog posts, cryptocurrency and loyalty points, to name a few. When updating your estate planning documents, it's important to take an inventory of your digital assets and consider how your executor (or attorney if you are incapable) would access these assets on your passing or incapacity. You should also consider with your estate planning professionals whether a digital assets clause in your documents is advisable or necessary.

14. ARE THERE ANY LETTERS OF WISHES THAT NEED TO BE UPDATED?

Where a will or POA leaves certain decisions to an executor's or attorney's discretion, it's common to prepare a letter of wishes to guide the executor or attorney in the exercise of their discretion by setting out your values, goals and concerns. Areas in which the use of a letter of wishes is particularly frequent

are the distribution of personal property, the management of trusts created in the will and personal and end-of-life care.

If your current estate planning documents are accompanied by a letter of wishes, you should review it to determine if it still accurately reflects your intentions. When updating your estate planning documents, your letter of wishes should also be updated to take into account your and your beneficiaries' current circumstances and the planning strategies utilized in those documents.

15. ARE THERE ANY FAMILY TRUSTS OR FAMILY FOUNDATIONS THAT REQUIRE PLANNING?

If you have family trusts or family foundations, it's important to remember that what happens to assets held within those entities on your passing is not governed by your will, but rather by the governing documents of those entities themselves (i.e., the trust deed/agreement or the organizational documents for the foundation).

With respect to family trusts, if the assets held within the trust are significant, you should review the trust deed/agreement to determine what will happen to the trust assets if the trust continues on after your incapacity or passing and ensure the trust's exit strategy is coordinated with your estate planning documents. For example, if you wish for your children to benefit equally from all of your assets and you have a family trust that holds significant assets, it's not sufficient to provide in your will that your assets are to pass equally to your children. You will also need to ensure that the distribution of assets from your family trust, at the end of its term, result in an equal distribution of assets to your children in this scenario. A trap for the unwary can pop up here if a child, or other beneficiaries of the trust as the case may be, are non-resident at the time a distribution is made to them from the trust. Typically, the exit strategy from a trust involves distributing the trust assets out to the beneficiaries on a tax-deferred basis. However, this tax deferral is not available with respect to a distribution made to a non-resident beneficiary and thus, it may be preferable to distribute the trust assets to resident beneficiaries and equalize the non-resident beneficiaries with other assets through your will where possible.

For family foundations, which can continue on into perpetuity in many cases, you should consider how the foundation will be governed upon your passing and ensure the foundation's organizational documents properly reflect your intentions. For families with donor-advised funds, while such funds are not entities in and of themselves, the account terms often allow families to provide for what they would like to happen to the fund assets when the original donor passes away.

16. DOES YOUR POA FOR PERSONAL CARE REFLECT YOUR CURRENT PERSONAL AND END-OF-LIFE CARE WISHES?

As we age, we become more attuned to the issues surrounding incapacity, illness and end-of-life care. When updating your POAs, you should carefully consider how your wishes for personal and end-of-life care may have changed since you last prepared them and discuss your wishes with your desired decision makers. There are many online resources, "kits" and questionnaires available that can help you to consider and document your values, needs and wishes in this regard.

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For those who feel their estate planning documents are in need of review and/or updating, please reach out to your Gluskin Sheff wealth advisor to schedule a consultation with our Wealth Planning team.