

The Brief

Death & Taxes: What Else is New?

Traditionally, death and taxes were seen as inevitable “events” that at best could be delayed or deferred, but ultimately would catch up with all of us. More recently, disability has staked a claim as one of life’s contingencies. We are living longer and arguably more complex lives than we did 30 years ago.

Lawyers are called upon to develop creative solutions to meet all three eventualities. We draft wills, health care directives, trusts and powers of attorney that go some length to addressing our

clients’ “final” needs, from both a health and financial perspective.

You may not be able to “take it with you,” but as lawyers we are constantly working toward developing estate planning tools that can ensure your assets are sheltered from the tax man and properly managed should you become disabled.

This edition of *The Brief* is devoted entirely to estate planning issues. Eleanor Wiebe discusses recent developments in the law with respect to beneficiary designations, Kelly Beattie explores the issue of charitable gifts by will and Dana Nelko discusses the importance of having an enduring power of attorney.

Arguably, these topics address the only area of the law that touches all of us. We hope the articles will be of both interest and value as you reflect upon your own personal “wealth management” plans. ▀

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The Brief goes electronic

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Scan the QR code with your smartphone for a directory of our Wills & Estates Practice Group or visit: www.fillmoreriley.com/law-practice-groups/group/24/wills-estates-law

The Will for the 21st Century

Enduring Powers of Attorney



Dana Nelko

Don't be fooled by the title of this article.

You still need a will. Death is inevitable and proper estate planning will always be necessary. While we lawyers have done a good job over the years educating our clients with respect to the need for a proper will, it is only recently that the need for a proper power of attorney has been recognized.

The law has always recognized that, in certain circumstances, an agent could be provided with the authority to carry out an individual's commercial activities if that individual became incapacitated. In Manitoba, *The Powers of Attorney Act* governs the appointment of agents to look after the financial affairs of others.

The donor (you) appoints an attorney (someone you trust) to look after your banking, pay your bills and generally manage your finances if you become incapable, either physically or mentally, to do so on your own.

There was a time when the will was the foundation of estate planning. Death, along with taxes, was inevitable and lawyers were insistent that their clients have proper wills. The expression, "You can't take it with you" comes to mind, as does the warning, "You don't want to leave a mess for your kids to clean up." Both lead to the inevitable conclusion that your affairs ought to be put in proper order before the grim reaper knocks on your door.

In the mid to late 1990s, we noted a shift in thinking. It's not clear whether the term "wealth

management" became merely a more polite reminder of our inevitable demise or whether the term crept into our lexicon to reflect a simple truth. We began to live longer.

In fact, the shift from planning for inevitable death to the planning for a likely "extended stay" has a lot to do with healthcare, nutrition and modern medicine. In 1961, the average Canadian could expect to live to the age of 71. By 2005, life expectancy had increased to 80.7, with males averaging 78.3 years and women 82.9.

All good news right? Well, arguably, yes and no. While death has been put off, concerns with respect to disability have now become more prominent. In a recent report prepared for the Alzheimer Society of Canada, *Rising Tide: The Impact of Dementia on Canadian Society*, it is predicted that we will see one new case of dementia in Canada every two minutes by the year 2038. Currently, 1.5% of the Canadian population has been diagnosed with a form of dementia, and that figure will almost double by the year 2038.

The largest passing down of wealth in Canadian history predicted by futurists took a slight detour as mortality rates dropped. But as these rates dropped, the rates of dementia in our elderly population began to rise.

Thus, the need to manage our estates while we are still alive has now become a key focus for lawyers and financial advisors. The will

In 1994 the Manitoba Law Reform Commission made the following observation as it reviewed *The Power of Attorney Act*:

"We believe that this situation (the appointment of an attorney) has a great deal of potential for abuse. All citizens who choose to order their affairs by means of an enduring power attorney are vulnerable to the misuse of this power, but it is the elderly who are most likely to be victimized...Evidence suggests that approximately 4% of elder persons in Canada are victims of abuse and that up to 100,000 seniors are abused in Canada annually...Financial exploitation, including the misuse of powers of attorney is involved in 30% of cases reported to the Elder Abuse Centre of Manitoba. As the numbers in proportion of elderly grow, financial exploitation, including the abuse of powers of attorney, is likely to become even more severe in the future."

as an estate planning tool now has some competition. The power of attorney is likely to become the 21st century “will.”

It must be remembered, however, that the attorney’s role as the financial manager, unlike that of an executor in a will, is not to distribute the donor’s estate but simply to administer or manage it.

The attorney’s role may carry on for many years depending on the nature of the donor’s incapacity. Like any estate management tool, the power of attorney must be carefully crafted. At the heart of the matter, the individual appointed to act as attorney is really a financial caregiver. The selection of this financial caregiver is as critical as

the selection of your executor, given the potential for abuse and the catastrophic consequences.

The legislation does attempt to offer up some protection as the attorney must provide an annual accounting of his/her activities and the court can intervene with the assistance of the Public Trustee if problems are encountered. Unfortunately, these problems often go undetected with devastating and sometimes tragic results.

A well-crafted power of attorney is a vital part of any estate or wealth management plan. It will go a long way to ensuring that your financial affairs will be well managed in the event you become incapacitated. ■

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Congratulations New Associate

The partners of Fillmore Riley LLP congratulate **Matthew T. Underwood** on his call to the Manitoba Bar on May 13, 2010, and his joining the firm as an associate as of June 3, 2010.

Matthew graduated from the University of Manitoba with his Bachelor of Laws in 2009. He practises primarily in the areas of business law, real estate, and wills and estates.

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Charitable Gifts by Will Make Sure You Get the Tax Treatment You Desire



Kelly Beattie

The *Income Tax Act* (Canada) provides individuals with tax relief for gifts made to a charity during a person's lifetime by providing for tax credits. Individuals are entitled to a federal tax credit of 15.5% of the first \$200 of charitable gifts and 29% for charitable gifts over \$200. A comparable tax credit is also available in calculating provincial taxes. A taxpayer may make an annual charitable gift of up to 75% of a taxpayer's income in any given tax year. If a charitable gift is made because of an individual's death, the annual limit is increased to 100% of the deceased's income in the year of death.

Gifts by Will

Where an individual makes a gift to a charity in his or her will, the tax credit may be used in the deceased's tax return for the year of death or in the year prior to the deceased's death.

For a gift to be considered a gift to charity by will, resulting in the deceased receiving a tax credit for the year of death, the Canada Revenue Agency has indicated that the terms of the will must provide for a gift of a specific property, a specific amount, or a specific percentage of the residue of the deceased's estate. An individual may also give his or her

executor the discretion to determine the identity of the charity to which the gift is to be made. However, if an individual gives his or her executor the discretion to determine the amount that is to be given to the charity, the gift will not qualify as a gift by will and no tax credit will be received.

The Canada Revenue Agency has also indicated that a gift will not qualify as a gift to charity for the year of death where the executor is given the discretion in determining whether or not to make a particular gift to a charity.

Charitable Gifts from a Trust Created by Will

The terms of a will may create a long-term continuing trust of the estate's property to be held for beneficiaries of the estate, and may give the trustee the discretion to make a distribution out of the trust to a charity. Such a trust under a will is treated, for income tax purposes, as a separate taxpayer which must report its income each year.

Depending on the circumstances, a distribution to a charity from a trust under a will may be considered as either a gift made by the trust, a distribution of the trust's income, or a distribution in satisfaction of the charity's interest in the capital of the trust.

If the distribution is considered to be a gift made to a charity by the trust, then the trust will receive a tax credit. If the distribution is considered to be a distribution of the trust's income, then the trust will be entitled to exclude the amount distributed to the charity from the trust's income in the year of distribution. If the distribution is considered a distribution in satisfaction of the charity's interest in the capital of the trust, the *Income Tax Act* (Canada) will apply to allow for a tax-free transfer of the property to the charity (that is, there will be no realization of any appreciation that may have accrued in the property). In the latter two cases, no tax credit will be available to the trust.

With respect to a distribution to a charity out of the income of a trust at the discretion of the trustee, the trustee may choose to treat the distribution as either a gift (and receive the tax credit) or as distribution of income (and exclude the amount distributed to the charity from the trust's income).

If the will directs the distribution of an amount out of capital to a charity (that is, the trustee is not given any discretion about whether or not to make the distribution), the distribution will be treated as a distribution of capital to a beneficiary and not as a gift, thereby entitling the trust to a tax credit.

*The Canada Revenue Agency has indicated that the terms of the will **must provide for a gift of a specific property, a specific amount or a specific percentage of the residue of the deceased's estate.***



Making charitable gifts by will is a useful estate planning tool when done properly. If not structured correctly, a charitable gift made by will may not be eligible for a tax credit or the tax credit may not be received at the time that income tax is payable. Therefore, it is important to consider the rules around charitable gifts by will to ensure that the tax advantages are available when they are the most tax-effective. ■

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Beneficiary Designations



Eleanor Wiebe

The common law dealing with wills has evolved with formality. The purpose of the will is to have the wishes of a testator (will maker) relating to the division of property followed after the testator's death. As the testator is not alive to provide further direction or clarification, formalities as set forth in *The Wills Act* of Manitoba and other requirements at common law must be met for the will to be valid and the testator's wishes followed. In broad terms, these formalities and common law requirements include: (1) the testator must have had capacity at the time the will was made, both as to legal age and mental capacity; (2) the testator must have known and approved of the contents of the will; (3) the will must be in due form, i.e. in writing; and (4) the formal requirements of *The Wills Act* must have been met (an example of a formal requirement is that two witnesses must be present at the same time to witness the signature of the testator).

Insurance Designations

Separate and apart from the law of wills, the insurance industry and legislatures have developed rules dealing with insurance proceeds payable on death. Under the provisions of *The Insurance Act* of Manitoba, an insured may, by declaration, designate a beneficiary or his estate to receive life insurance proceeds. This may be done either in a will or in a "declaration" that is signed by the insured, without other formality. Insurance products

are popular as a means of providing for loved ones on death or ensuring liquidity to allow for equalization among beneficiaries or payment of taxes or other debts. Unlike other assets of the deceased, proceeds of insurance which are payable to a beneficiary do not form part of the estate of the insured and are not subject to the claims of creditors of the insured. Life insurance that is payable to a named beneficiary passes outside the estate and is not governed by the testator's will. Even if a deceased or his estate is bankrupt, the proceeds of life insurance may pass to the beneficiary without regard to creditors' claims.

... the insurance industry and legislatures have developed rules dealing with insurance proceeds payable on death.

Designations of Retirement Savings and TFSAs

Pension plans and other retirement savings vehicles now form an important part of the financial products market and the savings strategies of Canadians. Early in the twentieth century, the Supreme Court of Canada considered a case where a designation of beneficiary was made for a pension benefit without the formalities of a will. The Court decided that such a designation was "testamentary" in nature and was not valid, as it did not comply with

The Wills Act. The result has been that the provinces have passed legislation to allow designations on a more informal basis. In Manitoba, *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* governs designations made by participants for plans for benefits payable on the death of the participant.

Pension benefits, RRSP and RRIF proceeds and TFSA plans are all governed by this Act for purposes of designations.

The Act allows a designation to be made by will or by an instrument signed by the participant. When made by instrument, the instrument is usually a form at the institution where the plan is maintained and is signed by the participant without witnesses or other formality. When made in a will, the designation must refer to the plan either generally ("all my RRSPs") or specifically ("my RRSP bearing plan no. 34437 at the Bank of Manitoba").

The Act allows revocations to be made by instrument or by will. When done by will, a revocation of an instrument is only effective if the revocation relates "expressly to the designation, either generally or specifically."

To read the complete article please go to www.fillmoreriley.com/articles.

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Tim Dewart



Tim Dewart (left) and Peter Gustavson.

Age: 52

Areas of focus: Business Law, Banking & Financial Law, Construction Law and Real Estate Law

Education: University of Manitoba, Bachelor of Arts, 1979; University of Manitoba, Bachelor of Laws, 1982

Number of years with Fillmore Riley: 24

Community involvement: Served as Board member of Partners In The Park Inc. which administered Pavilion Gallery Museum, the Lyric Bandshell and Leo Mol Gardens in Assiniboine Park, all of which now fall under the administration of the Assiniboine Park Conservancy.

Client quote: “Tim is very good at putting his clients’ interests ahead of his own. He creates a final game plan so he gets the desired results. I have never met a more competent person who is so humble.”

Peter Gustavson, Founder and former Chairman of the Board of Custom House

Best Lawyers, a peer-review publication, named you Lawyer of the Year in corporate law for Winnipeg. How did you earn this award?

Hopefully, it is recognition by other Winnipeg commercial lawyers that I strive to achieve my clients’ goals while working cooperatively with other counsel to complete each transaction as quickly and effectively as possible for both sides. It may also have something to do with the Custom House sale transaction.

During the lowest point of the economic downturn, I worked on a deal that was of international significance. On a North American scale, it ranked among the top mid-market deals for 2009.

What did the deal entail?

It involved the sale of Custom House, a foreign exchange and payment processing service provider, to Western Union. The deal involved a USD \$370-million cash transaction which we negotiated as lead

counsel. The transaction required some 25 regulatory approvals in seven countries. We also had just under 100 employees from all over the globe participating in the Employee Stock Option Plan (ESOP). They all had to be brought into the transaction which took considerable effort to coordinate.

We assembled a “deal team” of eight of our lawyers. Each lawyer brought a particular area of expertise to the deal. For instance, my partner, Peter Davey, was our primary Securities Law partner who had worked extensively with Custom House on their product offerings over the years. Cy Fien, my Tax Law partner, provided significant advice on the deal structure as well as on the ESOP and the tax-planning strategies required to maximize the return under the sale transaction.

Why did Victoria-headquartered Custom House turn to you as opposed to a West Coast-based lawyer?

We set them up in 1991 when the founder had just relocated from Winnipeg to Vancouver. We’ve been with them as they grew in size throughout Canada and then embarked on their expansion into foreign markets. As Custom House required greater capital, we provided counsel for its various loan and equity transactions.

The final sale to Western Union was the most complex transaction we had handled for the company to date. We had the entire history of the company at our fingertips and were in the best position to lead the company through the sale process.

With many of the senior executives remaining with Custom House, we continue to handle a significant portion of the Custom House legal work. To remain as counsel to the company after the sale closed is a privilege not often afforded to counsel. We also enjoy an ongoing relationship with Western Union’s general counsel in the U.S. ■

FillmoreRiley News

A number of Fillmore Riley lawyers were recognized by the Community Legal Education Association Inc. (CLEA) for providing services to that organization and the public at large during the past year. **Sofia Mirza, Marcelin Murray, Steven Raber** and **Norman Yusim** all participated in CLEA's Lawyer Referral Program. A student with the firm, **Celia Sherbo**, was recognized for participating in a public education program.

Janesca Kydd and **Paul Grower** participated in a presentation organized by the Manitoba Bar Association's Aboriginal and Taxation subsections dealing with section 87 of the *Indian Act*, which exempts a status Indian from paying tax on income situated on a reserve.

Fillmore Riley's managing partner **Glen Peters** was reappointed to the board of CancerCare Manitoba Foundation.

Anita Southall has been appointed to the Practice and Ethics Committee of the Law Society of Manitoba for 2010-2011.

Dana Nelko and **Anita Southall** presented a paper and seminar on *Powers of Attorney—A Litigation Perspective* through the Law Society of Manitoba's Continuing Legal Education Program.

Sofia Mirza was appointed to the Executive of the Manitoba Bar Association's Immigration Law Section for 2010-2011.

Eleanor Wiebe joined an advisory committee for a project supported by the University of Manitoba and the University of Winnipeg to facilitate the establishment of a Legal Help Centre in the inner city of Winnipeg. Others involved in the project include university professors, judges, community members and lawyers. **Sofia Mirza** will be teaching the immigration law component of the project.

Steven Raber attended the 132nd annual meeting of the International Trademark Association (INTA), held this year in Boston, Massachusetts. INTA's annual meeting is the world's largest gathering of trademark professionals. Steven met with many of our international associates and attended important continuing legal education courses, as well as completing a 20-hour course on mediation.

As one of the adult leaders of a group of high school students from St. Paul's High School in Winnipeg, **Charles Sherbo** volunteered from July 3-17, 2010, in El Salvador. After shipping a corn mill to the tiny village of Loma Linda, Charles, along with the other participants, helped to install a concrete floor in a church and construct a small building to house the corn mill. The volunteer group not only raised money to pay for the construction materials and equipment, they also participated in the work.

Talk to us today about
your legal challenge.

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