GENERAL PLANNING CONSIDERATIONS AND TECHNIQUES
GENERAL ESTATE PLANNING ISSUES

These materials were prepared by Kevin Rogers, of Canada Trust Saskatoon, Saskatchewan for the Saskatchewan Legal Education Society Inc. seminar, Estate Planning; March 2000.
# General Estate Planning Issues

## Table of Contents

<table>
<thead>
<tr>
<th>1. The Need for Planning</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) The Need for Planning as between Husband and Wife</td>
<td>1</td>
</tr>
<tr>
<td>(B) The Need for Planning by a Surviving Spouse</td>
<td>2</td>
</tr>
<tr>
<td>(i) Personal Possessions</td>
<td>3</td>
</tr>
<tr>
<td>(ii) Prior Advances of Funds</td>
<td>4</td>
</tr>
<tr>
<td>(iii) Joint Assets – The Problems</td>
<td>5</td>
</tr>
<tr>
<td>(C) Special Needs Planning</td>
<td>6</td>
</tr>
<tr>
<td>(i) Keep Testamentary Trusts in Mind</td>
<td>6</td>
</tr>
<tr>
<td>(ii) Common Law Couples</td>
<td>7</td>
</tr>
<tr>
<td>(iii) Same Sex Couples</td>
<td>8</td>
</tr>
<tr>
<td>2. Does Fair Mean Equal?</td>
<td>9</td>
</tr>
<tr>
<td>3. The Disabled Child or Beneficiary</td>
<td>10</td>
</tr>
<tr>
<td>(A) Disabled Beneficiaries</td>
<td>10</td>
</tr>
<tr>
<td>(i) Annuities</td>
<td>11</td>
</tr>
<tr>
<td>(ii) Trusts</td>
<td>12</td>
</tr>
<tr>
<td>(B) Special Beneficiaries</td>
<td>15</td>
</tr>
<tr>
<td>4. New Succession Planning Opportunities</td>
<td>16</td>
</tr>
<tr>
<td>(A) Business Succession Planning</td>
<td>16</td>
</tr>
<tr>
<td>(B) Succession Planning for “Special” Assets</td>
<td>18</td>
</tr>
<tr>
<td>(C) New General Developments</td>
<td>18</td>
</tr>
<tr>
<td>(i) “Alter Ego” Trusts</td>
<td>19</td>
</tr>
<tr>
<td>(ii) Joint Spousal Trusts</td>
<td>20</td>
</tr>
<tr>
<td>Conclusion</td>
<td>21</td>
</tr>
</tbody>
</table>
GENERAL ESTATE PLANNING ISSUES

1. THE NEED FOR PLANNING

(A) THE NEED FOR PLANNING AS BETWEEN HUSBAND AND WIFE

It couldn’t get any simpler. “I leave it all to my spouse.” You can scratch this on the fender of a tractor, and it will get the job done.

Unfortunately, even this area is no longer the simple one it used to be. The days where you can assume that spouses are going to leave everything to each other is gone. We now live in an age where second marriages are common. There could be specific assets passed down through generations, such as farmland, which are not going to be passed to a surviving spouse. On occasion, you will encounter spouses who have been together from the time of an early marriage, but who always maintained separate finances and who are both well off. Such couples often carry this separate approach through into their estate planning.

There is no question that in the traditional first marriage/family situation, where there are no unusual circumstances, holding all assets jointly between husband and wife is still one of the most effective planning tools. It recognizes the reality of matrimonial property and makes it likely that if only one spouse dies, there will not be an estate. The point which must be kept in mind is that this situation is becoming much less common.

For many of your clients, making all assets joint is still best, however you must make sure that you have covered everything. If you do not walk the clients through their assets you may find that probate becomes a necessity. You may have to make your clients provide copies of titles – especially for land. If they cannot do so, and are not certain as to registration, you may have to do searches.
The naming of beneficiaries on Registered Retirement Savings Plans ("RSPs") can be a problem. People can easily forget whether they have named a beneficiary, and if so, who. If you are dealing with young couples, you will occasionally find cases where they have still named their parents. Clients need to verify such items. You can place an RSP clause in their will, but there is no guarantee that the will clause will be an effective change of beneficiary, under the terms of Rule 45(23) and (26) of The Queen’s Bench Act. Those rules address the naming of beneficiaries in registered plans when the holder of the plan is not an insurance company. The rules state that:

“A contract holder may from time to time make a designation or alter or revoke a designation made under a contract for a retirement savings plan (or retirement income fund in (26)) but any such making, alteration or revocation of a designation may be made only in the manner set forth in the contract for the retirement savings plan (income fund)” (Insertions not in original)

This section will affect whether the will clause changing a beneficiary designation is of any effect. To determine this it is necessary to review the financial institution’s RSP or RIF plan forms. If the forms state that changes can be made in any manner, then the will clause will be effective. If the forms indicate that the beneficiary can only be changed using the institution’s forms, then the will clause is ineffective.

The bottom line is that to protect yourself and your client, you need to have them check their beneficiary designations, because you cannot count on a will clause to make the changes. A misplaced reliance on the will clause could cause a completely inappropriate distribution of the plan proceeds, and could cost your client the tax free spousal rollover.

B) THE NEED FOR PLANNING BY A SURVIVING SPOUSE

There are too many people who claim “there is nothing complicated involved – our children will share everything equally”. This may even be true in some cases, but even the simplest estate cannot suffer from advance planning. In far too many cases the parent(s) are either kidding themselves, or haven’t stopped to consider the reality of their situation.
Whether stated or not, one of the goals which every parent has is to try to minimize family friction once they are gone. Estate distributions have the capacity to tear a family apart when parents have passed away. There are many issues which can become a problem, and often they are really not related to monetary issues. There are some basic things which should always be addressed.

(i) Personal Possessions

Every family ends up with items which have special meaning. There will be great-grandma’s photos, grandma’s silver, the family bible, wedding bands, antiques and so on, and so on. In most cases people do not consider what will happen to such things, and haven’t considered how their executor will manage to equally divide a set of wedding bands among five children.

Parents, and especially a surviving parent, need to address this question. Failing to do so increases the risk that their children will end up with problems. With luck, such problems are temporary but they are sometimes enough to cause permanent rifts in a family. These personal possessions are usually dealt with at an early stage following the death of the last parent. Their children have not had time to come to grips with the loss of their parent(s), and this can be part of the problem in dividing up personal possessions. Grief has not yet been dealt with. Then personalities can come into play. Some people have no hesitation about saying what they want. Others are extremely uncomfortable doing so, but when they find themselves with nothing, they resent what has happened.

The answer is to make the parent decide - have them make a list of who is to get what. They will often tell you that they don’t know, and the answer is to have them speak with their children. Even parents who feel they know exactly what their children want are often very surprised.

The time to hold such a conversation is at a stage where the parent is still active and healthy, rather than on a death bed. Children are much more likely to be willing to sit down and discuss the issue when it can be viewed as a distant prospect.
If the children refuse to discuss it, parents should still consider making the list. Their directions can still save problems. When it is time to divide up personal possessions, the children are likely to take what they have been told to take. Later, they can exchange items if they choose, but that can wait until after they have dealt with the loss of their last parent.

The list should include any items of emotional or sentimental value— to either the parents or children. It is amazing what can become important at these times. Once the list is done, the issue becomes whether or not it will be signed, witnessed and attached to the will. If it is not, then it is not legally binding. Having said that, most children are unlikely to challenge such a list. Most parents are not in a position to complete a list prior to signing their will, and once they finish the list there will always be changes. A “Memorandum” clause can be included in the will, but only after explaining to the testator that the list is then not legally binding. If they have a family where that could be an issue, they will be able to tell you. They must be in a position to make an informed decision on whether to attach the list to the will, or take a chance on doing the list later.

(ii) Prior advances of funds to children

Parents will often find themselves advancing funds to their children — for vehicles, for down payment on a home or for any number of other reasons. Some will take the care to advance the same amount to each of their children, at the same time. If so, there is no problem. If not, it often becomes an issue for their children and their executor.

If a parent considers it a loan, they need to deal with it in their will. If the intent is to forgive any such loan at death, then that should be stated in the will. If it is to be taken into account in the distribution of the estate, that also should be stated clearly in the will, and the parent(s) must be advised to keep clear records of the loan. If they cannot do so, then one of their options is to provide “balancing” bequests in their will, and then they can divide up the residue of the estate. Failing to address the loan at all has the potential to drive a wedge in a family. The more the parent is willing to address and clearly deal with the situation, the less likely it is that the wedge will ever come into play.
(iii) Joint Assets – the problems

Holding joint assets can be a wonderful estate planning tool for a husband and wife. It can be something entirely different when a parent holds assets jointly with their children. There are the standard concerns, such as marital breakdown or bankruptcy of the child. Other problems include the lack of a “gift over” if a child predeceases the parent. The children of that predeceased child will likely see nothing unless their grandparent can and does make changes to deal with the problem.

There can be a tax problem created in the transition to joint names with a child. The transfer from the name of a parent to joint names with a child can trigger a deemed disposition for tax purposes. In the case of growth assets such as an investment portfolio, or non-exempt real estate like a cabin, the transfer will result in at least partial capital gains tax coming up.

An additional side issue involves the transfer to joint names of a “principal residence” for tax purposes. It is not clear at this point, however it may be that if a parent transfers their home to joint names with a child, they have potentially given away half of their exemption from capital gains tax. If the property is sold the parent can claim the house as a principal residence, however the co-owning child can make no such claim. The issue does not appear to have arisen in case law, but is a potential problem.

It has been suggested that this can be avoided by the execution of a document as between the owners which states that the transfer has been completed solely for the purpose of estate planning, and that full beneficial ownership remains with the parent. In the event that the home is still owned in joint names at the time of death of the parent, the parent’s executor, and you as the solicitor preparing a probate application, could be faced with an ethical dilemma. At the time of completion of a probate application, the executor is required to swear to all of the assets which are owned by the deceased. If they have transferred a title to joint names but retained full beneficial ownership, it could be claimed that asset should still be included in the assets being submitted for probate, rather than on the Schedule of assets passing outside of the estate. The
executor must sign an affidavit (which you have prepared) listing the assets. If we are dealing with a parent who had possession of property, together with full beneficial ownership, it is a questionable area. The Queen’s Bench Fee Regulations exempt “real property jointly held by the deceased and another person” from property of the deceased when calculating the value of the estate. This is more than a question of how land titles has the property registered. Given that you will be doing the drafting and explanation of the affidavit, you also face an ethical question.

(C) SPECIAL NEEDS PLANNING

The days of the single family unit which stays together for life is less common than it used to be. Everyone knows the statistics on divorce, and second marriages by widows and widowers have always been around. You then throw in common law relationships, same sex couples and families with children who are “his, hers and ours” and you are out of the standard estate in a hurry.

Much will depend on the circumstances, and you cannot provide stock answers from a presentation such as this. You will have to deal with each issue as it comes up. There are however some suggestions which can be made.

(i) Keep Testamentary Trusts in Mind

This may be especially true where you have a couple who have married late in life, following divorce or death of a spouse. If either or both members of the new couple have children, there will be concerns about making sure that the children will receive their share of their parents’ estate.

Such couples may operate a completely separate set of finances and there is no need that they provide for each other. They may have executed a pre-nuptual agreement. Such careful planning is not prevalent however, which leaves the issue to estate planning. If there is a need that the spouses provide for each other, one of the methods for doing that is to insert a spousal trust in their wills. By naming the proper children as residual beneficiaries the problem of making sure that the children receive their inheritance is dealt with, and is balanced with a need to provide
income to a surviving spouse. The children will have to wait, but are at least given some assurance that they will receive the estate. One issue which will have to be carefully addressed in such a circumstance is whether there is the power to encroach from capital on behalf of a surviving spouse.

(ii) Common Law Couples

The law has not kept up with common law couples when it comes to estate planning. Two of the critical areas are in relation to intestate succession and dependant’s relief. Neither Act provides for rights of common law spouses. This puts such a spouse in a position where they must use other alternatives such as trust claims, and this is rarely the desired outcome. For these reasons alone, timely estate planning is very important for couples living in a common law relationship.

It should be noted that this problem may be changing in relation to the provisions of The Intestate Succession Act. In Winik v. Saskatchewan (Public Trustee) (February 23, 1999) Regina Q.B.G. 2500/98 (Sask. Q. B.) a common law spouse was confirmed to have standing to challenge the constitutional validity of the provisions of the statute dealing with “spouses”.

One piece of legislation which has recognized common law relationships is the Income Tax Act. Under that Act, common law spouses do qualify for full spousal benefits, such as rollover of capital assets or retirement savings plans. To qualify as a common law relationship, the Act requires that the two persons of the opposite sex be living together at the relevant time and they must either:

- have been living together for the previous 12 month period; or
- be the parents of a natural or adopted child.

One area which you should insure takes place when you are doing wills for a common law couple is to warn them about section 17 of The Wills Act. If they decide to marry, then they will have to do new wills. This warning provides the clients with valuable and necessary advice and covers you in the event that they do decide to marry. In some cases you may want to go so far as having
the clients sign an acknowledgment of your advice, to hold on your file.

(iii) **Same Sex Couples**

Same sex couples tend to face estate planning problems which other couples do not have to deal with. In November, 1999 Ontario introduced legislation to address the different legislative treatment of same-sex couples, however those changes have not yet been made law and no other province has yet taken the steps which Ontario has.

Same-sex couples have no intestate succession rights. They cannot (yet) take advantage of spousal rollover provisions such as are provided for on registered retirement plans or concerning capital gains or appreciated capital property. They have no standing to apply for letters of administration, and are not likely to be considered a “dependant” who is owed a duty in the administration of the estate. All of this means that estate planning is especially important for same-sex couples. They must ensure that they have completed wills which clearly set out what they want to happen. Moving assets to a joint tenancy is likely the best route whenever possible. One additional item to address is powers of attorney. Same-sex couples sometimes find that they are less likely to be accepted as a replacement decision maker, and for this reason it is even more important that the couple complete powers of attorney. It would be open to a surviving spouse to apply to be named as a Guardian, on the basis that they are a “person who, in the opinion of the court, has a sufficient interest in the personal/property affairs of the person with respect to whom the application is made”. (Sections 3(1) and 16(1) of The Dependant Adults Act).

There are a few tax advantages which can be taken advantage of. Income splitting can be easier - because the Income Tax Act does not recognize same-sex partners, you can gift funds to a partner without attracting the attribution rules. As well, both partners will be able to claim a principal residence exemption. These advantages are offset by the lack of a spousal RSP rollover however.
2. DOES FAIR MEAN EQUAL?

Define Fair. Ask someone nearby for their definition. The two are likely going to be different. It seems obvious that fair will not always be equal. The problem is that when you are dealing with the “standard” estate, at least some of the children of the deceased will indicate that only equal is fair.

This should not be a difficult thing for most parents to understand. They have undoubtedly been dealing with it ever since they had children. We all know that children will tend to keep track of what everyone gets, and parents can end up accused of “liking” someone best. While parents are alive, they can straighten such feelings out. If the feelings are generated by an estate distribution, parents are no longer around to take care of such hurts, and their children have a wonderful opportunity to do battle.

If parents feel that fair is not equal, then they need to explain that fully. In many cases, this may require that they sit down with their children while they are alive, and explain what they are going to do, and why. At that point the children can express their feelings and deal with the issue. It will not be saved up until the death of the parent(s), at which point they will take it out on each other. Not all parents are going to be willing to deal with such a process. We all have a natural aversion to conflict, especially within our family. If the parents won’t deal with the issues in advance, then it is recommended that they either leave a letter with their will which explains what they have done, or provide some explanation right in their will. You will not want to “clutter” a will with much of this but if there is a short and easy explanation then it might be easy to insert.

In a perfect world, fair would be equal. In reality, children are going to be treated differently. If one of them has been close by and expended years looking after their aging parents, fair might require something other than equal. The same may be true of a history of help given to one child, even if it was never considered a loan. The estate is the last chance for a parent to even things out, but they need to make sure that process does not start a family battle.
It is interesting that the question of equality becomes much less important when you are dealing with nieces and nephews as beneficiaries, or siblings. The relationship with the testator is different and there seems to be less competition involved. It can still happen, however it is definitely less likely.

3. THE DISABLED OR SPECIAL BENEFICIARY

One of the first things to keep in mind is that there are not many people out there planning to deal with disabled beneficiaries. There are some, and for the most part they are not hesitant to approach you to arrange for their planning. They know they must deal with the issues.

The bigger area is parents who have a child or child or children who just aren’t making it through life. These are the parents whose children suffer from addictions, are permanently dependent on social programs or are simply unable to hold down a job or hold onto money. These beneficiaries may not be “disabled” in the traditional sense but they definitely require special planning.

(A) DISABLED BENEFICIARIES

One of the first questions will be to determine the type and degree of the disability. Is the child an adult? If so, are they under the terms of a guardianship order? If so, parents should be advised that they can name their replacement in their will, pursuant to s. 40 of The Dependant Adults Act. That “nomination” must be confirmed by a court within six months of the death of the original guardian. As with any guardianship appointment, the person appointed should be consulted in advance.

If we are dealing with a physically disabled beneficiary, there may be no special planning required, depending on the severity of the disability. If the beneficiary is severely disabled, whether mentally or physically, then the parents will have to make arrangements to ensure that the child’s inheritance will be looked after. If the child is severely disabled and is an adult, then the issue of whether to apply for personal and property guardianship should be discussed. This is
recommended only for the cases where it is very clear that the child cannot look after themselves, but having parents undertake the application in advance will make the process much simpler in the event that they pass away. Their other children or family will have enough to deal with concerning funerals and estates, without having to commence a guardianship application.

If the dependant is still a minor child, then it is clear that the choice of a guardian becomes even more difficult than usual and this will have to be very carefully addressed with the prospective guardian. At this point you are not just dealing with estate planning. One concern which any prospective guardian should and will have is the money necessary to care for a severely disabled child. You are starting to move into issues involving financial planning, and you may wish to involve an accountant or financial planner. They will undoubtedly be able to provide information, options and direction to both you and to the parents.

(i) Annuities

The planning which takes place will likely involve the use of a trust, but one option is the purchase of an annuity. The purchase of a life annuity will provide funds to the disabled beneficiary. In a low interest rate environment annuities tend to be frowned upon, but they are a viable method to ensure that income is being provided. For beneficiaries who are not severely disabled, it may be possible to pay the annuity directly to the beneficiary. It is more likely however that it will have to be paid to someone on their behalf. The question of a guardian again comes up. It is open to the parent to pick a family member to handle the funds, but they will run into problems unless they are given some legal authority. The annuity would need to be set up in trust to the child, with the trustee named.

The difficulty which is faced through this route is that you lose most of the flexibility. The payments are set at the origin of the annuity and the payments are going to arrive, whether they are wanted or not. The only way to avoid that would be to have the payments from the annuity policy held in a trust. Payments which are received by the beneficiary will have to be disclosed for the purposes of income assistance, and any provincial assistance will be reduced.
(ii) **Trusts**

This paper is not going to go into the "moral" aspects of whether the parent's estate planning should be geared toward maximizing the government benefits/assistance which will be available to the beneficiary who is mentally or physically disabled. That decision is for the parents of the beneficiary, and will undoubtedly depend in part on how much they will be in a position to leave their disabled child.

There have been a number of names used for a completely discretionary trust which names a disabled child as an income beneficiary. They are sometimes referred to as "social services" trusts. The common name is a "Henson" trust.

Under the terms of such a trust, the disabled child has no inherent right to either the income or capital of the trust. Any and all payments are made purely at the discretion of the trustee. The theory is that because the beneficiary has no legal enforceable right to payment from the trust, he or she will retain their right to income tested provincial assistance or "welfare". Any income which is paid over must be disclosed by the recipient and that will result in a corresponding decrease in the assistance which is provided.

The rationale of the parent is that by preserving provincial assistance for as long as possible, the funds held in trust can be retained against the day when provincial assistance could be canceled or withheld. In the interim, the trustee is likely to be trying to grow the funds, against this future possibility. If any payments are made to the benefit of the disabled child then it is likely that such amounts will have to be reported and are deducted from the funds provided under the provincial income plan. In some cases there are capital payments made to purchase "extras" for the dependant child, with payment for such "extras" made directly from the trust to the supplier. This is not likely to be effective in maintaining social assistance payments, as the benefit of the capital purchase does pass to the child, but such payments are often one of the desires which parents have.
One item which parents must keep in mind is that if they have a disabled child, there is a chance that the child may have the right to make a claim under *The Dependants’ Relief Act, 1996*. In the event that the child is receiving social assistance, the Public Trustee may be in a position to make a claim on behalf of the child.

Section 2(1) states that one of the definitions of “dependant” means:

“a child of the deceased who is 18 years or older at the time of the deceased’s death and who alleges or on whose behalf it is alleged that:

(i) by reason of mental or physical disability, he or she is unable to earn a livelihood; or

(ii) by reason of need or other circumstances, he or she ought to receive a greater share of the deceased’s estate than he or she is entitled to without an order.”

In the event that you are dealing with a severe disability, and the child is in receipt of social assistance, then the start of proof of 2(1)(i) exists. There is no question that the burden of proving that the will’s existing provisions are inadequate rests on the claimant, but because of its terms a Henson trust is unlikely to be supported by a court. At that point the moral and public policy issues become extremely important.

The Act goes on in Section 9 to provide that a court can order that a trust fund be established for the purpose of paying an allowance to the dependant. That allowance is to help the dependant achieve independence, meet special needs, provide occasional gifts, or any combination thereof. In determining the amount of the allowance, the court is to consider that any social assistance being provided will continue to be provided. Further, the capital or income from such a fund are not to be considered as an asset or income of the dependant for the purpose of determining eligibility for assistance under provincial assistance programs. The regulations to the Act state that such a trust fund established by the court cannot exceed the sum of $50,000.

It is worth noting that these sections only arise when the trust is created by a court pursuant to the provisions of the Act. When the court creates the small trust, income is not to be deducted from social assistance funding, however to this point Social Services has continued to take into account
any income received from any testamentary trust without reference to the size of the trust. The potential absurdity is clear. If a parent sets up a small trust to provide some funds for a dependant child, the income received will reduce the child’s entitlement to social assistance. If the parent establishes a purely discretionary or Henson trust, then the trust can be challenged. If the court in turn creates a trust out of the determination it makes under the Act, then the income from that trust is not to affect the child’s entitlement. This was verified in the decision of Re Penner (1997) Sask. R.317 (Q.B.) where the court stated that the purpose of section 9 is to create a trust fund to enhance the quality of life of the dependant without affecting their entitlement to public assistance.

The problem is that these provisions have been placed in The Dependents' Relief Act, 1996 as opposed to The Saskatchewan Assistance Act. Until that situation is changed, it is expected that such inconsistencies will grow as a problem until a legal challenge is mounted to remedy the situation.

In the event that parents are in a position to provide for a trust in excess of $50,000 then the question becomes irrelevant. It is open to the parent to attempt to set up a Henson trust and take their chances on a challenge. The alternative is to provide that the trust is to pay income over to the disabled child and see the possibility of social assistance payments being reduced or discontinued. One avenue which will still exist relates to the trust’s investments. Any long term trust should contain some growth assets in order to ensure the long term viability of the trust. You do not want to see it eaten up by inflation. Such investments tend to reduce the income being generated. It would be difficult to move the assets completely into growth investments, given that The Trustee Act now explicitly states criteria which must be taken into account when investing. One of the criteria which affects the trustee’s choice of investments is the income needs of the life tenant.
B) SPECIAL BENEFICIARIES

Henson trusts tend to be more easily established and maintained when the beneficiary involved is not disabled to such a degree as to rule out employment. At that point it becomes much less likely that they would be considered a dependant. Such trusts also come into play with the child who is not disabled, but who relies on social assistance. Both of these types of beneficiaries would qualify as special.

Many families then have beneficiaries who simply cannot be trusted to receive any substantial amount of money. It may be due to addictions or a pure inability to hold onto money. For whatever reason, parents are concerned about leaving cash to such children, siblings or other beneficiary.

The annuity mentioned previously is a viable option. A life annuity will make a payment to the intended beneficiary on a regular basis - usually monthly. If they blow the funds in one month, at least they will keep getting a cheque. They do not have the ability to lose everything.

A testamentary trust will also provide this ability, and will also provide a bit more flexibility. If the beneficiary truly "cleaned up their act" or had a dire need for a lump sum payment, the trust could handle such issues. The parent can then name the subsequent residual beneficiaries and feel that they have done their best to provide for their child, keeping that child's situation in mind.

One last category of "special" beneficiary is the child who is in what the parents consider to be a bad marriage. Many parents have concerns about their son or daughter-in-law obtaining a portion of their child's inheritance. For most parents, the concern is not enough to do more than insert a matrimonial property or "intended beneficiary" clause in their will. For extreme cases however the parent may end up providing their child a life interest only. Care will have to be taken to ensure that the trust is well drafted to take into account future changes. The parents may want to provide the capital to their child if the marriage does end, or if it continues for such an extended period that the parents feel payment should be made. These desires will have to be balanced
against the need to ensure that the trust cannot be wound up under the rule in *Saunders v. Vautier*.

4. NEW SUCCESSION PLANNING OPPORTUNITIES

One of the first questions which arises from a discussion on “succession planning” is the question as to exactly what such planning is. If you ask many accountants, they will tell you that it is the process of estate planning for business owners, with the goal of the planning being the continuation of family ownership and operation of the business. Many lawyers, especially tax specialists, would agree. For most of us, the term is just as likely to be synonymous with estate planning in general. Everyone who undertakes an estate plan is engaged in determining how best to get their estate to their successors.

(A) BUSINESS SUCCESSION PLANNING

We are not in the tax portion of the seminar and will not attempt to teach about the business succession planning routes. You quickly end up heading down the path of an estate freeze or gel, whether to use a family trust, and so on. This is a highly specialized area in which most lawyers will require some assistance.

Some general comments might be of help. Succession planning for business owners tends to be something they find extremely difficult. You are talking about having them give up sole control of a business they have likely put their heart and soul into. Then you add in the fact that they have to decide who is going to take it over from them. It is very rare that all of the children will have an interest, plus the ability, plus be capable of dealing with each other. This usually means that one or possibly two of the children will end up in control. Making the decisions about such an event can be extremely difficult.

One of the best pieces of advice I have heard about getting started is to ask the business owner to sit down and think about what would be happening if they died the day before. Who would look
after things in the short term? What will happen in the long term? Break it down to the point of who is going to be able to sign payroll cheques. How would a surviving spouse gain access to funds? Consider the business planning discussions which the children might have, given their known personalities and relationships. This type of exercise may be what is needed to get the businessperson to recognize the kinds of problems that will come up, and the potential disputes which will arise.

Once you are past the struggle to get a business owner to devote the time to succession planning, you have likely cleared the biggest hurdle. They rarely want to “waste” the time which is going to be required. Once you do have their attention, you will need the input of their accountant, possibly their in-house controller, and you may need the assistance of a lawyer with a tax specialty.

One of the first steps which will almost certainly be suggested is an estate freeze. It is considered the basic necessity when planning the estate of a business owner. Failing to complete an estate freeze will mean that capital gains tax will occur on death, at rates which are likely in the 40% range.

It may be that the gains are completely exempt under the provisions for small business corporations. As long as both the husband and wife own the shares, the potential exemption is $1,000,000 BUT you must be sure that the business qualifies.

Traditionally, business owners would hesitate about completing a freeze. They are passing the future growth of their company to their children. Today, those children may be fine, but what about down the road? It is now possible to do a “gel” instead of a freeze. In essence, the freeze would have a bail-out provision which the parent could trigger if circumstances with their children changed. A family trust may also provide some flexibility.
SUCCESSION PLANNING FOR "SPECIAL" ASSETS

Not all succession planning involves that family business in a traditional sense. Farmers present a prime example of a nontraditional succession planning problem. In most cases all of the children are not likely to be farming, or if they are, the land might not be easily divisible. So what should the parents do? One of the most common succession planning issues which can arise is the family cabin. In terms of importance, many families might place it ahead of a family business. What do you do?

The traditional methods for dealing with such assets are to provide them to the child that the parents want, and then to offset that gift from the residue of the estate. The other children will receive a higher share of residue to compensate. If there is not enough other residue to allow this, then parents find themselves turning to insurance to provide funding. One issue which parents must keep in mind when planning in this fashion is the taxes which will be payable. This will be addressed later in the seminar.

If parents do not have the funds or insurance to equalize their beneficiaries, then they sometimes will turn to having the asset provided to their children as tenants in common. This is definitely an option which is available, but the parents should keep in mind the personalities and relationships of their children. Do they have children who will be able to deal with each other over use of a cabin or rental of farmland? If not, the parents need to address these issues with their children and guide them toward use agreements, or eventual plans to have some of the children "bought out" of the asset.

NEW GENERAL DEVELOPMENTS

There have been new developments in the area. They are most likely useful for seniors, and arise from the December 17, 1999 draft legislation which was released by the Department of Finance.

The draft legislation is largely a refinement of proposals announced in December, 1998, however
there are two new estate planning opportunities which are included in the 1999 release, being the "Alter Ego Trust" and the "Joint Spousal Trust".

Normally, the transfer of assets to a trust is considered to be a disposition for tax purposes, and is deemed to be at fair market value. This means that the normal capital gain issues have to be addressed. An exception is provided where the transfer is to a spousal trust, which allows the transferor to decide whether to transfer on a rollover basis, or to use fair market value.

For tax purposes, a spousal trust must provide that the spouse (or common law spouse) is entitled to receive all of the income which arises from the trust property during the lifetime of the spouse. In addition, during the lifetime of the spouse, no one but the spouse must be capable of obtaining the use of the income or capital of the trust. This rules out any income or capital encroachment to children. As long as these two conditions are met, then any assets which are held in the trust will not attract capital gains tax until the death of the spouse, when fair market value will again come into play.

Transfer to a spousal trust has been the only exception available to avoid the deemed disposition rules. A taxpayer cannot transfer assets to a trust solely for him or herself, with named beneficiaries on the death of the taxpayer. Transfer or assets to such a trust will trigger a disposition for tax purposes. You may wonder why such a trust would be set up, however it could be useful in order to avoid probate fees/taxes, or it could be an asset protection trust.

The draft legislation proposes that this situation be addressed.

(i) "Alter Ego Trusts"

These sound like something from a science fiction novel, but they are trusts created after 1999 by someone who is at least 65. The trust must provide that the transferor is entitled to receive all of the income from the trust during his or her lifetime, and during that period there must be no other person who can receive or be entitled to use of any of the income or capital of the trust.
As long as these conditions are met, a transfer to this “alter ego” trust will not result in a taxable disposition. When the transferor dies, all of the property of the trust will be deemed disposed of at fair market value at that time. There is no tax benefit during the life of the transferor, as they will be paying tax just as they always have. There will however be advantages available for such things as probate fee avoidance.

(ii) “Joint Spousal Trusts”

At present, a taxpayer can set up a spousal trust, but if they join their spouse as a beneficiary of the trust, then the exemption is lost and the assets being transferred into the trust will be deemed to have been disposed of for tax purposes.

Under the terms of the draft legislation there could be a tax-free rollover to a joint spousal trust. Again, the trust must be created after 1999 by a transferor who is at least 65. The trust must provide that the transferor and their spouse are entitled to receive all of the income of the trust from inception until the death of the last of them, and that during that time no one else can be entitled to any income or capital of the trust.

During the lifetime of the taxpayer and their spouse, there is no tax advantage gained, as the transferor will report the income of the trust. The capital gains on the assets transferred will arise at the death of the last of the two of them, rather than at the time of transfer to the trust.

It must be kept in mind that these are merely proposals, however there has been commentary that the proposals are expected to become law. As a result, there could be renewed interest by seniors concerning inter vivos trusts. Saskatchewan will not see as many as the high estate tax provinces of Ontario and British Columbia, but fear of probate costs is also a Saskatchewan habit.
Conclusion

As a practitioner, the more you find out, the better off you will be. Unless you find out about family issues (beneficiary incomes/employments, marital status, etc), assets passing outside of the estate, status of land registrations, beneficiary designations, etc, you won’t be in a position to provide decent advice.

Part of the change which many of us need to make is to get out of the habit of treating wills as a chore which involves fitting clients to your standard precedent. Because of tax changes and the growing number of second and other families, the precedent cannot be relied upon.

An example would be the senior with no children who is giving his or her estate to charity. If it is a sizeable sum, would you consider suggesting a charitable remainder trust? Clearly, you would want to involve a tax adviser, but the client might find such an option attractive and in some cases it could save them a large amount in taxes. From your point of view you have turned a chore into a piece of paying work when it comes time to draft the trust. Your client benefits, as do you.

The point is that we need to obtain as much information as possible. Getting the bare information does not put you in a position to provide advice. It will allow you to draft a will using your standard precedent. There are many possibilities out there which might be of benefit to your clients. This seminar will cover off many of them but first you have to get to know your will client. Only then can you know what to suggest for planning options.

As has been mentioned (many times) in this paper, the other key is for parents to talk to their children in advance. If there are going to be shocks handed out in a will, for the sake of family harmony, they are better to be known in advance. Parents also need to know the feelings of their children on personal possessions, special assets and the possibilities of trusts. The more that a family talks about these issues in advance, the less likely it is that a family will end up going to war following the death of parents.