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Drafting Considerations for Wills and Estate Practitioners

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Tips and Traps When Drafting Wills: How to Climb the Ladders and Avoid Sliding Down Snakes

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TIPS AND TRAPS WHEN DRAFTING WILLS: HOW TO CLIMB THE LADDERS AND AVOID SLIDING DOWN SNAKES

COLLECTING THE (CORRECT!) INFORMATION

"The art and science of asking questions is the source of all knowledge."
Thomas Berger

A legal practice focused on estate planning can be a fulfilling and challenging career. And, if the legal career does not work out, you can pivot quite quickly into writing TV dramas or movie scripts since the information that you become privy to is quite astounding and will be a great source for scripts!

The first step to start the estate planning process is to meet with your client to obtain all relevant information. This information will allow you to provide helpful recommendations about what your client should consider in formulating the estate plan. In the initial meeting with your client, the goal is to create a connection that will facilitate useful responses to your questions and to be able to effectively read the body language of your client. Knowing where to probe further in response to an answer provided by your client is a true skill! But to keep you on track and to not get sidetracked by the soap opera of your client's life, it is helpful to have a fulsome questionnaire to ensure that you ask all of the right questions. Attached as Schedule "A" is a list of potential types of assets that your clients may own. But don't be a slave to the questionnaire – as mentioned, certain answers may take you in very different directions as your client relays information to you.

The next step is to verify some of the information provided to you by your client since clients are notoriously uninformed about their own affairs! For instance, it is important to confirm the registered ownership of real estate, the shareholders of corporations, the owners and beneficiaries of life insurance, the beneficiaries of registered assets, etc. Remember the old adage: You can't give away what you don't own!!

Ideally, it is recommended that you conduct independent searches and reach out directly to the client's investment advisors and bankers to ensure that the ownership and named beneficiaries are as your client thought they may be. There are some situations where this may not be cost effective or perhaps necessary. For example, for a young couple in their first relationship/marriage with very little in the way of assets, there may not be any reason to verify ownership of assets if they plan on gifting everything to the survivor on the first to die. However, verifying the ownership of assets can be very important for most other situations, including the following: individuals in second (or third or fourth) relationships, parties with children from prior relationships, parties who are older and have more than one adult child, high net worth parties (who rarely have a clear idea of what they own!) or parties who own private corporations.

One of the most useful things that you can do for your client is to unearth issues or problems that may exist in how they own their assets or who is named as a beneficiary of the assets so that you can help tidy up their affairs. Then drafting clearly worded, effective documents can increase the chance that the estate does not end up in prolonged litigation.

JOINT ASSETS

Joint assets are a quick and easy way to move assets into the surviving owner's name on the death of one of the joint owners. This is regularly used between spouses (in their first marriages) as an effective estate planning tool. Real estate, bank accounts and investment accounts can all be held jointly with the right of survivorship.

However, if joint ownership is used between parties other than spouses (in their first marriage), then there can be significant problems. In fact, the confusion that arises from owning assets as joint owners in estate administration matters has created much litigation.

Between married spouses a presumption of advancement applies. This is statutorily recognized for parties domiciled in Alberta.[1] As such, for any property held jointly between the spouses, there will be a presumption that on the death of the first spouse, that deceased spouse intended to gift ownership of the asset to the surviving spouse.

The presumption of advancement also applies between parents and their minor children.

For all other situations, there is a presumption of resulting trust where assets are held jointly with another party or parties, which means that the property reverts back to the estate of the deceased party unless that presumption can be rebutted. Equity does not presume a bargain not a gift!

These concepts were addressed in the seminal case from the Supreme Court of Canada ("SCC") of *Pecore vs. Pecore*[2] ("*Pecore*") and the companion case of *Madsen vs. Saylor*[3] ("*Madsen*").

In *Pecore*, a father moved a bank account into joint ownership with his daughter to avoid probate fees in Ontario. During his lifetime, the father claimed the income earned on the account on his tax return and his daughter could not access the account without his permission. The father's Will left his estate to his daughter and her disabled husband. On the father's death, the daughter claimed

[1] *Matrimonial Property Act* (Alberta) section 36.

[2] [2007] SCC 17.

[3] [2007] SCC 18.