

# **Surviving the Risk Management Issues of Estate Planning**

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*Estate Planning for the Average Wealth Client*

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## **SURVIVING THE RISK MANAGEMENT ISSUES OF ESTATE PLANNING**

### **INTRODUCTION**

This presentation is about practice management aspects, including the risk management, of completing estate planning with your client. However, this paper will be limited to preparation of a Will and the considerations relative to that. The topic of additional estate planning documents is addressed in another section.

I hope to provide you with some suggestions on how to best manage your estate planning practice and why this is important. It is intended to give you some insight into areas to reduce your risk of liability in a field that so many practice as a small portion of their practice.

I hope to provide you with some guidelines to complete each file in a competent and efficient manner.

I will advise you that some of the information presented has been taken from material that I prepared for a paper for internal purposes for the Professional Development and Competence Department of the Law Society of Upper Canada (LSUC) in 2012 while I was employed there as Counsel, Practice Review. While the information taken from that paper is limited to observations and information then available, it reflects deficiencies observed at that time by the Practice Review Department and applicable case law available at that time.

### **THE IMPORTANCE OF EFFECTIVE PRACTICE MANAGEMENT**

My experience as Counsel, Practice Review in both Ontario and Alberta, has included a review of a number of files of lawyers who have completed estate plans for their clients, and I have acted on contested estate matters. From this experience, and through review of relevant sources, I have concerns that we will see increased claims based on negligence of lawyers in this area of law. There are a number of reasons for this.

1. There is a large wealth transfer occurring from those who are now passing significant estates to the “baby boomers”. The number of “disappointed beneficiaries” may increase, as more estates are administered.
2. There are a large number of people from the “baby boomer” generation that are now planning the transfer of their estate to their beneficiaries. The number of wills to be administered will increase in the future.

3. A review of many lawyers' files, often indicates that preparation of an estate plan is generally something done for a small return, which suggests that minimal work and attention is given to the file by the lawyer. File contents themselves are often minimal.
4. Many lawyers complete estate planning, or preparation of wills and powers of attorney as a small portion of their practice. It appears to be a "sideline" for many lawyers, done to assist their corporate, litigation or family law clients or as additional income.
5. The world of estate planning requires a broad base of information in many fields of law, including family law, tax law, trust law, real estate law, sometimes immigration law and conflict of laws. The day of the general practitioner is fading away and often this broad base of information is no longer available to some lawyers.

Prior writings support these concerns. In 2004, Ian Hull in his article in "Preventing Will Drafting Errors" reported:

There is little doubt that with the onset of the significant transfer of wealth in Canada, we will see an increase in the number of negligence claims against lawyers doing Wills and Estate work.<sup>1</sup>

In an article in 2013, Corina Weigl<sup>2</sup> reported that the Ontario based Lawyer Professional Indemnity Corporation ("LPIC") indicated that negligence claims related to Wills matters is one of the highest claims areas in Ontario.

Although detailed information is not available from the Alberta Lawyers Indemnity Association ("ALIA") recent discussions with the ALIA claims department suggests that in Alberta, approximately 8% of claims relate to estate planning or estate administration. Claims relate to:

1. "Disappointed beneficiaries" who believe that the lawyer did not correctly follow the instructions of the client in drafting the provisions of the will
2. Drafting that created unexpected tax liabilities
3. Claims that the client suffered from incapacity or undue influence which was undetected at the time a new will was drafted by the lawyer
4. Inadvertent drafting errors where there were items missing from the provisions of the will

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<sup>1</sup> Ian Hull, "Preventing Will Drafting Errors" (2004) 3:1 LawPro Magazine 9.

<sup>2</sup> Weigl, Corina, Faskin Martineau DuMoulin LLP, Law Society of Upper Canada "Wills and Estates Practice Essentials 2013- How to Draft a Will- Minimizing the Risk and Liability to You: (2013) , at page 1-2