

TAX-EFFICIENT TRANSITIONS

HAVING CRUCIAL CONVERSATIONS

Estate planning is done to prepare families for the financial circumstances when a loved one passes away. Generally, it is the will that will direct what happens at that point; however, the vast majority of estate plans also include a simple power of attorney to deal with property issues if an individual becomes disabled and can no longer handle his or her own finances.

THE POWER OF ATTORNEY

A power of attorney is a document under which you appoint another person to handle your financial affairs in the event of your mental incapacity. Most powers of attorney documents are simple and to the point.

Some families are confronted with circumstances that demand that they implement or at least consider a power of attorney containing more sophisticated solutions. The bullet points listed below set out some of the situations where this might be true.

- **Allowing corporate restructuring** – An individual with an incorporated family business may want the flexibility to restructure downstream when it comes time to pass the company on to their children. Some business owners will want to conduct an estate freeze sometime in the future to defer capital gains and expand access to the capital gains exemption. Some business owners periodically ‘refreeze’ the shares. These steps cannot be taken under a stock power of attorney if the owner has lost his or her capacity and the power of attorney is in effect. That is true unless the power of attorney document expressly allows it.
- **Continued gifts to charity** – Some people make regular gifts to charity and want that gifting to continue after their death. The attorney under a stock power of attorney document cannot continue those gifts without an express clause to allow for it.
- **Supporting extended family** – Some people support one of their parents, keeping the parent out of a care home or other facility. The attorney under a stock power of attorney document cannot spend the individual’s money to help the parent without an express clause to allow for it. Depending on the province or territory, some statutory exceptions allow for the support of a spouse or dependent child, but those exceptions are generally narrow and restrictive.
- **Continuing support for a disabled heir** – People with disabled heirs frequently use their own money to support and improve the life of the disabled family member. They buy specialized wheelchairs. They pay for trips and meals. They buy clothes. They make annual Registered Disability Savings Plan (RDSP) contributions to trigger government bond and grant contributions. All of that generally comes to an end if they become incapacitated. The attorney under a stock power of attorney document cannot spend the individual’s money in that way without an express clause to allow it.



- **Persons subject to U.S. estate taxes** – Where the person is a U.S. citizen or U.S. domiciliary, a program of gifting is often recommended during their lifetime to reduce exposure to U.S. estate taxes. The program of gifting is often delayed until the children are older and the parent has reached a stage where he or she is confident that they will not require access to the gifted property. The gifts have to be modest enough to avoid U.S. gift taxes. The program of gifts is not possible under a stock power of attorney document unless an express clause is included to allow for it.

This list is not comprehensive. Additional items could be added for people with high net worth residing in jurisdictions with high probate fees (where applicable), allowing their attorneys to settle an alter ego trust later in life to avoid probate fees on assets inserted in the trust.

DO YOU HAVE THE RIGHT LAWYER?

If you need a simple will you don't need a specialist to draft it. If you need specialized planning you might require a specialized lawyer.

Most lawyers can draft a simple will or simple power of attorney. Advanced strategies may require more expertise. This does not mean changing lawyers. Many people have long-term and valued relationships with a lawyer or law firm who regularly does their legal work. The client is well advised to have a candid conversation with their regular lawyer, explaining the situation at hand (“I have a child who is disabled and think I need a special estate plan”), and then asking if the lawyer or firm is right for the job (“Is that the kind of work you do? Would I be better off with a specialist in that area?”).

WILL THE EXECUTORS BE POSITIONED TO SUCCEED?

Another crucial conversation should occur between you and the person who will handle things at your death under your will. Legally, that person is referred to as the executor or, in Ontario, the estate trustee. The executor can do a more effective job if he or she knows what to do and where to find the tools and information necessary to do so.

This discussion might be sidestepped by a healthy 40-year-old – the odds of dying over the decade that follows the conversation are remote. The situation is different for an older person or someone in poor health.

If your life expectancy is limited, you must have an open discovery conversation with your executor. The ability of your executor to step efficiently and effectively into service at the time of your death is valuable for everyone involved. It is always wise to have the same conversation with the person you have designated as attorney under your power of attorney.

On the next page you will find some points for you to discuss with the person you have chosen as your executor.



What are you doing after work?®

ACTION PLAN FOR THE EXECUTOR:

The crucial need for documentation

- **Location of the will and other key documents** – The executor needs to know where the will and other key documents are to be found, and needs to be able to gain access to them.
- **Funeral-related arrangements** – The executor, not the next of kin, is legally responsible for the body. Thus, the executor should be made privy to the arrangements, or at least be told who in the family knows what is to be done when the time comes. There will be other issues to deal with, ranging from the hymns at the funeral service, if any, and the obituary.
- **Content of the will** – There is real value to going over the will together. The will may contain a gift to a nephew. The executor needs to be aware of this before telling the next of kin to ‘take what you want.’ Where does second cousin ‘John Smith, of the city of New York’ actually live? There are hundreds of John Smiths in New York. How can you best ensure that the executor will be able to track down the right one? Other provisions in the content of the will may need explanation. It’s too late to clarify those details after you have passed away.

How much detail? Read over the will or give a summary. The executor needs to know as much as possible even though you may feel the need to keep some of the details confidential.
- **Assets** – You and your executor should review all of your assets together. What do you own and where is it? Who has been serving as investment and accounting advisors? The executor needs to know if there is valuable art in the basement, or a folder labeled ‘cottage receipts’ in the cabinet for use in assembling the adjusted cost base on the family cottage. The executor needs to know whether life insurance, RRSPs and TFSAs are being routed through the estate or

direct to designated beneficiaries. They also need to know whether there is a shareholder’s agreement forcing the corporate-owned family business to buy out your shares at the end of your life.

This discussion, however crucial, does not occur in many cases. The deceased passes away and the executor is left starting from scratch. Three important questions must be immediately answered:

- Is there a will?
- Where is the will?
- Is someone expected to be in charge of the remains?

Damage control

Without this information, the executor is left to assemble information through painstaking work. It means delays and errors. It means inefficient tax filings. It makes the job harder for the executor. If the executor is your spouse, and the spouse is capable, the damage is less severe. If the executor is your friend or your child who has not remained privy to your finances, the damage is palpable.

A binder of instruction

You may prefer to write everything down. There is no conversation. Instead, there is a binder. It is tabbed and organized and covers all of the items described above. The executor is simply told where to find the binder. That serves much the same purpose. Is a binder better than a meeting?

Each has virtues. Even if the executor makes notes, the binder will have more detail than the executor can record with a pen during the meeting. On the other hand, the binder may not be comprehensive. The executor may have questions, and the binder cannot answer those questions or be asked to provide more detail later.

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