

# **Estate Planning 101**

**Death and Disability**

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**Concordia University Pensioners' Association**

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# **The Crucial Messages: I**

## **“The Basics” : Avoiding King Lear**

**King Lear, Shakespeare’s most tragic character, had a crazy estate plan.**

**Lear would abdicate his throne, and then divide his lands among whichever of his three daughters flattered him most. One loyal daughter refused to play the flattery game so Lear banished her. The other two poured on the flattery, took his lands, and then threw him out.**

**Upon discovering both were having an affair with the same man, one of the flatterer daughters poisoned the other, then stabbed herself to death. Meanwhile, the loyal daughter was executed by mistake. Lear now broken, abandoned and demented, began to converse with mice.**

**King Lear’s sorry end personifies what aging persons most dread: Lear died broke, sick and senile, his family a train wreck, his legacy to be forever remembered as a vain buffoon. Lear’s loopy plan, land for flattery, was doomed from the outset. He failed as a king and as a father with such colossal grandiosity that Shakespeare immortalized his folly. Aging persons want what eluded poor Lear: financial security, attentive care, a connected family at peace, and a positive legacy by which they are remembered.**

# **Estate and Disability Planning: Avoidance Tactics**

- **Ignore it (if you have a problematic family situation)**
- **Procrastinate about it (“Let the chips fall where they may”)**
- **Indulge in misconceptions and myths**
  - **Only for the wealthy**
  - **Only for mortals**
  - **Only for feeble and ill people**
  - **Everything will go automatically to my spouse (legal or *de facto*) or my children**

# **The Crucial Messages: II**

## **“The Basics”: Essential Documents**

- **Every adult should have a:**
  - **Protection Mandate (also called a Power of Attorney, Living will, Health Care Directive, etc.)**
  - **Will (or updated Will)**

# **Crucial Messages: III**

## **Disability Planning**

- **Integral part of later life planning**
  - **Should not take a back seat to estate or tax planning (not “a side of fries”)**
- **Carpe Diem**
  - **This is your chance to decide who will make decisions for the management of your property, health, nutrition, hygiene, clothing and safety when you lose your mental capacity to make the decisions yourself**
- **Alternatives:**
  - **Protection Mandate or Power of Attorney or both**
  - **Regime of protective supervision**
    - **Private curator or tutor**
    - **Public curator or tutor**

# **What is mental incapacity and how does it happen?**

- **The ability to appreciate information relevant to making a decision combined with the ability to understand the consequences of that decision**
- **Illness, injury, diseases of old age, psychiatric disorders (especially bi-polar, obsessive compulsive disorder and unipolar depression)**

# Property vs. Personal Care

- **Functions can be given to different persons**
- **Limitations may be imposed on powers**
- **Special powers to be considered**
  - **Gifts to family and charities**
  - **Care and maintenance of family members**
- **Multiple or Situs Powers of Attorney**

# Are they safe?

**Given modern phenomena of elder abuse, financial abuse (cf. Mickey Rooney, Brooke Astor, Lee Harper, Lilianne Bettencourt), predatory marriages (May/December) and inheritance impatience)**

- **Balance risks: not having one is riskier**
- **Personal Care = very low risk**
- **Property = make it; don't release it**
  - = checks and balances if joint attorneys**
  - = accounting requirement**
- **Homologation by court upon occurrence of incapacity supported by medical and psychosocial evaluations**



- **Planning is painful, but brings peace**
- **It is not about money**
  - **easy to give away money**
  - **what is difficult is to give it away well**
- **Anticipate irrationality**
- **Keep costs down through preparation and forethought**
- **Do not do it yourself:**
  - **Caveats: holograph will (“The Jolly Testator Who Makes His Own Will”) will kits (save now, pay later)**
- **Formality**
  - = **certainty**
  - = **reduction of unnecessary taxation**
  - = **avoids contestation**

# **If you are divorced or separated or in an extended family situation**

- **Divorce never ends**
- **Live where it is real: inter-family tension**
- **High risk of wrong person getting authority**
- **High risk of litigation**
- **Requires thought to balance needs**
- **Substantial benefits to be gained from planning**

# **Basic Steps to Establish Your Estate Plan**

- 1. Prepare an inventory of your assets and liabilities**
- 2. Identify your estate planning objectives**
- 3. Prepare your Will**

# Step 1: Inventory of Assets and Liabilities

- **ASSETS:**
  - **RRSPs, RRIFs and pensions**
  - **Movable property such as cars, furniture, jewellery, art**
  - **Property such as your home, chalet and investment properties**
  - **Investments such as stocks, bonds, GICs, mutual funds and partnership interests**
  - **Insurance (term, universal)**
  - **NB: Check beneficiary designations RRSPs, RRIFs and insurance:**
    - **Valid?**
    - **Up-to-date?**
  - **Receivables and advances**
- **LIABILITIES:**
  - **Hypothecs**
  - **Investment-related debt**
  - **Lines of credit, loans**

# Step 2: Objectives

- **Depend on various factors:**
  - **Your age**
  - **Your marital status**
  - **Location of your assets**
  - **Joint ownership of assets**
  - **Ages of your family members and other beneficiaries**
  - **Needs of your beneficiaries (disabled child)**
  - **Your beneficiaries' ability to handle their own financial affairs**
  - **Current value of your estate**
  - **Your tax situation**

# Prioritize Objectives

- **To Achieve:**

- **Maximization of wealth for heirs**
- **Fulfillment of your wishes**
- **Timely and orderly distribution of estate proceeds**
- **Adequate liquidity to pay taxes and other liabilities**

- **To Avoid:**

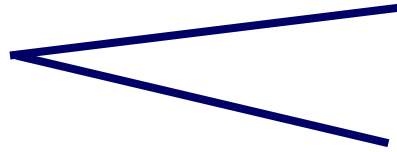
- **Needless taxation**
- **Family strife**
- **Costly legal challenges**
- **Unnecessary delays**
- **Loss of control of family assets (e.g. country property)**

# Every Situation is Unique

- **Couple with children or without children**  
**or**
- **Second-family**  
**or**
- **Couple close to retirement or retired**  
**or**
- **Single person**

# Methods of Passing on Assets

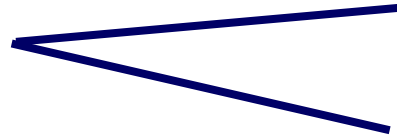
**During your  
lifetime**



**outright gifts**

**Inter vivos trusts**

**On death**



**outright distribution**

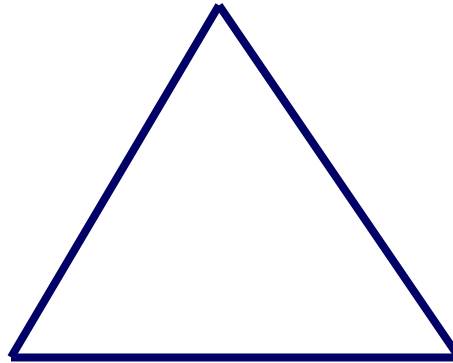
**Testamentary trust(s)**



# De-Mystifying Trusts

- **A trust like an elephant is difficult to describe but easy to recognize**
- **No definition in CCQ; only trust elements are described**
- **Trust is a triangular arrangement or relationship defined by a trilogy of actors:**
  - **Settlor**
  - **Trustee**
  - **Beneficiary**

**Settlor**



**Trustee**

**Beneficiary**

# **The Trust**

## **Separate Patrimony**

### **Separate entity for tax purposes**

## **Settlor**

- **Places assets/property in the trust**
- **Sets up rules for operating the trust**
- **Sets up rules for winding up the trust**
- **May establish trust by gift, will, contract, judgment or law**

# **The Trust (cont'd)**

## **Trustee**

- **Manages assets**
- **Files income tax returns**
- **Provides annual and final accounting**
- **Follows trust agreement**

## **Beneficiaries**

- **May receive trust income**
- **May receive property/assets (trust capital)**

# Situations for Effective Use of Trusts

- **Although trusts are not for everyone, they have been used in situations that include:**
  - **Managing money for children until they are older**
  - **Managing assets for a child or spouse who is incapable because of age, physical or mental disability**
  - **Tax planning**
  - **Protecting assets from lawsuits and creditors**
  - **Charitable giving**
  - **Holding the family chalet for your children and grandchildren to ensure equitable sharing of its use and operating costs**
  - **As an alternative to a power of attorney if your situation requires more formal instructions and control**
  - **Meeting the need for privacy, since trusts are private and do not become a matter of public record.**

# Kinds of Trusts

- **Testamentary Trust**
  - Set up in a will
  - Takes effect upon your death
- **Inter vivos or Living Trust**
  - Set up in a trust agreement or deed which may be a deed of donation, a contract or may be established by law or judgment
  - Takes effect during your lifetime

# Testamentary Trusts

- **The common types of testamentary trusts are the spousal trust and family trust**
- **Family trusts include:**
  - **Trusts for underage children who cannot hold assets directly**
  - **Trusts for spendthrifts, and**
  - **Trusts for family members with special needs (e.g., disabled members)**

# Inter Vivos Trusts

- **An inter vivos trust is created during the settlor's lifetime and is sometimes called a living trust**
- **Inter vivos trusts can be used in estate planning:**
  - **To minimize the income taxes due on death, by freezing the value of investments or the shares of a business**
  - **To provide privacy for your beneficiaries, since trust assets do not become a matter of public record**
  - **To provide one individual with the use of the property, with instructions to transfer the property to someone else after death**
  - **For charitable giving**
  - **As an alternative to a power of attorney, since a trust agreement can provide more detail and control over how assets are to be administered (e.g. alter ego trust or joint partner trust)**
  - **To protect the assets or property from creditors**



# **Costs of Setting Up and Maintaining a Trust**

- **There are costs associated with setting up trusts and there are also fees such as legal fees, on-going administration and accounting fees**
- **Remember that while trusts are flexible and advantageous estate planning tools, they involve costs, tax consequences and certain complexities and, therefore, you should seek professional advice**

# **Do Not Overlook Impact of Family Law**

- **Matrimonial regime**
- **Family patrimony**
- **Alimentary support**

# **STEP 3: PREPARE YOUR WILL**

## **How to Decide**

- **Kind of Will**

- **Holograph: NO!**
- **Witness: probate required; recommended if assets out of Quebec**
- **Notarial: ensures permanency and confidentiality; no probate required**

- **Liquidator/Trustee**

- **not an honour**
- **appoint for honesty, diplomacy and realism**
- **hire expertise**

# Conclusion: Avoid King Lear Results

- **How?**
  - **Accept reality (you may become incapable)**
  - **Accept the unavoidable (you are mortal)**
  - **Avoid complexities of regimes of protective supervision (and public curator as overseer)**
- **Avoid Instestacy (with its often unintended and hurtful consequences) or family strife or litigation**
- **Make a POA/Mandate**
- **Make a Will or update your Will**