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NEWSLETTER

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Divorce and the Disabled Adult Child– As if the family doesn't have enough difficulty caring for a disabled adult child, things are compounded when Mom and Dad are aging, divorced and uncooperative. In a recent Ontario case parents of a 42 year old mentally incapable daughter fought over guardianship. Both agreed that a group home would be preferable, but nothing was available. The court found both parents would provide a loving home, but the father was better able to provide the required mental stimulus, training and community involvement. As a result, the father was appointed sole guardian of property and personal care.

The case is also noteworthy for its comments that at the date of judgment over 19,000 people in Ontario were waiting for placement in a group home and typical waits were five to fifteen years. Since both parents were in their seventies, the question begs: "What happens when they both die?"

> My definition of a free society is one where it is safe to be unpopular. **Adlai E. Stevenson**

Separated but not Divorced– We all know folks who have been separated for years, are happy in a new, stable long-term relationship, but who have not tied up the loose ends. This is especially true with respect to wills, insurance and death benefits. Even divorce does not necessarily cut all such ties. You have to address each such issue to ensure that upon your death the right property goes to the right person.

First, unless you are divorced, the old will leaving all or most to the "ex" likely still stands. Unless there is a separation agreement with ironclad, unambiguous language, your new partner is likely to get a nasty shock after your death. The first logical move is a fresh will. And we are not going to comment on the folly of separating without a fulsome separation agreement.

Another set of loose ends involves unattended beneficiary designations. In case after case, individuals die without having changed the designated beneficiary of RRSPs, life insurance or death benefits. The law here is very simple: the administrator has to follow the words of the existing contract. If you never got around to changing it, too bad for your new partner or children.

Another bad scene arises where you die without a will. Here, the laws of intestate succession give large chunks of your estate to your "spouse". Under the *Succession Law Reform Act*, "spouse" means married spouse. Thus, unless your undivorced spouse has released all succession rights in the most explicit language in a written agreement, they will do quite well after your death, and your common-law spouse gets nothing.

> This thing that we call "failure" is not the falling down, but the staying down. **Mary Pickford**

A Reminder About Limitations– We can never ring the warning bell enough about the limitation of actions. All jurisdictions prescribe a time limit within which you must bring a lawsuit, failing which you are forever barred. In Ontario, that limitation is two years from the date on which you knew or ought reasonably to have known of the cause of action. Whether breach of contract, a physical damage, or whatever else, the defendant will go scot-free if you let the limitation date slide by. If you have any doubts on the matter you should speak to counsel well in advance.

Duties of an Executor– Remember that you are a fiduciary and as a trustee will be held to very high standards. In the simplest terms, these are the rules by which you must live:

1. Follow strictly the clear terms of the will. If you find them confusing, contradictory or impossible, get help.
2. Interpret the will correctly. It is a solemn legal document replete with legal terms. Get an interpreter.
3. Administer with professional guidance. Complex tax and legal issues are like landmines, hidden below the surface and invisible to the layman, but not to the lawyer of the disappointed beneficiary.
4. Remember that you have been made a trusted servant to see that the beneficiaries receive their full due. If they think you are not up to the job, or are dragging your feet, you can expect calls from them or their lawyers.
5. Administer diligently and keep meticulous records of all transactions. Always be ready to explain and account.
6. Communicate with the beneficiaries. They have both a moral and a legal right to know what is going on.

Disabled Children Reaching Majority– What happens when a mentally incapacitated child turns eighteen? A lot. Parents who are used to making decisions and looking after their child's finances are often shocked to learn that they can no longer do these things.

Since the law considers every adult to have the right to self determination until that right is removed or restricted, we start with the proposition that the freshly-minted adult can now decide what he wants to do and govern his own finances. If it is apparent that the now adult child is not capable of making good decisions or reasonably managing his financial affairs, there is a serious and glaring gap.

For the purposes of analysis, this is exactly the same legal situation which arises if a spouse or parent loses capacity by reason of trauma, Alzheimers' or any other factor. Somebody needs to step up, first to demonstrate the lack of capacity and second to convince the appropriate authority that the applicant has both a reasonable plan of management and the capacity to perform.

In cases where the family can act in concert, such situations are difficult, but manageable. However, as we have seen, if the family is divided, the problem can become exponentially worse.

Moving into or out of Ontario? If you have a will and powers of attorney in any jurisdiction and change your domicile to another one, you need to have your documents reviewed and probably renewed. Although the succession law of most common law jurisdictions around the world is roughly the same, you can be badly hurt by subtle differences. A will that stands up in Ontario could well fail under British Columbia's *Wills Variation Act*.

Another practical reason to revisit your will and powers of attorney is that your move may have put an impractical distance between you and the people you have named to look after things in the event of your death or disability.

Après moi, le déluge– All too often we are called in for last-minute estate planning for a dying elderly person where it quickly becomes apparent that long-held grudges amongst the kids will (to mix metaphors) turn into nuclear warfare right after the funeral. Such warfare can be avoided or minimized with proper care and planning.

First, the will should deal head-on with such concerns. Appointing all your kids as executors is likely a ticket to disaster. Maybe one of them has the thick hide to handle the others and doesn't care about consequences, but you'd do them all a favour by naming a professional or institutional executor such as a lawyer or a trust company.

Next, your will needs to be extremely clear and bullet-proof. If you intend to treat one or more of the kids differently (perhaps you have already been very generous to one, another may have special needs, or perhaps you want to recognize the significantly greater help and assistance that one of them has rendered to you over the years) you need to spell out the reasons in the will, and you need to have the courage and courtesy to tell all the kids while you are still alive. If your will might hold a surprise such as a large gift to a friend or charity you are generally wiser to let your family know while you are still here to explain yourself and avoid an attack on the will after your death.

Sometimes there are very hot potatoes such as the existence of a half-sibling your kids didn't know about. These are extremely awkward situations. One should not blunder into revelations of this sort but rather think long and carefully with the advice of persons whose wisdom and confidence you trust. But if, as they say, the cat will eventually be out of the bag, it should be your choice as to how and when the disclosure will occur, and your thought should be the impact on family, not your own feelings.

App review– Occasionally a program or application comes along which can be transformative. Nozbe is one of these. The application runs well on all platforms and browsers and connects with Dropbox, Evernote and the Google suite. Plugins are available to connect to Outlook.

Nozbe is one of the best electronic iterations yet of David Allen's *Getting Things Done*. All of your loose ends, checklists, fridge notes, landscaping projects, cruise planning– all the mind-numbing tangle of things to do– are loaded in, categorized, prioritized, annotated, linked, calendered and even delegated. And then calm descends.

Whether business or personal, or both, Nozbe can bring order to your chaos. If you're already quite organized, Nozbe can take you to a higher level.

As well as calendering and setting reminders, you can assign "contexts" to tasks, so that if you have a thirty minute wait at the airport you can call up a complete list of all the phone calls you need or want to make "when you have a minute". "Errands" can take the randomness out of your shopping. If you link to other users, you can delegate back and forth and hold one another accountable.

All non-attributed content in this Newsletter was written by Norman Bowley. Please direct all comments and criticism to his attention.