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NEWSLETTER

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Testamentary Trusts– Estate planners have always been very fond of the testamentary trust, and why not? Since a trust is a separate taxpayer under the *Income Tax Act*, a testator could set up a trust for each of his or her children or grandchildren which could spin out income long after the testator's passing, but with the added bonus of trust income being taxed at graduated rates. Thus, you could have a beneficiary whose personal income was taxed at a mid-range rate receiving income from the trust which was also being taxed at a middle rate. If you had given the beneficiary the capital such that he earned the income in his own hands, he would likely be pushed to the maximum rate. Annual tax savings of tens of thousands of dollars were achievable.

Effective January 1, 2016 testamentary trusts are virtually finished as a tax planning device. Except for a few minor exceptions such as qualified disability trusts, a testamentary trust is now taxed at the highest marginal rate, which in many provinces exceeds 50%.

Taxpayers who have made testamentary trusts a cornerstone of their estate plan should therefore revisit the plan to consider alternatives.

Financial Planners– In the retirement planning/investment advisor world there's a lot of snake oil, but there are also many genuinely intelligent, hardworking and honourable professionals who do a remarkable job for their clients. We work with some of the finest financial planners in the region. If you feel that your retirement portfolio is in the hands of a professional who has your best interests at heart, we are not about to persuade you to move. But if you are just starting out, or if you feel your current advisor is lost in the woods, we'd be happy to share some names of planning professionals who we think would be a good fit for you and who would truly look after your interests.

The Rule in Howe v Lord Dartmouth– In most of the wills we draft there is a provision to the effect that the rule of equity known as the Rule in *Howe v Lord Dartmouth* is not to apply. This leaves most clients, and even a few lawyers, scratching their heads.

This 1802 case is still good law in Ontario. In essence, it provides that when a trustee holds property for the benefit of a life beneficiary, and afterwards is to give the property to the residuary beneficiaries, or remaindermen, the trustee is obligated to maintain an absolutely even hand as between the two levels of beneficiary. In very simple terms, the trustee cannot put the assets into high-risk, high return investments so as to enhance the benefit to the life tenant, nor can he put them in zero risk, zero return investments so as to ensure the remaindermen suffer no risk. The trustee must vigilantly balance the two interests.

A strict application of the rule requires a crystal ball and a good deal of luck, in the absence of which the trustee is sure to displease one or the other class of beneficiaries. Thus, for the sake of the sanity of the trustee, most careful lawyers "negative" the Rule.

> We should every night call ourselves to an account: What infirmity have I mastered today? What passions opposed? What temptation resisted? What virtue acquired?
>
> **Seneca**

Limitation Periods– The law prescribes that if you want to sue somebody, you do so within a particular period of time, after which you are "statute barred". In Ontario, generally, you have two years from the date you knew, or should have known, you sustained the injury, breach, or other loss. Some limitations, however, particularly with respect to protected entities such as municipalities, or in the case of liens, are significantly shorter. Limitation periods are suspended or delayed in certain cases such as sexual abuse of minors.

There are many good reasons for imposing limitation periods. The general notion is that we should be able to plan our futures without fear that some event in our distant past will come back to haunt us in a courtroom. We should be able to archive records after a reasonable period, and eventually get rid of them. Equally important, over time memories not only tend to fade, but they also evolve, subtly tailored to burnish the reputation and self-regard of the holder of the memory. And, of course, key witnesses will become unavailable. In order to ensure that a defendant is not disadvantaged by the passage of time, we require that a plaintiff bring the action on a timely basis.

Powers of Attorney– Apparently 56% of all Canadians do not have valid Wills. The number of people without Power of Attorney for Property and Power of Attorney for Personal Care would certainly be higher, and this is a disaster in the making.

Why? Simply because medicine is stretching out our lives, keeping our bodies functioning years and even decades longer than those of our parents. But not our minds.

Because many of us will have our bodies continue to function much longer than our rational intellects, we are beginning to encounter a crisis of mental capacity. Whether the decision is one of financial management or personal care, somebody needs to have the authority to decide for you when you can no longer do so.

The POA for Property and the POA for Personal Care are your opportunity to appoint someone to act on your behalf when you lose capacity. If you fail to appoint someone, there are fallbacks. First, the Government of Ontario in the person of the Public Guardian and Trustee can step in, at your expense. Second, an interested friend or family member can make an application to the court to be appointed Guardian of Property or Guardian of the Person. This person may be interested in your welfare, or they may be interested in preserving their inheritance, or they may simply want to be appointed because they want to prove they love you more than your other daughters. Sometimes the reasons are noble, sometimes not so much.

> Politics offers yesterday's answers to today's problems.
> **Marshall McLuhan**

Voir Dire– Sometimes called a little trial within a trial, a *voir dire* is a procedure in which counsel will argue a point of evidence and the court will rule on its admissibility or weight. Counsel introducing the evidence will, of course, want to have the entire evidence introduced for its probative value, and opposing counsel will want it completely excluded. Sometimes the judge will allow the evidence, but limit the amount of weight which he or she attaches to it. If there is a jury, they will be excluded during the *voir dire* so as to avoid contaminating their minds with discussion of inadmissible evidence.

Why it's difficult for professionals to retire with grace– In many callings you can come to a point where you simply spend less time coming into work. If you are a porridge maker, if you own your own business, you simply start coming in twenty hours a week instead of fifty. But for many professionals, there is a wrinkle to the math, and it's this: for the professional to keep competent, there is a minimum amount of professional development time required, no matter how much time you spend in the saddle.

Let's say, for instance, that a tax lawyer needs to spend ten hours a week keeping up with CRA's bulletins, tax cases, commentaries and studies. That simply keeps you up to date. If you spend less than that, you begin to lose your edge, and soon enough you cannot really call yourself a tax lawyer.

If you spend fifty hours a week at the office, ten hours is only 20%, but if you wanted to cut back to twenty hours a week at the office, ten hours becomes 50%. Your productivity and effective billable rate is disproportionately slashed. Given that most overhead is straight-line, the collapse of net income makes it pretty unpalatable to go from full time to part time.

This model is true for many high-end professionals and the regrettable result is that society loses the benefit of much highly capable talent far sooner than should be the case.

> Never underestimate the instinct of the court for rescue. **Justice of Appeal John Laskin**

Charitable Remainder Trusts– These are not for everyone, but in the right case they can be amazing devices. In essence, the federal government lets you have your cake and eat it too, for charitable purposes. You make an irrevocable gift of revenue-generating property to a charity, get a charitable receipt here and now (for the present value) but continue to enjoy the income for the rest of your (and your spouse's) life. Particularly for high income retirees, this can enable significant tax savings while benefiting registered charities.

A Salute to 99– Around the time you read this, Leslie Bowley will be blowing out the candles on his 99th birthday cake. Still able to follow the details of national and international news and politics and give a good argument on any topic you care to raise, he looks back over a life that has seen the advent of aviation, radio, television, the computer, space travel, and those darned little phone things all the young people carry around. Serving his country at war and giving of himself into many, many lives, the world is a better place because of him. We're proud of you, Pop!

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

1565 Carling Avenue, Fourth Floor, Ottawa, Ontario, Canada K1Z 8R1
Telephone: 613-236-9442 Fax: 613-236-7942 www.lmrlawyers.com