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# NEWSLETTER

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**Leaving It Tidy**– We all need to face our finiteness. There will come a day when we won't be here, or are here but incapable of giving direction, and somebody else will have to step in and look after whatever we leave behind. That might be easy, or it might be a nightmare. That is very much up to you.

In our practice we have seen clients pass leaving everything fiscally and personally tidy and positive, but we have seen too much of the other. Recently we have encountered a number of cases where the deceased left both an economic mess and a terrible drama of hurt and anger, and family not ready to forgive the needlessly ill-prepared departure. Don't let this be you.

We urge friends and clients to take the time to be sure they have attended to these essentials:

- develop and complete an estate plan appropriate to your financial, tax and family status
- ensure that all business and investment interests will flow smoothly and on a tax-efficient basis on your passing
- inventory and record all your assets and key information so that your loved ones won't be baffled if you leave them or lose your voice
- ensure loved ones have a clear understanding of what matters to you if you become so incapacitated that you cannot give instructions
- talk to your loved ones about your passing so that they don't have to struggle about your funeral, burial and property distribution choices.

For some of these you need a lawyer. For most of them you just need courage.

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

**Obeying Orders**– This old story may be apocryphal, but always worth repeating. It goes like this. Enjoy the archaic but uplifting language!

An English farmer was one day at work in the fields, when he saw a party of huntsmen riding about his farm. He had one field that he was specially anxious they

should not ride over, as the crop was in a condition to be badly injured by the tramp of horses, so he dispatched a boy in his employ to this field, telling him to shut the gate and keep watch over it and on no account to suffer it to be opened. The boy went as he was bid, but was scarcely at his post before the huntsmen came up, peremptorily ordering the gate to be opened. This the boy declined to do, stating the orders he had received, and his determination not to disobey them. Threats and bribes were offered in vain.

After awhile one of noble presence advanced and said in commanding tones: "My boy, I am the Duke of Wellington and I command you to open the gate."

The boy lifted his cap, then answered firmly: "I am sure the Duke of Wellington would not wish me to disobey orders. I must keep this gate shut. No one is to pass through but with my master's express permission."

Greatly pleased, the sturdy old warrior lifted his own hat and said: "I honour the man or boy who can be neither bribed nor frightened into doing wrong. With an army of such soldiers I could conquer the world."

All that is necessary for the triumph of evil is that good men do nothing.  
**Edmund Burke**

**Cottages**– That most Canadian of all seasons, cottage season, is upon us. We would remind clients that cottages are often one of the most valuable assets in an estate, but also one of the most troublesome. We recently reviewed a case where a family fight over a \$300,000 cottage cost about a million dollars in legal fees. If you want to avoid leaving an economic and emotional minefield, you need to be talking to us.

**"Communication When It Matters"**– After thirty-five years of practising law, preceded by ten years as an educator, I have seen some very effective and some very ineffective communication. Having analysed what works, and what doesn't, I'd love to share the secrets and the best practices. If a keynote, breakout or coaching would be of interest to you or your organization, be sure to let me know.



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***Home Is Where the Heart Is? Not Necessarily***— Over a lifetime it is not uncommon for spouses to live in different jurisdictions—sometimes together, sometimes not. On the death of one of them, this can sometimes lead to surprising and sometimes troubling results.

In one recent case a husband came to Ontario to establish a winery. The wife remained in Germany. Still, they remained happily married and continued to consider themselves for all purposes as husband and wife.

On the husband's death, the wife elected to make an FLA equalization election. The Ontario court refused jurisdiction to hear the case and held that the proper law applying to the couple was the law of Germany.

Another case had to do with domicile. Eldon Foote was born and educated in Alberta, and there he developed a business where he amassed millions of dollars. A wealthy man, he bought his dream home on Norfolk Island which is under Australian jurisdiction. He moved there, initially intending to stay there for the rest of his life, although he later purchased a condo in Victoria, BC and considered moving back to Canada permanently.

However, when he was diagnosed with cancer, he returned to Alberta for treatment which turned out to be unsuccessful, and he died there. The question before the court was where his domicile was for succession purposes.

After analysis of his intentions as evidenced by his actions, the Alberta Court of Appeal found that his domicile was still Norfolk Island.

In a very recent Western case, an individual died while he was "between domiciles", that is, he had uprooted himself from his most recent "domicile of choice" but had not yet established a new one. The Court decided that having abandoned his domicile of choice and not having established another, he had reverted to his "domicile of origin", the default domicile.

In his particular case, domicile of origin was a place where neither he nor his spouse had any current links, where he owned no property and where had no connections, but nevertheless gave the courts no choice but to apply that law to the facts of his estate.

In a word, it is important to ensure that your will, your family, your property and your circumstances all "line up" from a legal perspective.

***Where There's A Will, There's A Way— Right?***—

How free are you to leave your property to whomever you please? You might be surprised to learn that Canadian courts can and sometimes do depart from the express provisions in a Will. Two recent high profile cases are illustrative.

In *Re McCorkill Estate* an entire estate was left to a violent neo-Nazi group. The New Brunswick Court of Queen's Bench declared the Will void because the group stood for principles "that are both illegal and contrary to public policy in Canada", a decision subsequently upheld by the Court of Appeal. The result was an intestacy, so that the estate would be distributed to the deceased's next-of-kin.

By contrast, in *Spence v. BMO Trust*, the Ontario Court of Appeal affirmed the freedom of individuals to generally leave their property to the person(s) of their choosing without judicial second-guessing.

Mr. Spence left his entire estate to one of his two daughters despite the fact that she had virtually no contact with him throughout her life, whereas his disinherited daughter had a meaningful relationship with throughout her life, save for the few years before his death.

According to the evidence of a family friend, Mr. Spence had become furious when the second daughter had a child with a man that her father disapproved of on racial grounds. Although the will did not mention this, the trial judge looked to the evidence of a friend that Mr. Spence's Will was based on a "clearly stated racist principle."

*Spence* risked opening litigation floodgates, inviting disappointed beneficiaries to argue "public policy". The appeal court overturned the trial decision and reaffirmed testamentary freedom, drawing a distinction between Wills that create a public trust or go to an organization such as *McCorkill*, and Wills that benefit private beneficiaries. The former can be struck down in part or in whole on public policy grounds, but the Court of Appeal cautioned that courts should not too readily interfere with the latter.

The Supreme Court of Canada is currently considering whether to hear an appeal of *McCorkill*. Some think *McCorkill* may be coupled with *Spence* so as to give much needed clarity to Canadians about testamentary freedom. Stay tuned...

***Ryan Flewelling***, LMR litigator

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

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