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Wills & Estates

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ESTATE PLANNING – REGULAR CHECK-UPS REQUIRED!
PART III – CHANGES IN ESTATE LAWS

This is the third article in a four-part series on wills and estate planning.

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In previous editions of *Estate Planning – Regular Check-Ups Required!*, we discussed how changes in your assets and changes in your family life and relationships may require that you review and revise your estate planning documents.

As a general rule of thumb, we suggested that if your estate planning documents are more than three to five years old, it's time to review and up-date them.

Another reason to review your estate planning on a regular basis is that the legal landscape changes over time and may result in unintended consequences if your estate planning is not revisited and revised.

A number of changes in estate law and the probate process have resulted in new planning techniques which may not have been available when you last made your Will.

Some of these changes include the following:

1. As of January 1, 2015, estate trustees are required to file an Information Return with the Ontario Minister of Finance in connection with the requirement to pay Estate Administration Tax. The Return sets out the nature of the assets in the estate. The filing must be made by the estate trustee within 90 days of the issuance of a Certificate of Appointment of Estate Trustee ("**probate**") by the Court. The Ministry of Finance has the authority to audit and reassess tax, and is in fact doing that.

   While for many years estate planners were using dual Wills to save on probate fees on the value of shares in privately held corporations because those shares can be transferred without a probated Will, the onerous reporting and audit requirements and potential valuation issues has now made this strategy attractive for other assets as well, such as art, jewellery, collectibles, and motor vehicles and boats, all of which can generally be transferred without a probated Will. In addition, Wills are being revised to include an indemnity of the executor from any personal liability arising as result of penalties under the *Estate Administration Tax Act*.

2. Over the past few years, executor's insurance has been introduced to the marketplace by a new insurance provider. In many instances, the testator (the person making the Will) will want to ensure that the estate trustee can purchase and pay for this insurance from the estate funds and Wills are being up-dated to include this provision.

3. To reduce probate fees, many people have transferred assets such as a bank account, investment account or real estate title into the joint names of themselves and another family member. This is usually with certain expectations of how the asset will be dealt with after death. The Supreme Court of Canada in the 2007 case of *Pecore v. Pecore* essentially confirmed that holdings of this sort between a parent and an adult child are presumed to be trusts for the estate beneficiaries, unless the contrary intention can be evidenced. Further cases since then have made their way through the Courts. The uncertainty and costs of litigation in determining how these assets are to be dealt with has lead estate planners to carefully consider the advisability of this strategy and if determined appropriate, ensure that the intention of the testator is very clearly documented either in the Will or in a stand-alone document setting out the intention.

   Furthermore, if intention is that it be held in trust, planners will use dual Wills to capture this trust interest and reduce the probate fees that would otherwise be payable on this asset.

4. More recently, the *All Families Are Equal Act* (*Parentage and Related Registrations Statute Law Amendment*), 2016. S.O. 2016, c. 23 - Bill 28 came into force. Among other things, this statute provides that up to four intended parents of a child born to a surrogate will be recognized without a court order if certain conditions are met, and that a posthumously conceived child will be able to inherit and seek support from their deceased parent's estate, if the child is born within three years of their deceased parent's death. This changed landscape requires consideration of each testator's family circumstances in order to address these potential issues in the Will.

Stay tuned for the final instalment of reasons to up-date your Estate Planning.