

□ **“A son can bear with composure the loss of his father but the loss of his inheritance might drive him to despair.”** □ **Niccolo Machiavelli, A.D.1517** □

My intention in writing this article is not to give the legal advice on estate planning but hopefully to provide a practical approach within the framework of the reader's personal family situation. Most importantly however, I hope that this article will assist the reader to avoid leaving behind the nightmare of the family feud.

It is important to remember the words of the 19th century American essayist, poet and philosopher RALPH WALDO EMERSON who said “When it comes to dividing an estate the politest people quarrel”.

Recently I attended a senior's health fair and gave a talk entitled “10 things you should know about choosing a power of attorney for property”. I was struck at the time by a comment which was made by one of the seniors in attendance. It was to the effect that her son kept asking her about whether she had a power Attorney for property. She gave me a wry smile and said “I told him I have one but I really don't” with that she giggled and walked on.

As she did so I realized just how many interpretations could be placed on this incident.

Was she worried about her son “taking over”. Did she feel that he could not be trusted. Was there someone else whom she would have preferred to appoint but did not have the courage to confront her son. Was she simply being coy and felt that she was quite capable of looking after her own affairs. Was she afraid of loosing control.

Was the son legitimately worried about his mother's welfare. Did he feel that she was “slipping” and would need someone soon to look after her affairs. Was he simply worried that one of his siblings would “get in there first” and take steps to alienate her assets to themselves and thereby deprive him of “his entitlement”.

Now imagine we are a year or two into the future and in fact something has happened to this lady and she is now incapable. Firstly she will not have a caregiver to be sure that her physical needs are attended to. Secondly she will not have appointed someone in whom she does have confidence and can trust to manage her property in her best interests. Sadly, it is now too late for both of these needs to be satisfied!

While this is truly a calamity and one which can place great cost on the family in time and money it is also a recipe for a family feud. It is easy to see how an accusation of impropriety

could arise between the son, who had every reason to think all was in order probably with him at the helm and other siblings, especially if they had a history of difficult relationships.

“Mom told me she had a Power of Attorney now where is it! I can’t find it and it should have been with her important papers. Are you sure you didn’t take it!! You were in her home last. I never did trust you!” On and on it goes.

I could not help thinking how this incident is quite typical of many family situations which I have encountered in my 35 years in the practice of law involving the preparation of wills, powers of attorney and an estate plan.

Many times I have received a call from a prospective client asking me to prepare a simple will. My answer is that when we are finished our task hopefully the will will be simple but getting to that simplicity is a complicated process. It should be the objective of the lawyer who drafts the testamentary documents to put the wishes of the client into uncomplicated legal terminology. However serious consideration must also be given to the reasons why the client wishes to leave their estate as they have stated.

In addition to the usual considerations such as the ownership of assets, impact of taxes, (capital gains for example), insurance designations, support obligations and many others there is the overlay of the family dynamic. Lack of communication, undue influence, emotional baggage, complicated family relationships, greed and simple insensitivity are but a few of the many considerations demanding attention in a good estate plan.

It has been my experience that where there is a lack of communication between members of a family it is almost inevitable that this situation will not change on death. There is therefore a high degree of probability of family discord, suspicion and possibly costly litigation. All of this can be avoided or at least minimized if some time is devoted by the draftsman to the family dynamic at the time estate planning is undertaken.

When we discuss the term “family dynamic” what do we mean? There are many levels to this term, some not so immediately apparent.

By family dynamic do we mean the way the children deal with each other on an ongoing basis and how would the death of one or both of the parents change this, if at all. Are we thinking about how the spouses of the children, the dreaded in-laws, might negatively affect the siblings’ relationship after death. What about a second marriage where there are children from a prior union, and possibly stepchildren. How are they to be recognised and what rights do they have vis-à-vis the new spouse. How do we avoid the “disappointed beneficiary syndrome”. Are there children whom the person wishes to financially benefit more than others or possibly to leave that single coveted family heirloom. Have some children received more during the person’s lifetime in the form of gifts or loans and how are they to be dealt with. Are there children who will never be self sufficient and are truly more needy. How do we ensure that our parents, who might still be alive and in need of care, are taken care of.

These are all very serious issues to be considered and dealt with as part of an effective estate

plan and will drafting process. There is no such thing as a “simple” will!

Many times I have felt more like a family counsellor than a legal adviser when I am asked “what is fair” or “what should I do” about leaving one child more than another and the reasons for it. Often my clients suffer from a high degree of guilt and anxiety when they leave a disproportionate bequest.

In addressing my clients’ concerns and putting them into legal terminology it is clear that it is simply not possible to wash away the effect of years of a deteriorating relationship, neglect or misunderstandings in one will drafting meeting.

What good is a well crafted estate plan with all of the bells and whistles when the estate is embroiled in rancour and litigation for years with disastrous financial and relationship consequences!

I believe that there is a growing movement in the legal community to become more holistic about estate planning. By that I mean involving the family, where appropriate, at the outset of the planning journey. If everyone knows what to expect on the death of their loved one there will be much less rancour and considerably more acceptance of the wishes of the deceased. If the client does not feel comfortable disclosing their wishes at the planning stage I then strongly recommend that they consider disclosing their wishes at a family meeting or to each of the interested parties individually.

As funeral preplanning reduces the stress on family members at a very sad occasion so too does the open and frank discussion about the wishes of the deceased while living. If a member of the family decided to contest the will and claim that someone had influenced the person unduly it would be difficult to do so at a later date. This is also true where a family member claims that the person was of unsound mind. **SAY IT NOW OR FOREVER HOLD YOUR PEACE.**

In an open and frank discussion with family members as opposed to giving them a surprise on your death you are really giving them the best estate plan possible. Your legacy should not be one of family discord and corrosive litigation.