FORUM

Hamel-Smith

ATTORNEYS-AT-LAW, TRADEMARK & PATENT AGENTS

VOLUME 5 ISSUE 3 The Lawyers Newsletter for Business Professionals JANUARY 2006

TRANSITION PLANNING FOR THE NOT-SO-GOLDEN YEARS

Alana Haqq & Celeste Mohammed

A wise man once said "The older we become, the more certain our future". At first glance, the statement rings true - a stark comment on the inevitability of death. Indeed, when we consider the vast array of possibilities between our present circumstances and our deaths, we cannot but admit that we are very uncertain about what is to come.

We don't know how long we will live, we don't know how long we will be independent and able to manage our own affairs and we can't predict what effect our incapacity or disability may have on our children and loved ones. Those of us with an aging parent might even have noticed his/her growing paranoia and insecurity in relation to financial matters.

But what we can do is devise a transition plan to get us from here to there with the minimum of distress for our families. In a previous issue of this publication we dealt with making a will. In this issue, we explore the legal implications of several popular methods of providing for illness and incapacity.

Planning for Financial and Administrative Issues

Powers of Attorney

The Power of Attorney is a commonly known tool. By using a Power of Attorney, a person (the Donor) gives authority to someone else (the Attorney) to act on his or her behalf and manage his or her affairs.

Although a Power of Attorney might be limited to a specific matter, for example to sign a Conveyance while the Donor is abroad (Specific Power of Attorney), it is quite usual to find the Attorney being given very wide powers over the Donor's affairs (General Power of Attorney). General Powers of Attorney have not only been used by those anticipating trips abroad, but also by those concerned with what would happen should they suddenly become ill or suffer an accident.

A popular misconception exists that a General Power of Attorney can continue to be used even after the Donor becomes mentally incapable. Indeed, many pro-active persons making Powers of Attorney "just in case", invariably believe that they are covering this possibility. Unfortunately, except in certain defined circumstances set out in section 58 of the Conveyancing and Law of Property Act Ch.27 No.12, a General Power of Attorney does not cover mental incapacity, and once the Donor becomes mentally incapable, then by operation of law, the Power of Attorney is revoked, i.e. the Attorney can no longer legally act.

Against this background, the Enduring Power of Attorney i.e. a power of attorney in a prescribed form, which is not revoked by any subsequent mental incapacity of the Donor, was introduced by statute in the United Kingdom a few years ago. However this concept has not yet been accepted into the laws of Trinidad and Tobago and we continue to be bound by the common law as stated above.

Joint Accounts

Perhaps the easiest method of planning ahead for financial continuity in the event of disability or incapacity is by the

(cont'd on page 2)

In This Issue	Author	Page
Transition Planning for the Not-So-Golden Years	Alana Haqq & Celeste Mohammed	1
Reducing the Risks of E-mail	Christopher Hamel-Smith	3

TRANSITION PLANNING FOR THE NOT-SO-GOLDEN YEARS (cont'd)

Alana Haqq & Celeste Mohammed

(cont'd from pg 1)
use of joint accounts. For example, a joint chequing account in the name of parent and child allows the child to sign cheques and pay for the parent's medical bills, if the need arises.

One disadvantage that some people see in this is the accompanying loss of control and automatic inheritance – the child has full authority to access the funds in the account and automatically gets all the money in the account upon the parent's death. A parent may simply be reluctant to hand over his money (or at least control of it) to someone else – even though that someone is a son or daughter. It is possible, even in the case of a joint parent/child account, to give a written direction as to what you would want to happen to the money in the account after your death. However, the honouring of these wishes still depends on the goodwill of the child who is the joint-account-holder – such wishes are, strictly speaking, not legally enforceable. But for some individuals, the above-mentioned issues do not loom large and therefore the joint-account may be the ideal solution.

Planning for Medical Issues

Living Wills

A living will is usually a written statement setting out in advance what types of medical treatment the maker of the will does or does not desire to receive in specific circumstances should he be incapable of giving or refusing consent. A living will must be signed whilst the maker is mentally competent.

A Living Will is not a Will, in the true sense of the word. It does not deal with property inheritance after death, but is an advance decision or advance directive, setting out the wishes of a mentally competent adult as to what treatment would accord with his/her wishes in the case of an illness or accident which might leave a person with little or no prospect of recovery and unable to communicate.

If someone loses the ability to communicate, for example after a serious stroke or if he/she should develop severe dementia, his/her doctors will decide on what treatment they consider to be in the patients best interests. However, the doctor's right to administer treatment is limited by law. The general legal requirement (subject to very few exceptions) is that a doctor may touch a patient only with the patient's consent (otherwise it is a battery). The law takes the view that competent adults have a right to refuse medical treatment, even if this refusal results in death or permanent injury.

If a Living Will has been made, then this is a legally binding document which sets out the person's wishes, which must be respected by the medical team. A Living Will may set out what medical treatment the person signing wishes to refuse in certain circumstances. For example, he or she may not wish to be resuscitated or tube fed or subjected to any other artificial life-prolonging means. A simple form of Living Will can achieve this. If it later transpires that a person might want to make a more detailed Living Will, then it is advisable to carefully discuss with the attending physician the patient's known range of prognoses and available treatments. This would allow for more precise targeting for advanced refusals of treatment and other specifics that can be built into the Living Will.

The Living Will is legally binding providing that:

- The person signing has the mental capacity to make the medical decisions contained therein;
- He or she understands the consquences of such decision;
- The statement of intentions concerning future treatment is clear;
- There is no undue influence of any other person;
- He or she is over eighteen years old.

It is very important that doctors and hospitals are made aware of the existence of a Living Will. The completed document may be lodged with their family physician along with patients' medical records. It is also recommended that family members be made aware that there is a Living Will in existence. Note however that Living Wills may be used to accept or refuse legal medical treatment, but they cannot be used to take active steps to end a life.

Conclusion

As difficult or distasteful as it might be, we need to think through the possibility and the practical consequences of our infirmity and/or mortality sooner rather than later, and discuss it with our loved ones. Parents can make things easier on their children by simply getting organized, i.e. put as many records as possible in one place and let a confidant know where to find them; be sure to include information about bank accounts and other financial holdings; tell your confidant about any safety-deposit boxes or other storage spots; and, to the extent possible, record your intentions and wishes. Children afraid to explore the subject with their parents might invite the parent to visit a professional to discuss their unique circumstances and the options available.

REDUCING THE RISKS OF E-MAIL

Christopher Hamel-Smith, S.C.

E-mail is a simple, yet powerful, business tool. It allows us to communicate in a manner that is quick, cheap and efficient. It is therefore well-suited to the hectic demands of modern business. For these reasons, we use e-mail every day to communicate both internally within our companies as well as externally with persons across the globe. E-mail helps us to reduce costs, increase our responsiveness to customers and suppliers and improve productivity.

The very characteristics of e-mail that make it such a useful tool also create a number of legal and business risks. E-mail's speed, and the respon -siveness and informality which it facilitates, encourage us to make statements with less care than we would normally take when using more traditional forms of communication. Think about the process that you would ordinarily follow before a traditional business letter leaves your company. You might first dictate the letter, then you review and amend a draft, before you finally sign the final version of the letter. Compare this process with the way in which we typically respond to e-mail messages.

"In order to minimise the risks associated with the use of e-mail in our companies, we must train ourselves to always consciously pause and think twice before we hit the "send" button. As we do so, we need to ask ourselves whether there is anything in the e-mail message that we are about to send which we might later regret."

It is hardly surprising that many of us make statements in e-mail messages that we would never have included in our formal business correspondence. Yet, the legal and business consequences of what we write will usually be the same whether we communicate by e-mail or by letter.

It is also important to recognise that a damaging or embarrassing e-mail message cannot be made to disappear by simply pressing the "delete" button. This is because various software tools can be used to "undelete" such messages and, in any event, back-up copies of these messages will probably exist in several locations. We should always assume that each e-mail message will constitute a permanent record and that it can and will be used against us in a court of law.

Another important characteristic of e-mail is the ease with which messages can be copied and forwarded. Although this is one of e-mail's great strengths, it also means that once we have sent an e-mail message, the recipient (and each person to whom he or she forwards it) can disseminate it widely to large numbers of persons with very little effort. It is also very easy for any of these persons to post it on the Internet in such a way that it may be read by literally millions of people across the globe.

In order to minimise the risks associated with the use of e-mail in our companies, we must train ourselves to always consciously pause and think twice before we hit the "send" button. As we do so, we need to ask ourselves whether there is anything in the e-mail message that we are about to send which we might later regret. In particular, might any statement in the e-mail message cause us any difficulty or embarrassment if it were to later become evidence in a lawsuit? By adopting this approach, we can significantly reduce the risk of creating a permanent record of an ill advised statement that proves to be damaging and costly to our companies and ourselves.