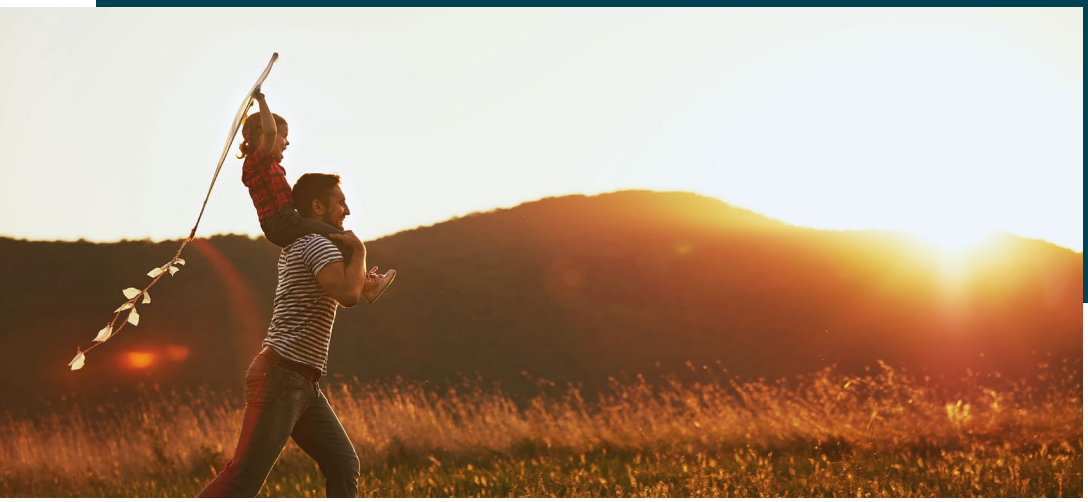
Planning Matters



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Addressing Mental Illness in Estate Plans

In "Managing Capacity," we discussed planning strategies in the case of diminished mental capacity through dementia. This quarter, we explore the broader issue of estate planning should your kids, your spouse, or your parents suffer from a mental health disorder. The quality of life for your surviving family is at stake should their ability to independently manage their finances and health be impaired, so planning for those different needs is crucial.

Breaking the Taboo

As Managing Partner of O'Sullivan Estate Lawyers, Margaret O'Sullivan has deep experience helping families create customized estate plans that address the complexities mental illness can introduce. She notes that an important first step is recognizing when special planning is required. Many parents choose not to deviate from equal treatment

of children, for example, in order to avoid conflict or an appearance of favouritism. "But families need to break the taboo," she says. "If we don't talk about the issues, we can't plan for them."

Irrespective of age and the nature of the illness, the common challenge she sees across generations is the need to provide for the additional time and money required to help the affected family member. For young children, it may be the need for special programs, advocacy within the health care system, or after-school care that can handle aggressive or potentially violent behaviour. Adult children may need oversight to ensure medications are taken, employment assistance, or outside control over their finances. Ageing parents may require assisted living or a nursing home (and someone to ensure this transition happens when required), transport and support at frequent medical appointments, or a decision maker for both personal and financial needs.

How and When to Start Your Planning?

O'Sullivan suggests that everyone should have some sort of plan in place, and that it should be a matter of updating the plan over time. "Failing to plan is planning to fail," she says. "Your plan should be organic and continue to change over your lifetime. We urge people that they should have a plan, even in their 20s, and then from there, if they marry and have children, it will change, and when their children get older and have grandchildren, it'll change again. Somebody dying, a separation or a divorce, moving to a different country, a huge change in financial circumstances, or in health, or capacity… those are all changes that should trigger the need to go back and look at the plan and say, 'Time to do an update.'"

Creating a Strong Trusteeship for Your Child

The worst-case scenario from a planning perspective is having no plan at all. If there is no will, the estate would pass on an "intestacy" and the law then determines the family members entitled to the estate and in which proportions. For distributions to minors, the estate would likely be released when they turn 18 but if a child is not able to manage their assets, the other family members would need to go to court and have the court appoint a guardian to do so on their behalf.

"This scenario requires quite a lot of court intervention, court reporting, preparation of accounts, passing the accounts, a lot of additional time and expense, in order to create a very controlled administration of the incapable person's assets," O'Sullivan warns. "That could have been avoided, had the parents done an estate plan, choosing the trustees they wanted, and the trust terms that they wanted, to look after that child."

"Failing to plan is planning to fail," she says. "Your plan should be organic and continue to change over your lifetime."

Margaret O'Sullivan, O'Sullivan Estate Lawyers

If the child is not able to manage their assets independently, O'Sullivan recommends ***parents set up a trust structure*** whereby a third-party trustee controls the distribution of assets over time. Depending on the level of capacity, a parent may wish to make the child a co-trustee, and while some parents choose to appoint family members as trustees, she warns that conflict can sometimes follow this approach – as that sibling or uncle then sits between the child and the money. An independent trustee, possibly from a trust company, can help facilitate a strong trusteeship whereby the child with special needs has a good structure to look after them.

Another wrinkle is that for some conditions, you won't always know how well the child may be doing 20-30 years into the future. In these cases, you can appoint a trustee but write in language that dissolves the trusteeship if certain conditions are met.

"The trustees could be given the power to pick a termination date, at which point the trust could terminate," she says. "And then a letter of wishes could be used as a companion document, to outline the parent's thinking with regard to the appropriate circumstances for terminating the trust, what the desires would be of the parent, why the trust is being created, and generally, what they would hope the policy of the trustees would be with regard to looking after their child."

The Clinical Tests for Capacity

According to Dr. Kenneth Shulman, a psychiatric researcher and capacity expert, determining capacity is not a straightforward legal exercise. At a CFA Society Vancouver event, Dr. Shulman explained that to prove capacity one must satisfy two key principles of cognition: do you understand relevant facts, and do you have an appreciation of the consequences of making a decision – or not making a decision?

Capacity is also not a general determination, but one that applies to a *specific task*: are you capable of making financial decisions, drawing up a will, or assigning power of attorney? In addition, the capacity to understand relevant facts and the consequences of making a decision applies to each specific task *within the specific circumstances* being tested.

Dr. Kenneth Shulman, Sunnybrook Health Sciences Centre

Shulman draws the comparison between two people with similar cognitive abilities making the same decision to assign power of attorney:

"There's a big difference between somebody who's been married to the same person for 50 years, has two loving children with whom they have a wonderful relationship, and has a pretty basic economic situation... and a person who's been married three times, has step-children, half-children, conflicting families, a large corporation with complex assets and divisions. That requires a different level of cognition to be considered capable."

So for a medical expert like Dr. Shulman to determine capacity or incapacity, they must determine your ability to understand relevant facts, appreciate the consequences of making the decision, as it applies to a specific task, and given the circumstances under which the task is being performed.

Thinking Through Capacity Issues with Your Parents

Most married couples leave most or all of their assets to each other through what's called an "outright distribution." Where trouble can arise, O'Sullivan says, is when the unthinkable happens and one spouse develops dementia. In this case, there are two risks needing to be managed. The first is that the unwell spouse may no longer be deemed capable of changing the will. And second, should the healthy spouse die first, and no changes were made (attempted or not), the incapacitated spouse will be left to administer the estate without help.

To manage these risks, O'Sullivan suggests couples look at a structure such as a ***spousal trust***, an ***alter ego trust***, or a ***joint partner trust*** – and to do so while the affected spouse is still able to, once diagnosed. Through one of these options, the surviving spouse would be protected if the first spouse passes away and they are not able to look after the estate on their own.

Effective estate planning for families with mental health challenges requires trusted legal advice and the discipline to update your plan over time, but it first requires acceptance of the need for a nuanced plan. Through creative estate planning with some of the ideas developed here, families may effectively provide for the unique needs of each individual member.

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