

Estate Planning for Unique Assets: *Who will milk the cows tonight?*

Whenever interesting, unusual and unique assets pass from one generation to the next on death, special care may be required to manage that process. An executor may need to verify the precise nature of a certain estate asset and prevent it from harm, while preserving its value for the beneficiaries. Ascertaining a special item's value can be a journey in itself, as can determining how to dispose of, or transfer a unique asset legally and safely. Some thoughtful preplanning for special items and preparations for your executor will pave the way for a smooth estate administration and transfer of the asset.

Art and artifacts

Valuation and provenance can pose significant estate challenges for these items, including paintings, sculptures, collectibles and cultural objects. Establishing the value of an artistic item is an exercise in discerning authenticity and background. So many variables can alter an artwork's current value, for instance, establishing its historic chain of ownership, verifying dealers involved in its previous transfers and any prior registrations of the work. Collectibles may also vary widely, from rare stamps to Barbie® dolls, and the value of a collection may not be readily apparent to the untrained eye.

Obtaining an accurate appraisal can be an onerous task. The appraised value is not only a key piece of information for the beneficiaries, it is equally essential to the executor who needs this for probate (where applicable) and tax purposes, securing adequate insurance coverage and to arrange for shipping the item safely to its heirs. However, beneficiaries may balk at the cost of appraisals for these items.

An executor must also determine how the testator intended a valuable art object to be treated – whether as an investment or as an item of personal property – each resulting in different handling for the beneficiaries, and may sometimes need to determine how to sell multiple pieces of a collection without depressing the market price. And occasionally, estate administrators will encounter cultural property of historic or ecological significance that may fall subject to legislation; directing it be seized or returned to its country of origin.

Therefore, it is advisable for the benefit of your future executor to leave clear instructions about obtaining appraisals and authorizing the sale of valuable artistic items, including the names of any trusted experts and dealers. Include additional helpful directives in your Will that express your distribution preferences to specified estate beneficiaries, mandate a dispute settlement mechanism, and assign responsibility

for costs associated with managing the artistic objects. Lastly, leaving access to all provenance documentation in your possession, along with any photos, will prevent your executor from embarking on a costly chase to pin down your collection's value.

Living assets

Naturally, when we think about living assets we immediately think of our domestic pets, but estates may also include exotic animals, some of which enjoy lifespans greater than their human owner! Living creatures all need immediate and ongoing care which may be in jeopardy when their owner dies. However, the safety and health of your executor should be just as important as your pets. No executor wants to find themselves in the position of having to extract unusual or potentially dangerous insects or reptiles from the deceased's home, and either find or provide care for them. Especially difficult is the situation of commercial animals that have regular, demanding needs. When a dairy farmer passes away, it's important to know, *who will milk the cows tonight?*

Both commercial animals and agricultural crops pose unique challenges for estates. Dairy cows and laying hens require constant management to maintain their health and productivity in order to sustain the value of the farming operation. Cash crops demand experienced stewardship from planting through harvest to realize their potential for the estate. Executors must be careful of environmental as well as pre-existing contractual responsibilities to ensure the value of these living assets is preserved. Farming operators may wish to include robust environmental clauses in their Will to protect their executor from unexpected liability for environmental problems. Nominating an agent in their Will who knows their agricultural operation well is an excellent strategy to assist your executor with managing the farm assets.

Similarly, pet owners who wish to construct failsafe provisions for their furry friends would be well advised to make those provisions clear in their Will. This arms your executor with authority to manage the care and transfer of your pet according to your specific wishes, including making a cash gift to the chosen caregiver for the upkeep of your animal. Allocating money in your Will for the care of animals after death can become complicated when a caregiver declines the responsibility or passes away. Such monetary gifts should be structured carefully and in consultation with a solicitor and your intended pet foster parent.

Intellectual property

Rights to inventions or creative works owned at death belong to the estate of the creator. How they are managed from there determines how the estate beneficiaries profit from these assets. Patents, trademarks, copyrights and industrial designs are all protected by various pieces of intellectual property (“IP”) legislation in Canada, even after the owner’s death, for varying periods of time. For example, the copyright to an author’s book is protected for the author’s lifetime plus 75 years after their death.

A decision will need to be made by the executor about licencing an IP asset to generate a royalty stream for the beneficiaries versus transferring the IP rights to an interested party for appropriate compensation. If the asset will continue to generate royalties for the estate, the executor may need to value the future income stream for probate purposes and monitor the use of the asset over time to protect against exploitation of the IP by unauthorized users at the beneficiaries’ expense.

Creators of intellectual property should leave clear instruction in their Will concerning entitlement to royalties or other fees. Similarly, if the property rights are to be transferred to a beneficiary or a third party, a method of valuing the IP asset should be clear and a dispute resolution mechanism provided to avoid unnecessary conflicts. The deceased creator may already be a party to existing contracts for the use of their IP that could bind their estate after death and limit options for the beneficiaries. Creative professionals should include a full review of such agreements as part of their estate planning to ensure they have addressed and understand the IP rights and obligations facing their estate. Making sure existing IP agreements have clear and flexible terms will streamline your estate and support your executor’s administration of these intangible but potentially valuable assets.

Firearms

Few assets generate more trepidation for executors than

firearms and ammunition. Whether the testator enjoys sport shooting, historical collecting or is a hunting enthusiast, understanding how to plan and to prepare your executor to manage these items in your estate is vital, but is often a source of misunderstanding and fear.

Obligations of executors regarding firearms are set out in the Federal Firearms Act. On the death of an owner, the estate administrator generally has the same rights as the deceased to possession of the firearm for the duration of the estate administration. The deceased owner’s Possession and Acquisition Licence (“PAL”) will be required for the executor to deal with the items appropriately. Firearms themselves are classified as non-restricted, restricted or prohibited, with the latter two categories requiring registration with the proper provincial authorities. Any firearms in the estate that were not properly registered by the deceased owner may be subject to seizure.

It’s best to safeguard your executor from surprises by advising him or her where firearms and ammunition are stored, where your PAL and registration certificates are kept, and instructions on how to properly lock and store the items for eventual transportation and distribution. It’s important to take time to choose your firearms beneficiaries carefully. Qualifying to assume possession of a firearm gifted from an estate requires the beneficiary be at least 18 years of age and hold a valid PAL. If there is no eligible or willing beneficiary, your executor has little choice but to sell, gift or export the item to a qualified third party. Failing this, firearms may be surrendered to law enforcement authorities for destruction.

Loyalty program points

With respect to airline rewards, fuel, grocery and drugstore loyalty programs, people often ask, are these “assets” transferrable at death? Frankly, it depends! Each reward program publishes its own rules concerning transferability of points on the death of the owner and a thorough reading of the program agreement is required to determine what those rules might be. Some programs permit full transfer, while others only authorize redemption for gifts by an eligible user, such as the personal representative of the deceased. In both cases, the valuation of points may be required for probate and estate calculation purposes.

If you intend to pass on your eligible, transferable points, wording may be included in your Will authorizing your executor to deal with your points balances and make the estate gift. This authority also simplifies dealing with the program’s administrators after your death. Your executor should be aware of strict time limits that must be adhered to in order for the transfer and redemption of points after your death. And, as a

rule of thumb, all transfers or redemptions must be completed prior to closing the loyalty program account.

The most unique asset of all – you!

Navigating wishes around the disposition of human remains can be an emotional project for families, fraught with custody disputes, philosophical differences and regulatory impediments. Trends and preferences are evolving for the distribution of human remains. Previous generations in Canada buried their loved ones in family plots but, more recently, our society is choosing cremation and scattering the ashes in locations meaningful to the deceased, often all around the globe.

At law, your executor has responsibility for dealing with your earthly remains. Often, testators provide specific instructions to family members in this regard that can become the source of confusion or conflict. When families cannot agree on their loved one's disposition, it can delay final closure and prolong lasting differences. Cremated remains can be divided and distributed among family members to satisfy competing views, although this kind of custody battle is probably the last thing the deceased loved one hoped for. If a testator intends to leave his or her body to a medical institution for research or has committed organs for donation, it will be important for close family members to be aware of these arrangements. Few contracts require such rapid fulfillment as these and any hesitation can make them unviable. Be aware that your immediate family members may be able to revoke such prearrangements.

Burial of an uncremated body can be arranged only in a regulated cemetery by purchasing a plot. It is also possible to purchase rights to bury or scatter cremated ashes in a cemetery. Scattering elsewhere; however, can create problems. On private land, one should always obtain

permission and, depending on the jurisdiction, may be required to register any scattering activity with municipal authorities. Crown land, national parks and some municipal parks generally permit scattering of ashes. Just to be safe though, unless you are on open water, it is always best to ask.

When preplanning your final arrangements, help your executor and family members by making your personal wishes clear and in writing, leaving copies of these instructions in multiple places and nominating a decision maker to arbitrate any disputes. When the time comes, your family will thank you.

Seek professional advice

Each one of these unique and unusual assets requires special planning and preparation for your estate. Regardless of which of these you may possess, it's important to seek professional guidance in order to structure your estate documents and to groom your executor for the responsibilities that lie ahead. Talk to your BMO financial professional and your estate solicitor who can help you develop a plan for your distinctive assets to preserve their value, to keep everything safe, and provide the best outcome for your beneficiaries.



For more information speak with your BMO financial professional.



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