ESTATE PLANNING

Make Estate Planning Work for You

While estate planning sounds like an exclusive tool for the wealthy, it's a process that's widely and effectively used for even the most modest-sized estates.

For many people, estate planning begins and ends when they draw up their Will. While a properly prepared and up-to-date Will is certainly the cornerstone of any estate plan, it's really just one part of an effective estate planning strategy.

Estate planning starts with an analysis of your personal financial situation and a discussion of how you want your assets distributed upon you death. You then decide the estate planning tools you need to use to accomplish your goals, such as a Will, Power of Attorneys (for personal care and for property), trust, or life insurance.

Estate planning can help you minimize estate taxes and probate fees and ensure that your estate assets go to your intended beneficiaries. Some careful planning now will ensure that your assets are distributed as you intended in a timely and tax-effective way.

Estate Planning isn't Just For The Wealthy

If the word "estate" makes you think of manicured lawns and a mansion on a hill, you'd better think again. If you own your own home – or any other valuable asset – you'll leave an estate when you die. And just as you work hard to protect your assets while you're living, it's also important to ensure these assets are protected if you become incapacitated or die.

Are you still unsure that estate planning is the right choice? Take a look at three ways an estate plan can work for you.

#1 – Ensure your assets go to the right people

Estate planning will help ensure that your assets are distributed after your death to the right people, according to your intentions. For example, if you die without a valid Will in Ontario, a court can appoint someone to administer your estate and distribute the assets according to a formula set out in provincial estate and family laws. The formula may not distribute the assets in your estate to the beneficiaries you intended. That's why a lawyer-prepared Will is an essential part of every estate plan.

A carefully designed trust can also ensure that your property goes to the right people upon your death. For example, if you remarry but have children from your first marriage, a testamentary trust (one that's created in your Will) can provide support for your spouse during his or her lifetime, while ensuring that your children inherit any remaining assets.

#2 – Lower your estate's tax bill

You can spend a lifetime building your estate, only to see a good portion of it taxed away at death. While Revenue Canada doesn't impose death taxes, inheritance taxes, or succession duties, your estate could still be liable for a substantial tax bill. There are two reasons for this:

- You're deemed to have disposed of all capital property at the time of your death, and your estate must cover the tax on any capital gains; and

- Unless you have a surviving spouse named as beneficiary, your tax-sheltered assets held in registered plans (such as RRSPs and RRIFs) lose their tax-sheltered status upon death.

In addition, probate fees (which your estate must pay to the Government to confirm the validity of your Will) can amount to thousands of dollars, especially in Ontario and British Columbia.

Some careful planning can substantially reduce the probate fees and other taxes that your estate would otherwise pay.

#3 – Protect your assets if you become disabled

What happens to your assets if you become mentally or physically disabled and can't manage your affairs? A Power of Attorney for both Personal Care and for Property lets you choose a trusted friend, family member, or advisor to manage your affairs in the event that you're no longer able to. While you may never need to use a Power of Attorney, it's an important estate planning safeguard.

Estate planning – a continuing process

As life changes, so should your estate plan. Not only will there be changes to your personal life, but legislation that can affect your estate plan also changes frequently. Make sure you review your estate plan with an estate planning professional at regular intervals (every one to two years) to ensure it continues to meet your needs.

When choosing an estate planning professional, look for one of these recognized designations:

- Certified Financial Planner (CFP)
- Charted Financial Consultant (CH.F.C.)
- Chartered Life Underwriter (CLU)

INFORMATION ABOUT TRUSTS

What is a trust?

A trust is a legally recognized relationship which allows one person – the Trustee – to hold assets for the benefit of another – the beneficiary, on the terms set out in the trust document. For tax purposes, a trust is considered a separate entity and is taxes separately from the beneficiaries of the trust. This can create important income splitting tax advantages for your estate and its beneficiaries.

How does a trust work?

When you set up a trust, you make the decisions about how it will work. You must decide who the Trustee is, what powers the Trustee should have, and how long the Trust will last. You can give your trustee conservative or broad discretion in making investment decisions about managing the assets in the trust. You can give your beneficiaries limited or unlimited access to the interest earned and the capital held in the trust. Each trust is unique and personally designed to achieve your objectives.

Who would need a trust?

Establishing a trust for your surviving spouse can achieve income tax savings or can be used to ensure your spouse doesn't outlive his or her income. Trusts for minor children or grandchildren can be used to ensure assets are available for educational purposes; to help set up a business; buy a home; or even provide income for the child's lifetime. Through a trust, the distribution of capital can be delayed past the age of majority until the beneficiary is more mature and better capable of making sound financial decisions. Trusts are also used for special needs beneficiaries to ensure continued care for the beneficiary throughout their lifetime. Finally, establishing a charitable trust can be an effective way your favorite charity and provide tax savings to you or your estate.

What do you look for in a Trustee?

Any Trustee, including an Executor (Estate Trustee) can be held personally liable for any errors made if they do not perform their duties with proper care. When choosing a Trustee you should look for; availability to perform the job for as long as required; expertise in estate administration, tax, property management (if required) and investments; impartiality; trustworthiness; reliability; and financial accountability.

Income Taxes At Death

When an individual dies, his or her personal income tax returns can be infinitely more complex than any previous return. There are a staggering number of special rules that apply only at death and these can trigger some post-death tax minimization strategies. Many Canadians are quite informed of the importance of pre-planning for income taxes

that arise upon death; very few are aware of post-death opportunities, if any. That is why final tax matters should be looked after by a tax professional such as a certified general accountant.

You may know that the Executor (Estate Trustee) or other legal representative is responsible for filing your final income tax return. However, did you know that up to four separate personal tax returns can be filed for a deceased person? This alone might save thousands of dollars in income taxes. An Executor may file one or more separate returns where the deceased,

- was a partner or proprietor of a business with a fiscal year (other than the calendar year) and the individual dies after the close of the fiscal year;

- was a partner or proprietor of a business and had not yet reported all of his or her deferred income (common to many business owners);

- was the beneficiary of a testamentary trust and received income from the trust after the trust's fiscal year end; and

- died while possessing the "rights or things" (e.g. income form certain partnerships; business income from a cash-basis business such as farming; due but unpaid salaries or wages; certain declared but unpaid dividends; matured but uncashed bond coupons; and unused vacation leave credits).

Disposing of Assets

At the time of death a person is deemed to have disposed of all of his or her capital assets, and certain other assets such as RRSPs and RRIFs, at fair market value. For capital assets (e.g. socks and real estate) this will trigger a gain or loss that must be reported in the final return. Where the real estate was the deceased's principal residence, such as a home or a cottage, only one qualifies as a principal residence and gains on the other are taxable.

Where capital assets are left to a spouse as the deceased's beneficiary, the gains on these assets can be deferred until the spouse either sells the assets or dies. When desired, a spouse trust can be used.

Similarly, RRSPs and RRIFs can be transferred on a tax-deferred basis to a spouse. Where the deceased had a spouse, but designated the estate as the beneficiary of an RRSP or RRIF, special elections are available to still take advantage of the spouse beneficiary rules. Also, if there is no surviving spouse but there are children or grandchildren dependent on the deceased, it may be possible to achieve a tax deferred transfer of the RRSP or RRIF.

The ability to transfer capital assets to a surviving spouse on a tax-deferred basis is elective – not automatic. In fact, a tax minimization strategy might include transferring some assets at fair market value.

Don't forget: a "common-law" spouse is considered a spouse under the Income Tax Act.

Another tax minimization strategy can arise where capital assets left to an estate are sold within the first taxation year of the estate for less than the fair market value declared in the deceased's final income tax return. Any losses in excess of gains (timing the sales is crucial!) can be carried back to the deceased's final return and used as a deduction against capital gains already reported and taxed.

Deduction of Medical Expenses

The usual rule for medical expenses is that you can claim those paid within any 12-month period ending in the year. For a deceased person the rule is changed to any 24-month period that includes the date of death (e.g. this could be the six months prior to death and the 18 months after). Also, the maximum deduction for a part-time attendant is doubled from $10,000 to $20,000 in the year of death.

Three Rules for Charitable Donations/Giving

Three special rules exist that apply to charitable donations in the year a person dies. First, the usual maximum claim of 75% of net income is increased to 100 percent of net income. Second, gifts given in the year of death can either be claimed in that year or the previous year. Finally, gifts made under a Will can also be claimed in the year of death or the previous year.

These are just some of the special rules that apply to income tax returns in the year of death. Many other rules are applicable in particular circumstances. While the assistance of a qualified tax professional (such as a certified general accountant) is essential, your Will is the key instrument in the preparation of your final tax return. Without a properly drafted Will many of the tax minimization strategies that could be employed might be unavailable or overlooked.

Using life insurance to protect your estate assets

Life insurance is more than a way to provide for your dependents if you die unexpectedly. It's also a great way to cover the fees, taxes and debts that may be payable by your estate after you're gone.

We traditionally think of life insurance as an important way to protect and provide our loved ones in the event of an unexpected death. Indeed, for anyone with dependents, life insurance should be an essential part of their long-term financial planning.

But life insurance can also play an important role in your estate plan – specifically, to preserve your estate assets. To appreciate the benefits of life insurance in your estate plan, it's important to understand the two main ways the value of your estate can decrease before it's distributed to your beneficiaries.

#1 – The impact of fees and taxes

Even the most thoroughly planned estate will have to pay taxes. If you have a spouse who is the beneficiary of your estate, some of these taxes can be deferred until your spouse's death. But if you don't, the tax liabilities can be significant.

You're deemed to dispose of all your capital assets at death, with taxes payable on any capital gains (other than for your principal residence). Similarly, assets held in any registered plan (such as an RRSP or RRIF) are deemed disposed of for their fair market value and must be included in your final year's income. Your estate may also have to pay probate fees, which can amount to thousands of dollars depending on the Province you live in. Will cash be readily available to pay those taxes and fees?

If you factor in legal fees and funeral expenses as well, you can see how the value of your estate can be quickly reduced.

#2 – The cost of selling assets when you don't want to

Liquidity is often a problem when settling estate debts. While your Executor can always sell estate assets to cover amounts owing, this could be a costly choice. Poor market conditions could result in getting less than full value. In addition, there may be an emotional cost to selling a cherished asset, such as a family cottage.

Life insurance – a cost-effective estate planning solution

One of the best ways of covering taxes, fees and other estate debts is to buy life insurance. Here's why:

- Your estate or designated beneficiary receives the death benefit tax-free, so the dollar amount your estate or designated beneficiary.

- If received by the estate, the proceeds, while subject to probate fees, can be used to cover the taxes and other debts the estate must pay, leaving a larger estate benefit for your beneficiaries; and

- Your estate won't have to sell assets to cover liabilities, so your beneficiaries can decide if and when any assets should be sold.

Permanent insurance is recommended for estate planning problems that may increase over time and will likely not go away. Permanent insurance is initially more expensive, but the costs are fixed and do not increase. Many permanent insurance products also

offer a tax-sheltered savings component, with the potential to grow the value of your policy over time. Such products include Whole Life, Term to 100, and Universal Life.

Life insurance is a cost-effective estate planning tool. Each year, it usually only costs from one to two per cent of the face value of the policy. That's a small price to pay for some substantial peace of mind.

Look to life Insurance for other estate planning needs

Life insurance can do more than protect the value of your estate. It can also be used to:

- Enhance the value of your estate, to ensure that family or business partners have the financial means to carry on without you; and

- Make an important contribution to the charity of your choice without diminishing the value of your estate.

An example of how life insurance can help

When Mary died at age 75, she owned a condominium as well as a family cottage, which was used extensively by her children and their families.

Mary's estate was liable for capital gains taxes on the increase in value of the cottage. The cottage was purchased in the 1960s for $30,000, but was now worth $250,000. The Executor calculated the capital gains to be about $80,000.

Since none of the children were in a position to cover the tax liability, the cottage was sold (during a depressed real estate market) to cover the tax. Had Mary taken out a life insurance policy years ago to cover the $80,000 tax bill, her family would have continued to enjoy the property and would have benefited from the increase in value when the real estate market recovered. The children could even have shared the cost of the insurance.

Bequests to Charity

Charitable giving – through bequests in Wills – has become an increasingly important source of revenue for charitable organizations.

For example, one-quarter of the private funds donated to the Canadian Cancer Society and the Heart and Stroke Foundation of Ontario are from bequests. These gifts have funded vital research into the cure and treatment of these devastating diseases.

As well as the most usual gift, a bequest of cash, other gifts can be considered too. Gifts such as life insurance, stocks and bonds, real estate, retirement savings plans, to name a few, can all form part of a balanced estate plan that includes charitable giving.

The Government looks favourably upon charitable giving through one's Will. Tax relief available to your estate has increased substantially in the past few years. Today, your estate may receive tax credit for a bequest, up to 100 percent of taxable income in the year of death. Any unused portion may be carried back to offset taxes paid in the year prior to death.

There are several methods by which you can leave funds to charity in your Will – fixed sum gifts, gifts of residue, or a gift of the whole estate. Fixed sum gifts can either be a specific dollar value, or a percentage of your estate. When your bequest takes the form of a gift of residue, it means that after you have provided for the needs of your family and friends, the remainder of your estate is given to charity.

Speak with your lawyer about including a charitable bequest in your Will. Ensure you have the correct legal name of the charity. Your lawyer may want to consult with the charity to confirm your wishes can be carried out as stated. If this contact is not made, it is possible your estate, and the charity, may face costly legal proceedings to prove your intentions. The result may be a reduced gift, or no gift at all.

Even if you already have a Will, it's not too late to think of a charitable bequest. For Wills already in existence, a Codicil (an amendment to the Will) can be added to effect your charitable intent. Or your lawyer may advise you have a new Will prepared.

Bequest gifts are tangible proof that Canadians care about their health, each other, and the future.

ABOUT WILLS AND WHY EVERYONE NEEDS ONE

Who needs a Will? The simple answer is, everybody. It is the only real way of making sure that when you die, matters regarding your estate, will be carried out according to your wishes.

Most people want to protect the property they have acquired during their lifetimes and at the same time ensure that this property is distributed to individuals, (usually family), and institutions, according to their wishes. If you were to die without having made a Will, your estate would be distributed according to a strict formula which is set out in Government legislation.

Wills also dictate who you have chosen to be the Executor or Estate Trustee of your estate. This is the person that will look after collecting in your property, paying your bills and final taxes, and then distributing your estate according to your wishes. If there were no Will, then usually a family member, friend or even a government representative will come forward and make application to be appointed as the person responsible to carry out such duties and then a judge will make the ultimate decision as to whether or not they qualify. The person applying or approved may not be an individual whom you would have chosen. As well, even though someone is approved by the Court, they will usually have to go to the time and expense of getting an insurance bond and filing this with the Court, in order to further protect your assets for the beneficiaries. In the event that they were to mismanage the handling of your estate, to the financial detriment of the beneficiaries, the bond would be in place to cover such loss.

If you have minor children and both you and your spouse were to die at the same time, or if your spouse predeceased you, you will also want to make sure that your children are looked after by someone that you choose, rather than someone chosen by a judge or government agency. This is known as choosing a guardian and even though it is not absolute, the Court will give serious consideration to your wishes in making their final decision.

Many people appoint the same individual(s) as both Estate Trustee(s) and Guardians of their minor children, while others want certain people to look after the money and yet others to look after the children. Some people you may not trust with your money, but you would with your children, and some with your money, but not with your children. It's really a matter of personal preference and it often depends upon the individuals involved.

You may also feel very strongly about not only what happens to your assets and your children when you die, but also, what is going to happen to you.

Some people insist on being cremated after they die, while others are very adamant that they are not. Strangely enough, it has been found that it is the female that wants to be cremated, while the male doesn't care or just goes along with the wishes of his spouse. Your Will can set out specific instructions to your Estate Trustee(s) as to how your remains are to be disposed of, the kind of funeral service you would like and where your remains are to be placed after the funeral. Again, this can be very important, because without a Will, practically anybody could be making these decisions and they may not be in agreement with what you would have liked to see happen.

These are just the basic reasons why you should have a Will, but there are others, such as setting up trusts for minors or for dependant disabled individuals; bequests to churches or charities; tax saving strategies; continuance of a company or a business. These can get quite complicated and Wills covering such matters are usually prepared only after a thorough review of your estate by such individuals as a lawyer, accountant and perhaps a financial advisor.

Farmers and other self-employed individuals often desire to have their farm or business carried on by one or more of their children following their decease. This can pose difficulties in attempting to achieve a fair and equitable division of estate assets where there are other children who will not be involved in the farm or business. A lawyer can suggest to you various means to resolve this dilemma and your Will can be modeled to your own particular situation and desires.

Although you can draw a basic Will yourself, it is not recommended. A will written entirely in your own handwriting and signed by you is legal, however you will never be sure whether or not it actually carried out your wishes until it is too late. Even though you may have drawn a Will before your death, unless its form and content conform to various Government legislation, it may not operate at all, or it may be varied according to the legislation.

A proper formal Will is typed and signed by the person making the Will, in the presence of two witnesses. Almost all formal Wills are prepared by lawyers because they have been trained in how to prepare them, and they are qualified in giving advice on their preparation as well as keeping up on the changing laws which affect them. A lawyer's knowledge and experience can avoid family quarrels or unnecessary taxes when you make a Will. Here is some valuable information to help you, even if you already have a Will.

Your lawyer protects your interest

When you make a Will, you decide who will get everything that you leave behind. You can name someone – an executor – to follow the instructions in your Will. You can also name someone – a guardian – to look after your children, if you and your spouse die while they are under eighteen. A Will leaves your family and loved ones instructions so they will not have to worry about what to do.

Be Prepared

Your lawyer needs to know what you want to say in your Will. Think about your answers to these questions before you meet with a lawyer.

- Who do I want to get my possessions after I die? (Beneficiaries)
- Who do I want to be in charge of my estate (Executor or Estate Trustee)

- Who do I want to name to name for my minor children (Guardian)

- Who will take over if my beneficiary, Executor or Guardian dies before I do? (Back-ups?)

- Do I want to make a gift to a charity (Planned Gifts)

Documents to be reviewed

A lawyer needs to know what you own. Prepare a list. Include your house, Registered Retirement Savings Plans, life insurance policies, and business interests. If you own any of these things with someone else, bring copies of the ownership documents. Who is a named beneficiary? To receive the money when you die under your insurance policy or RRSP?

Questions to ask your lawyer

- How much will it cost to help me to write a Will?
- What might a change to the Will cost?
- How long will it take to prepare my Will?
- Do I need a Power of Attorney for property or personal care?
- Ask your lawyer to explain any words that you don't understand in your Will.

Commonly Asked Questions

Q: Is it important for my children that I have a Last Will and Testament?

A: Yes. Your Will can specify who will be the Guardians or acting parents for your children. If you do not appoint Guardians in your Will, the Ontario Superior Court of Justice will appoint legal guardians of your children. As a parent you know who can best care for your children – why leave this critical decision about your children to others when you can express your wishes in your Will?

Q: Can I provide in my Last Will and Testament for my spouse and children to stay in our family home?

A: Yes. You can instruct your Estate Trustee(s) to maintain the family home for the benefit of your spouse and children. However, you must be careful not to tie your Estate Trustee(s) hands; perhaps it would be best that the family home be sold to raise needed monies to keep your family going. It will do them no good to have a big house and no money – you must trust your Estate Trustee(s) to deal with your assets after you are gone.

Q: When I die, does my life insurance have to pay my debts?

A: Yes and no. Yes, if you do not name a beneficiary in the insurance policy. No, if you do designate or name a beneficiary in the policy, then the life insurance proceeds go

directly to the name beneficiary, bypassing your will, legal estate and debts. The bottom line here is that you can provide a debt fee inheritance to someone if you name a beneficiary in your life insurance policy.

Q: What is a Power of Attorney and why should I have one?

A: Ontario law provides that you can appoint someone to be in charge of your affairs when you are not available but still alive. You could be physically or mentally ill to the point that you are incapable of making responsible decisions about your personal and business affairs. Or you could simply be absent or on vacation out of the country. A Power of Attorney is usually a one or two page document which may restrict your attorney to act only during a certain time period or only on certain terms and conditions. A power of attorney is as important a document as your Last Will and Testament.

Q: Why is it important to have a Last Will and Testament?

A: One reason is that a written Last Will and Testament allows you to choose who will receive your property, that is, who will be the beneficiaries of your worldly possessions upon your death. Without a Will Ontario law will divide your property amongst your spouse and your blood relatives – your best friend would receive nothing, or your hated sister or brother may get it all. Your Last Will and Testament says what you want done with your property!

Q: Do I have to leave anything in my Will to my spouse?

A: The answer depends upon your spouse's financial resources. Ontario law requires that you leave enough property to your spouse to support him or her in relatively the same lifestyle as during your lifetime. Generally, you cannot leave your spouse with nothing. Your destitute spouse can apply to the courts to set aside or alter your Will because you did not adequately provide for him or her. This is an example of where your Last Will and Testament can be overruled by the courts.

Q: Can my Last Will and Testament deal with my personal jewellery, china, furs, antiques and guns?

A: Yes – you can actually list who will receive what. Many people have special feelings about particular items of personal property – this special item should go to that special person. All of these details can be put in a Will. Be very careful though – the exact way your Will is written is most important to ensure that your wishes are carried out.

DON'T LET THE PROVINCE DICTATE YOUR AFFAIRS

There are many other laws which affect your estate planning. And we will bet that many of you have not yet made your Will, leaving the Province of Ontario to dictate what

happens to your estate after you have passed away. This article will review some of the reasons why you should make out your Will NOW.

One reason is to deal with the new Family Law Act 1986.

The second is to prevent the Province of Ontario from dealing with your estate through the laws in INTESTACY (i.e. dying without a will).

The third reason is to provide for your children, especially if they are infants (under 18 years of age). You should appoint Guardians to take care of the children on a day-to-day basis. You should appoint Estate Trustees to take care of the finances or money. If you do not have a Will to provide for these two very important appointments, the question of guardianship will be dealt with by the Ontario Superior Court of Justice, the Ontario Public Guardian and Trustee, and even the Children's Aid Society. All monies will be held in trust by the Public Guardian and Trustee in Toronto to be used for the benefit of the children until they are 18 years of age when any monies remaining will be distributed. Would you rather have your own appointees taking care of your children and your money? We think yes and this is one of the most important reasons for you to do your Will now.

The fourth reason we can give you is to distribute the money to the people that you include or exclude in your Will, and in such amounts and in such manner as you may decide – not the Ontario Government or its representatives.

The fifth reason is to provide for an orderly and inexpensive distribution of your estate through your Will instead of an expensive application to the Court to appoint an Administrator for your intestacy.

If these five reasons are not convincing enough, phone your lawyer and review your circumstances – we are sure that he/she will be able to point out more reasons. DO YOUR WILL NOW!

Some definitions

First of all, what is a Will? Or as it is formally referred to, a Last Will and Testament? A Will is a legal statement of a person's wishes about what will be done with his or her property after he or she passes away.

A TESTATOR (male) or TESTATRIX (female) is a fancy legal term for the person who makes the will.

TESTATE means dying with a properly signed Last Will and Testament.

The person named in your Will to carry out your instructions is the EXECUTOR (male) or EXECUTRIX (female). The terms "Executor" and "Executrix" have been replaced by

newer terminology, where the individual charged with this obligation is now called "Estate Trustee with a Will".

INTESTATE means dying WITHOUT a properly signed Last Will and Testament. Ontario laws dictate the distribution of your estate according to preset formulae or rules. This means that your property may not be distributed according to your wishes. Also, there is delay, expense and inconvenience since an ADMINISTRATOR (male) or ADMINISTRATRIX (female) must be appointed by the Courts and the Ontario Public Guardian and Trustee must become involved if there are infant children (under 18 years of age), or where a child is over eighteen but not capable of handling their own affairs on account of some disability.

WHO can make a WILL? Any mentally competent person eighteen years or more of age.

A NEW WILL always revokes or cancels an old or prior Will. In other words, if the latest dated or LAST WILL is found by a court to be invalid, the most recent WILL prior to the last Will will be effective. If a Will is found to be invalid and there is no previous Will, then the Ontario laws of intestacy will govern. Therefore, it makes sense to seek legal advice and assistance to ensure that your will is property drawn and executed (signed).

A CODICIL is an amendment to a WILL. It is drawn up and signed in the same manner as the original Will. It confirms your instructions in the original Will, except for the specific change(s) you want. A good example of a CODICIL would be a change of Estate Trustees, for instance, where your Estate Trustee has moved away.

There are essentially two forms of Wills recognized by Ontario law. First, the HOLOGRAPH WILL which is a Will completely in the handwriting of the TESTATOR or TESTATRIX (the person making the Will) without the requirement of witnesses for his or her signature. If you know what you are doing you can write your own Will at home and it will be valid. This does not mean you can purchase a form and fill in the blanks with your handwriting. The Will must be completely in your own handwriting.

The second form of Will we call a FORMAL WILL where the TESTATOR or TESTATRIX signs at the END of a typewritten document in the presence of two witnesses who must sign as witnesses in the presence of the Testator or Testratrix and each other. In other words, you have a small party of THREE persons, one Testator or Testatrix and two witnesses, for execution (signing) of the Will.

Here are the usual duties of your Estate Trustee:

1. Arrange for appropriate burial following instructions in the Will, if any;

2. Study of Will and meeting with family;

3. Assemble, protect and insure all assets;

4. Value assets such as securities, real estate, private companies, etc.;

5. Notify beneficiaries;

6. Prepare and file income tax returns;

7. Prepare Statement of Assets and Liabilities;

8. Complete life insurance and Canada Pension Plan claims and collect proceeds;

9. Convert assets to cash to pay legacies, debts, taxes;

10. Prepare a complete and detailed accounting of the estate for beneficiaries;

11. Arrange for probate of Will;

12. Pay legacies, debts, taxes;

13. Liaise with spouse regarding share under Family Law Act and distribution of any part of estate during initial six months after death;

14. Estimate cash requirements to settle legacies, debts, taxes;

15. Advertise for creditors;

16. Review securities and provide management for investments and business;

17. Redirect mail, cancel leases, subscriptions, memberships;

18. Collect income from stocks, bonds, mortgages, rents and other investments;

19. Notify stock brokers, bankers, business associates and arrange for transfer or liquidation of bonds, stocks, bank accounts, business interests;

20. Distribute assets of estate according to terms of Will;

21. Set up and administer trusts as directed by terms of Will.

As you can see, the Estate Trustee is a very important person in your Will. He or she is in charge of your financial affairs and carrying out your instructions in your Will. Your Estate Trustee should be chosen very carefully with his or her full understanding of these duties. Our advice is to pick a person as your Estate Trustee to whom you would turn over your wallet/purse, money, assets, etc., TODAY together with a list of instructions of how to handle your financial affairs; you should have complete faith and trust that

your Estate Trustee will handle your financial affairs wisely and carry out your instructions.

Your Estate Trustee need not have a thorough knowledge of the stock market or other similar sophisticated investments – your Estate Trustee should have basic common sense in dealing with money matters and sufficient "smarts" to know when to consult experts or more knowledgeable people.

Remember that your Estate Trustee will be the person who looks after the money for your children, who cannot legally have their share of your estate until age 18 or whatever higher age you specify in your Will.

Your Estate Trustee is usually given the power to use the children's money for their benefit if they need it prior to age 18. Again you need a wise and common sense person who understands your philosophies of child raising and what monetary demands of the child or child's Guardian are worthy of payment prior to age 18. Our recommendation is that your Estate Trustee NOT be the same person as the Guardian of your children. We believe in the "separation of powers" theory where the best person to take care of your financial affairs (Estate Trustee) is not necessarily the best person to raise your children (Guardian).

As a final note in choosing your Estate Trustee, he or she should be of relatively the same age as you, and live in the same locality or at least the same Province. Sometimes all of these criteria cannot be met in your choice and this may result in extra but not insurmountable legal work in the administration of your estate.

Something else to remember, Estate Trustees are entitled to charge a fee for their services. In all Provinces, except Quebec, these fees are determined based on percentage guidelines established in the courts. A trust company cannot charge any more Estate Trustee fees than an individual acting as your Estate Trustee.

Giving instructions to your estate trustee

Your Estate Trustee in your Last Will and Testament is the person who will be in charge of your financial affairs and carrying out your instructions in your Will. We advise that you choose as your Estate Trustee a person to whom you can turn over your wallet/purse, money and other assets today, confident that your Estate Trustee will carry out your instructions and handle your financial affairs wisely.

What instructions and powers do you give your Estate Trustee in your Will?

Firstly, as legal owner of the body, your Estate Trustee may have explicit instructions from you regarding how you wish to be buried, cremated, etc.. Lacking your specific instructions your Estate Trustee has legal authority to bury, etc. in accordance with your station in life and to pay the reasonable expenses of the funeral and burial. Your Estate Trustee may spend more than you wish on burial, etc., so it is wise to give specific

instructions in your Will. Also, you should advise the Estate Trustee personally as to your wishes since the Will is usually not reviewed until after death.

The second major instruction to your Estate Trustee is to pay debts and taxes.

Then you may wish to give specific items of your assets to specific beneficiaries. This could range from a first of $1,000.00 to your nephew, an automobile to your son, jewellery to your daughter, to a specific gift of a piece of land to a brother or sister, as examples of specific gifts or bequests under your Will.

After specific gifts your Will should deal with the division of the remainder of your estate among the beneficiaries that you choose. This division may be as simple as giving the remainder (or residue) of your property to your only son or daughter, or the division may be unequal shares to different people at different ages or times. Sometimes there is a trust fund set up for use by a wife during her lifetime and then a specific division after her death. There are as many possibilities as you can imagine. This is why your lawyer should draft your Will – to ensure that your wishes are properly translated into legal instructions to your Estate Trustee.

Dealing with children under 18 years of age, your instructions to your Estate Trustee are important. We advise that Estate Trustee investment powers be restricted to those investments authorized by Ontario law for Trustees. This requires "blue chip" stocks, certificates of deposit from large financial institutions, and other similar "good" "solid" investments instead of shares of a private corporation and risky speculative type investments.

Your Estate Trustee should also be authorized to pay the income or even part of the capital of the child's share to a parent or guardian for the use and benefit of the child prior to age 18 or such higher age as you may specify in the Will. The Estate Trustee should have discretion to pay for necessary medical expenses but should have the common sense NOT to purchase a shiny new red convertible, as an example.

Other general powers and instructions to your Estate Trustee should include the power and discretion (1) to sell assets to convert them to money, () to value and divide certain assets if a beneficiary wishes to have the asset instead of money, and (3) to borrow money using the assets as security.

CHOOSE YOUR ESTATE TRUSTEE WISELY!

The validity of a will can be attacked

The question in your mind possibly raised by the title of this article may be "Why would anyone want to attack the validity of another's Last Will and Testament?"

The answer is that the person attacking the Will, the "attacker" stands to gain by a Court declaration that the "attacked" Will is invalid. The attacker will receive a greater benefit either through the next previous Will or through an intestacy (dying without a Will).

As an example, a son or daughter may attack the mother's Will dated March 1, 1996 because this Will leaves nothing to them, where the next previous Will dated December 10, 1995 leaves them one-half share of the mother's estate. For some reason such as family dispute, the mother changed her mind about leaving one-half of her estate to her son or daughter. Therefore the son or daughter would start a Court action to obtain an Order declaring that the Will dated March 1, 1996 is invalid. Once declared invalid, the December 10, 1995 Will becomes the deceased mother's Last Will and Testament". Or, if she had no previous Will or it could not be found, the Ontario laws of intestacy (dying without a Will) would govern. For a son or daughter their share of the mother's estate under the laws of intestacy are better than nothing under the March 1, 1996 Will.

For what reasons can a Will be attacked?

- Under age 18 years (with some exception)
- Lack of Testamentary (Mental) capacity
- Ignorance of contents of Will
- Suspicious circumstances surrounding making of Will
- Exercise of undue influence by someone over testator
- Fraud
- Mistake
- Improper signing of Will
- Will must be in writing
- Improper substitution of pages

These are some of the reasons for attacking Wills.

The topic of mental capacity to make a Will and what a court would consider a lack of mental capacity: Remember that a person will attack the validity of a Will in order to obtain a greater benefit under a previous Will or the laws of intestacy.

A Testator (person making a Will) must understand the nature of the act and its effect. A Testator must understand the extent of his/her property – in other words, what he/she has to give away. A Testator must understand and appreciate the claims of the people surviving him/her to his/her Estate – in other words, who are his/her potential beneficiaries? A Testator cannot suffer from disorders of the mind or delusions which would affect his/her appreciation of the act of making a Will, the amount and kinds of property he/she has to give away, and the people to whom he/she should consider giving his/her property.

A Testator may be sane in the ordinary sense but not have the soundness of mind necessary to make a Will.

On the other hand, a Testator may have a mental disease or may have been found to have been incapable of managing his/her affairs, but still have the mental capacity to make a Will.

Even though he/she has impaired mental power, a Testator may have sufficient intelligence to understand and appreciate the act of making a Will as described above.

In other words, a Testator confined to a mental hospital could have the necessary mental capacity to make a Will, but a Testator walking the streets like you and I may suffer from such mental problems that he/she would not have the necessary mental capacity to make a Will.

Your next question may be, "How do I know if my elderly mother has the mental capacity to make a Will?" The answer is that you seek legal advice from your lawyer who will carry out the necessary testing procedure when taking instructions for a Will from your mother.

Keep your will current

Does your existing Will protect you? Your Will should be routinely reviewed to reflect your changing needs. Ask yourself these questions:

- Has my financial or tax situation changed?
- Has anyone named in my Will died or become disabled?
- Have changes in the law affected my Will?
- Has my Will dealt with family property laws?
- Has a divorce, marriage, separation or birth of a child occurred?

Your Will should reflect your current situation and desires and should be reviewed on a regular basis. In the event of marriage your Will is revoked unless it is stated to have been made in contemplation of that marriage. You should also review your Will in the event of any other change in your family status. The birth of children always dictates the need to appoint Guardians and will likely change your intended beneficiaries. As children grow older you may need to make changes to these items. Also consider whether any change in your assets, employment, or residence requires changes to be made to your Will.

We cannot stress enough the importance of having a valid and current Last Will and Testament. Preparing a Will is a small investment both in terms of cost and the time involved compared to the benefits which will be gained by your beneficiaries.

If you are not sure your Will is up-to-date, contact a lawyer. Your legal costs will be modest when compared to the savings and peace of mind.

We hope you found this information helpful.

If you have any questions and/or you would like to discuss estate planning and/or preparation of a Last Will and Testament and/or Powers of Attorney, please contact us and we will be happy to assist you. You should also be aware that your legal fees with respect to estate planning are tax deductible.

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