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## ***YOUR WILL***

### **Why do I need a Will?**

Your Will is the primary element of your estate plan. The moderate cost of preparing one is worth the peace of mind you will gain by knowing that you have provided for the people you care about after your death. If you don't have a Will,

- The court will select who will administer your estate after you die.
- Provincial legislation will govern who will share in your estate.
- Your family members will not be able to deal with your assets until a court application has been made and an administrator appointed.
- Any money or assets left to a child will be held by a government agency until the child is 18 years old. A parent or guardian of the child will have to apply to this agency to use any of the money.
- A child will be entitled to his or her entire inheritance at the age of 18.
- Administration of your estate may be more expensive in terms of legal fees, probate fees, and income tax.

### **When do I need to review my Will?**

It is a good idea to review your Will approximately every three years, especially if you have children whose needs may change as they mature. In particular, you should change your Will or make a new one,

- If you get married, since marriage revokes your Will unless your surviving spouse elects to let it stand.
- If you get divorced, since provisions in your Will naming your ex-spouse as executor or leaving part of your estate to your ex-spouse are automatically revoked by law.
- If you separate from your spouse, since your spouse will remain entitled to any gifts provided by Will.
- If an executor or beneficiary of your Will dies or becomes disabled, or if you have additional beneficiaries.
- If your financial situation changes.
- If the law changes.

As your circumstances and wishes change, I can help you prepare a new Will, or a Codicil to make minor changes to your current Will.

### **What should I tell my lawyer?**

Before you meet with me, please complete my Estate Planning Questionnaire, along with copies of the documentation requested therein. This will expedite my meeting with you, and ensure that I have the background information I need to prepare your Will. You should also consider the following matters:

## Executors

Your executors are the persons who administer your estate. If you appoint two or more executors, they must agree on all decisions unless your Will provides for a majority vote, in which case you can also require that a named person (such as your spouse) be part of the majority. You should also consider providing for an alternate executor or executors to take the place of the first named executor in case of death or disability.

Being an executor involves a lot of work and responsibility at a difficult time. See my information sheet on Duties of Executors and Administrators for a list of the tasks that an executor must perform. Whoever you choose to be an executor should have the following characteristics:

- He or she must be over 18.
- He or she should live in a Commonwealth jurisdiction, because otherwise he or she must provide a bond, the annual cost of which will be charged to your estate.
- He or she must be someone you can trust to carry out your wishes as stated in the Will.
- He or she must have the proper judgment and business sense to make business and investment decisions.
- He or she should relate well to the members of your family.
- He or she should be willing to accept the administrative, financial and legal responsibilities of the position. Be sure to ask a potential executor before you name him or her in your Will.

People usually name one or more of their primary beneficiaries as their executor or executors. You may wish to appoint a professional advisor or a trust company as an executor, especially if your estate will be complicated, if your Will sets up trusts which have to be administered for a number of years, or if there is some reason why it would not be appropriate for a family member to act.

Executors are entitled to receive compensation from your estate, which is normally based on a percentage of the amounts received into and paid out of your estate, and the amounts held by your executors in any trusts established in your Will. A family member may choose not to claim compensation, whereas a trust company may wish to enter into a compensation agreement with you at the time you prepare your Will.

## Guardian of Minor Children

A guardian is the person you name to have custody of your children who are under the age of 18 at the time of your death. The person named must still apply to court for a guardianship order, but the Will provision will be legally binding for 90 days, and will be considered very seriously by the court if any dispute arises as to who should have custody of your children. Before naming a Guardian in your Will, you should confirm that the person is willing to act.

## Beneficiaries

Your beneficiaries are the persons who will inherit your assets after you die. Your primary beneficiaries will likely be your spouse and children. However, for each particular gift, you should consider naming an alternate beneficiary to inherit if the primary beneficiary dies before you or before he or she becomes entitled to property held in trust. In addition, you may wish to leave a portion of your estate to one or more charities. There are many options available to make a charitable gift in your Will or as part of your estate plan, and considerable tax benefits can be obtained for your estate by taking advantage of these options.

## Assets

My Estate Planning Questionnaire asks you for certain financial information. This information will assist me in advising you and in preparing your Will for a number of reasons:

- Some types of assets, such as foreign assets and business interests, raise particular planning problems which may need to be addressed outside your Will.
- Other assets may have significantly increased in value. The tax payable on this increase (known as a capital gain) may be reduced by leaving these particular assets to a spouse or a charity.
- In some cases, probate fees may be reduced by having assets pass outside your Will. However, see my information sheet on Probate Fees for the dangers involved in attempting to avoid probate fees.
- Where you have significant liabilities, I may recommend that you purchase life insurance to meet them, or roll them into a corporation to reduce probate fees.
- After your death, I can assist your executors in identifying, valuing and realizing your assets.

## Disposition of Property

Specific items of financial or sentimental value, such as jewellery or antique furniture, can be listed in your Will, in a binding memorandum incorporated into your Will, or in a non-binding memorandum prepared separately from your Will. A non-binding memorandum can be changed from time to time before your death without overriding your Will. Once you have disposed of specific items, you should decide whether you want all the rest of your personal and household items to be given to one person, to be divided among several named persons, or to be sold.

The “residue” of your estate is what is left over after you have provided for all other gifts of specific items (“bequests”) and sums of money (“legacies”). You may leave the entire residue of your estate to one person or charity, or divide it among several persons or charities. However, it is important to plan for the possible death of a beneficiary and for any future change in the value of your estate, because if some of the residue of your estate is not disposed of by your Will, that part will be distributed as if you had not prepared a Will at all.

Instead of giving an outright legacy, or share of the residue of your estate to a particular beneficiary, you may wish to have the assets transferred into a trust for your beneficiary. Trusts incorporated into your Will can be useful tools in many situations:

- If you don't want a child to receive his or her entire inheritance at age 18, you can provide for the inheritance to be held in trust and paid out at a later age or in stages (e.g.,  $\frac{1}{3}$  at age 25,  $\frac{1}{3}$  at age 30, and  $\frac{1}{3}$  at age 35).
- You can provide for a steady stream of income for a beneficiary who is unable to manage property wisely or who has other special needs, and give the capital to someone else after the beneficiary's death.
- You can provide for payments of capital out of the trust to cover educational or medical expenses, to help the beneficiary start up a business or purchase a home, or for any other reason.
- You can preserve or protect a particular property, such as a home.

For more information, please contact Laura Kerr at (613) 614-7140 or [lkerr@estateslaw.ca](mailto:lkerr@estateslaw.ca).