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Estate Planning Guide

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Wills

General Information

What is a Will?

A Will is a legal document that is prepared by you during your lifetime which takes effect upon your death. It directs the manner in which your various assets and possessions are to be distributed upon death. Simply put, the function of a Will is twofold. Firstly, it appoints an executor/executrix (now also known as an Estate Trustee) to attend to the various matters in connection with the administration of the estate, and secondly, it specifies to whom the assets of the deceased are to be distributed.

What Effect Does a Will Have Prior to Death?

A Will is said to "speak" only at the moment of death. Therefore, by signing a Will, you do not in any way restrict yourself in connection with the disposal of your assets during the rest of your lifetime. For example, although you may have bequeathed your stamp collection to your brother, you are free to sell that stamp collection at any time without the consent of your brother.

Legal Fees for Will Preparation

The truth of the matter is that you cannot afford not to have a Will prepared. Having said that, legal fees for the preparation and execution of Wills are relatively inexpensive. Legal fees for the preparation and execution of a basic Will is generally around $175.00 with legal fee increasing for a more complex Will.

Is a Will Necessary for Everyone?

Quite frankly, if you have no intention of dying, there is absolutely no need for a Will - in fact the preparation of one would be a waste of time and money. For those of you who believe there is a possibility you may die sometime during your lifetime, the question whether you should have a Will can be answered by an emphatic YES!

Should you die without a Will, the administration of your estate is complicated by the fact that you have not appointed an executor or executrix. More importantly, without a Will, your death may result in your assets being distributed to various heirs that you did not want to receive an inheritance. On the other hand, those dear friends and relatives that you wanted to be included in the distribution of your assets may inherit less than you intended or even nothing at all.

The following is a comparison as to what would happen in a situation where there is a Will versus a situation where there is no Will:

WILL		NO WILL	
1.	The testator is free to distribute assets to beneficiaries of his or her own choosing and upon the terms and conditions that he or she thinks best.	1.	The assets are distributed in accordance with the laws of intestate succession which establishes an arbitrary and inflexible scheme of distribution. This distribution may differ substantially from the wishes if the deceased.
2.	Can ensure that all of the assets pass to the testator's spouse and then on the spouse's death, to the children in equal shares.	2.	Under the laws of intestate succession, the entire estate will not necessarily pass to the spouse. If there are children, they will be entitled to receive a portion if the estate in their own right provided the estate is worth a certain minimum value.
3.	Can provide for the distribution of the estate to children at an age when the testator believes it to be in their best interest.	3.	As the distribution is in accordance with the laws of intestate succession, a child who has reached the age of majority (i.e. 18 years) is free to receive and spend his share of the estate as he or she wishes upon the death of the intestate.
4.	The testator is free to provide for the future administrator and management of the estate assets vested in beneficiaries who are infants or individuals incapable of managing the property.	4.	No Provision is made for the future administration and management of estate assets for such beneficiaries other than the payment into Court of such assets, or receipt of a Court Order setting out the "rules" to be followed.
5.	A provision can be made for the appointment of legal guardians in the event that both parents die while one or more children are under the age of majority.	5.	Relatives will have to determine who the guardians should be in conjunction with the office of the Public Guardian and Trustee.
6.	Provides flexibility to allow for specific bequests to particular individual – i.e. family heirlooms can pass to named individuals. Also, can make provisions to various charities, hospitals, etc.	6.	Distribution in accordance with the laws of intestate succession prevent specific bequests from being made.

7.	Testator can appoint executors and alternate executors of his or her own choosing.	7.	An Estate Trustee is appointed by the Court.
8.	The executor takes his or her authority from the Will and is capable of dealing with the estate from the moment of the testator's death.	8.	The Estate Trustee takes his authority from the Certificate of Appointment if Estate Trustee Without a Will and cannot act until the Court order has been granted by the Court. This can be a source of anxiety for the family as estate assets cannot be used in the interim.
9.	An executor does not have to be bonded if residing in the jurisdiction in which the Will is being probated.	9.	An Estate Trustee must be bonded unless the Court decides to waive this requirement. Obtaining an Administration Bond can be both an expensive and cumbersome process.
10.	Allows the testator to engage in tax planning and estate planning.	10.	Does not allow for tax planning and estate planning.
11.	Provides for a quicker and more orderly administration of the testator's estate which can also result in lower legal fees.	11.	The estate may be left in a legal tangle which could delay settlement and result in higher legal fees.
12.	Provides peace of mind for the testator as he or she knows that the assets accumulated during the course of a lifetime will be distributed according to his or her wishes.	12.	Provides no peace of mind.

Items to Consider Before Seeing a Lawyer for a Will

1. Appointment of an Executor

A testator will usually appoint a spouse as executor and if not married, a close relative or friend is often selected. It is usually best not to select an executor who is older than yourself or one who lives in another province or jurisdiction. It is important that you discuss this with anyone you are contemplating naming as an executor to ensure they would in fact be prepared to fulfill such a role.

2. Appointment of an Alternate Executor

All Wills should appoint an alternate executor who can be called upon in the event that the first named executor predeceases the testator or is unable or unwilling to act. The same selection criteria should be employed with an alternate executor as with an executor.

3. Beneficiaries

Consider the individuals that you wish to benefit under your Will. Beneficiaries may receive a percentage of your estate, a specific sum of money or a specific item.

4. Trust Provisions for Minor Beneficiaries

Consider at what age you wish minor beneficiaries to receive their inheritance. A simple trust can be established wherein a minor beneficiary does not receive the full inheritance until a certain specified age. They would however be entitled to receive money prior to this age but only as reasonably required at the discretion of the executor, utilizing a power of encroachment.

5. Guardian

Consider appointing a guardian or guardians to look after your children should you die while your children are still minors. It is equally important that you discuss this with anyone you are contemplating naming as a guardian to ensure they would in fact be prepared to fulfill such a role.

6. List of Assets

Prepare a list indicating the location of your assets and identifying characteristics. It is important to include all applicable account numbers and names of financial or investment institutions you deal with. Items to consider in compiling such a list include:

- Bank Accounts
- RRSPs \ RRIFs \ RESPs
- Mutual Funds
- Guaranteed Investment Certificates\ Term Deposits
- Life Insurance Policies
- Real Estate (house, cottage, etc.)
- Stocks
- Canada Savings Bonds or other Bonds
- Gold or Silver
- Safety Deposit Box (location of box and key number)

Probate Planning and Strategies

The laws of Ontario do not presently impose estate or death taxes, however we do have probate fees. The process of obtaining what is still commonly referred to as Letters Probate involves submitting an original Will together with all documentation in support of the application for a Certificate of Appointment of Estate Trustee with a Will to the Ontario Superior Court of Justice. Probate certifies that the Will has been duly approved and declared valid and confirms the authority of the personal representatives (i.e. Executors or Estate Trustees) named in the Will.

Since June 1992, the fee structure is two tiered. The probate fee payable for the first $50,000.00 of value in the estate is at the rate of ½ of 1% or $5.00 for every $1,000.00 of value in the estate. The probate fee for the value of the estate over $50,000.00 is calculated at 1.5% or $15.00 for every $1,000.00 in value.

To place this increase in perspective, consider as an example, an estate value at $500,000.00. The probate fee payable is $7,000.00!

Note however, that the administration process within the court remains the same whether an estate is valued at $50,000.00. or $5,000,000.00. In addition, the vast majority of the paperwork that is required to prepare and process the application is completed by law firms and not government employees.

Clearly, probate fees can be classified as a form of wealth taxation.

With the size of probate fees, estate planning should involve a review of your assets in order to minimize probate fees payable. The following are just some of the ways in which you can structure your personal affairs in order to reduce or possibly eliminate paying probate fees:

1. Joint Ownership of Property with Right of Survivorship

When real property is held with another person in joint ownership with the right of survivorship, upon the death of one individual, the property will automatically pass to the survivor by operation of law and not through the Will. The jointly held asset does not form a part of the estate of the deceased joint owner and thus, the requirement for probate on the jointly owned property is avoided.

2. Joint Bank Accounts

As in the case of joint ownership of real property, a joint bank account provides for the right of survivorship. On the death of the first joint account holder the survivor is entitled to all monies on deposit without the need to include the amount on deposit for probate purposes.

3. Beneficiary Designations

The value of RRSPs, RRIFs, GICs and Life Insurance Policies do not have to be calculated when administering an estate provided there is a named beneficiary for each plan. In most cases it is possible to change a named beneficiary prior to death and therefore some degree of flexibility is maintained for ongoing estate planning purposes. As asset distribution is based upon the last beneficiary on record, care should be taken to ensure that your designated beneficiary is up to date.

4. Gifting Assets

Consideration may be given to gifting certain assets prior to death. These assets can range from cash to business or investment assets.

Summary

There are a number of more complicated strategies that can be resorted to by some individuals for the purpose of reducing or eliminating probate fees such as employing the use of a trust and private holding companies. As serious tax consequences may arise in the course of estate planning, it is always recommended that you consult both a Chartered Accountant with a solid tax background and a lawyer for guidance.

Definitions

ADMINISTRATOR (also now known as an Estate Trustee Without a Will)
An individual appointed by the Ontario Superior Court of Justice to administer the estate of a person who dies without a Will. The feminine form is "administratrix".

BENEFICIARY
An individual who receives some benefit, whether a bequest of money or a devise of property pursuant to the Will of a deceased individual.

CODICIL
An amendment to a Will that requires the same formalities of signing as with a Will.

ENCROACHMENT
The act of paying out portions of money or other assets to a beneficiary that are being held in trust for the beneficiary.

ESCHEAT
The process by which the assets of a deceased individual pass to the provincial government when an individual dies without a Will and without a spouse, children or any next-of-kin.

EXECUTOR (also now known as an Estate Trustee With a Will)
An individual appointed in a Will to administer the estate of the deceased. The feminine form is "executrix".

GUARDIAN
The person designated to be legally responsible for the child or children should both parents die before the child or children reach the age of majority.

HOLOGRAPH WILL
A Will written completely in the handwriting of the individual making it.

INTESTATE
An individual who dies without a Will has died intestate.

ISSUE
The descendants of an individual, including not only children but grandchildren, great-grandchildren, etc.

LEGACY
Personal property or money that is passed to a beneficiary pursuant to the terms of a Will.

LIFE INTEREST
A benefit given to a beneficiary in a Will which permits that beneficiary to enjoy the use of some property or some amount of money for the balance of the beneficiary's lifetime only.

LETTERS OF ADMINISTRATION
A Court grant appointing an Estate Trustee Without a Will to administer the estate of an individual who has died intestate.

LETTERS OF ADMINISTRATION WITH WILL ANNEXED
A Court grant appointing an Estate Trustee With a Will to administer the estate of an individual who left a Will where the named executor has died or is unable or unwilling to act.

LETTERS PROBATE
A Court grant confirming the appointment of an executor or Estate Trustee named in a Will and confirming the validity of the Will itself.

NOTARIZED OR NOTARIAL COPY
A true copy of an original document certified by a lawyer or a notary public as being a true copy.

ONTARIO SUPERIOR COURT OF JUSTICE
The Court which is responsible for the appointment of personal representatives and is generally involved with problems and issues that arise during the administration of an estate.

PERSONAL REPRESENTATIVE
The individual administering an estate, whether an executor (Estate Trustee With a Will) or an administrator (Estate Trustee Without a Will).

PERSTIRPES
A method of dividing the assets of an estate so that if a member of the named group among whom the assets are being divided happens to be dead at the time of the division, the children of that deceased member of the group will divide amongst themselves the share that their parent would have received had their parent been alive.

RESIDUE
The portion of an estate that remains after all of the specific bequests and specific devices have been made.

RESIDUARY BENEFICIARY
A beneficiary who receives the residue of an estate.

SPECIFIC BEQUEST
A gift under a Will of a specific item of personal property or a specific amount of money.

SPECIFIC DEVISE
A gift under a Will of a specific piece of real property.

TESTATOR
A man who makes a Will. The feminine form is "testatrix".

TRANSMISSION
The transfer of property to a beneficiary once the Certificate of Appointment of Estate Trustee with a Will or Certificate of Appointment of Estate Trustee without a Will have been obtained from the Ontario Superior Court of Justice.

Personal Representative's Checklist

The following is a general list of some of the more common duties that a personal representative may be required to deal with:

- ❑ Complete all funeral arrangements and attend to the burial or cremation of the deceased.
- ❑ Locate the original Will.
- ❑ Meet with the lawyer that will represent the estate in all legal matters.
- ❑ Take all necessary steps to preserve and protect the assets of the deceased.
- ❑ Locate all of the bank accounts of the deceased and determine the balance on deposit for each account. Notify the bank of the death.
- ❑ Locate all insurance policies, annuities and investments and determine the amount payable for each. Notify the necessary companies of the death.
- ❑ Notify the applicable pension offices of the death.
- ❑ Locate the key and prepare an inventory of the contents of the deceased's safety deposit box.
- ❑ Completely review all personal papers of the deceased in order to locate all assets and debts.
- ❑ Review all real estate documents including, deeds, mortgages and leases.
- ❑ Prepare a detailed estate inventory of all of the deceased's assets and debts. Open an estate account for depositing monies received.
- ❑ Arrange for the storage of assets requiring storage and advise insurers of any physical assets of the deceased. Arrange for any insurance coverage required.
- ❑ Notify the beneficiaries named in the Will of the death and advise them of their entitlement under the terms of the Will.
- ❑ Arrange with the post office for mail to be readdressed, if necessary.
- ❑ Cancel any subscriptions or charge accounts and return or destroy all charge cards.
- ❑ Obtain all unpaid wages and other benefits from the deceased's former employer. Contact all service clubs and veterans clubs for death benefits that may be payable to the estate.
- ❑ Apply to the Ontario Superior Court of Justice for a Certificate of Appointment of Estate Trustee with a Will (if there is a Will) or for Certificate of Appointment of Estate Trustee without a Will (if there is no Will) and pay all probate fees to the Court.

- ❑ Advertise in a local newspaper with a Notice to Creditors and Others, if necessary.
- ❑ Arrange for the filing of an income tax return for the year of death and for any former years that may not have been filed by the deceased.
- ❑ Apply for Canada Pension Plan benefits if the deceased qualifies for benefits.
- ❑ Apply for civil service, union and veteran's benefits, if applicable.
- ❑ Apply for any amounts payable to the estate under insurance policies.
- ❑ Sell any estate assets which must be sold and those which the personal representative chooses to sell provided that this power is given under the Will.
- ❑ Pay funeral expenses, income taxes payable, charge cards, personal loans and any other debts of the deceased.
- ❑ Obtain an income tax refund, if applicable.
- ❑ Pay all money bequests and distribute all other property to the rightful beneficiaries pursuant to the terms of the will and obtain releases from all beneficiaries.
- ❑ Transfer or cancel any insurance policies on the house, car, boat, etc.
- ❑ Obtain reimbursement for all necessary and reasonable expenses incurred in the administration of the estate (with receipts).
- ❑ Pay legal fees and all other outstanding fees relating to the administration of the estate.
- ❑ Pass accounts before a judge of the Ontario Superior Court of Justice, if necessary

Powers of Attorney

In addition to making a Will, all individuals should consider executing two Powers of Attorney: A Continuing Power of Attorney for Property and a Power of Attorney for Personal Care. Both are legal documents that appoint an individual (or individuals) to act as attorney for the individual giving the power ("the Donor") in order to allow the attorney to do anything in law that the Donor could do. These documents become very important in the event that the individual appointing an attorney suffers a subsequent physical and/or mental disability; however, they can also be utilized on other occasions as well.

Continuing Power of Attorney for Property

An unrestricted Continuing Power of Attorney for Property deals with all property (both real estate and personal property) owned by the Donor. Restrictions can however be placed on such a Power of Attorney as to either the time when it is in effect or for a limited purpose.

A Continuing Power of Attorney for Property must include a specific provision stating that it is intended to survive the incapacity of the Donor. In the absence of this statement, the Power of Attorney will automatically become invalid should a mental incapacity occur.

A Power of Attorney becomes effective immediately upon signing, however it is permissible to provide that a Power of Attorney be made on a contingent basis. Thus, the donor may specify that the Power of Attorney will not take effect until the occurrence of a specific event, such as the mental and/or physical incapacity of the Donor.

Power of Attorney for Personal Care

A person may now also grant legal authority to another person to make substitute decisions in connection with personal care. These personal care decisions may relate to food, living arrangements, health care, clothing, cleanliness and safety. A person is considered to be unable to make personal care decisions if he or she is unable to understand information that is necessary in making these decisions or is unable to comprehend the consequences of a decision.

A Power of Attorney for Personal Care may extend full authority, or it may place limits on the attorney in regard to certain areas of personal care. Of great importance is the fact that the Power of Attorney for Personal Care may authorize the attorney to give or refuse consent to medical treatment on the donor's behalf. Such a Power of Attorney may also contain specific details in connection with where the donor wishes to live or under what conditions he or she would consent to certain types of medical treatment.

This guide to Estate Planning was written by Richard Wm. Chuback for Foster & Associates Financial Services Inc. It is only a guide and should not be taken as a substitute for proper legal or accounting advice. Please consult your lawyer and accountant as applicable.

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