

- Client Information Summary -

Issues To Consider When Drafting A Will

Your Will: The primary means of distribution of any estate at time of death is a Will. A Will is a legally binding document that tells your executor to whom your property should be distributed after death and other wishes that you may have.

Your Objectives: The purpose of planning when making your Will is to review, analyse, prepare and document a strategy and eventual outcome with your primary objectives in mind. In the case of a Will, the primary objective is to provide for your heirs and the orderly management and distribution of the estate at the time of your death. It is also prudent to see that unnecessary tax and other estate settlement costs are avoided, as well as assuring that the estate has adequate liquidity to meet the needs of your heirs. The extent and degree of these provisions, however, is highly individual.

Distribution of Assets: There are two basic types of distributions under a Will that are referred to as; Wills with "outright" distributions and "life interest" trusts. A Will with outright distribution passes assets directly, or outright, to a surviving beneficiary. A Will providing for life interest, also known as a "life income" or "trust", leaves assets in trust for ultimate distribution (usually outright) to certain beneficiaries, generally children, while providing income to another beneficiary, usually a spouse, during their lifetime.

Assets Not Covered by a Will: It is important to recognize that there may be some assets which pass directly to the last survivor, joint tenants or designated beneficiaries and therefore, do not pass through your estate. These assets include:

- § Property held as joint tenants
- § Joint bank accounts
- § Insurance payable to designated beneficiaries
- § RRSP, RRIF, annuity or pension plan proceeds where a designated beneficiary is named
- § Property subject to buy-sell or survivorship arrangements
- § Property subject to trusts
- § Shares of corporations with a restriction on stock transfers
- § Property subject to marriage contracts, separation agreements and partnership agreements

As such, it is important that you clearly understand that your Will can distribute only assets that you have sole and unrestricted ownership of.

Specific Bequests: While a Will excludes certain assets from distribution, there may be special bequests that you wish to make that should be covered by a Will. This could include bequests of specific tangible property (personal and household effects) or might include bequests to charities, family members or friends, of cash or other identifiable property. Your lawyer can advise you as to whether your specific bequests are best handled by your Will or, in some provinces, simply by a memorandum. It should be noted that leaving a specific portion of the estate to a beneficiary, such as 50%, allows the beneficiary the opportunity to review the accounts of the estate whereas leaving a specific bequest, for example \$10,000, does not allow the beneficiary to review the estate's accounts.

Executor: The executor is the person, or persons, who must carry out the obligations under the Will. Included in these obligations will be such matters as payment of debts and taxes, filing tax returns, arranging to collect monies owing, funeral arrangements and, of course, distributing the assets according to the Will. (Depending on your executor, it may be wise to specifically empower the executor to hire professional help.) The role of the executor may be easy and short (everything to your spouse), or may be time consuming and complex if you have a wide variety of assets and a detailed Will creating an estate that may take years to settle.

Most commonly, executors will be spouses, family members, professional advisors, friends or a paid executor, such as a trust company. (All executors have the right to be paid, however, non-professionals, such as friends or family, seldom accept payment.) It's important to make certain that a person appointed as an executor is willing to act as an executor, as you cannot force someone to take on this job. It's also important to provide for alternate executors in case an executor dies or decides later not to act.

The choice of executor is yours. You should choose someone you can trust and, at the same time, someone who is capable of handling the job. Using a combination is common. For example, a spouse and/or children may be appointed as co-executors along with a trust company or professional advisor. Again, the more complex the estate, the more likely you should have somebody other than a family member as one of the co-executors.

Other Provisions: There are a number of other provisions (both personal and financial) that should be considered when drafting or revising a Will that include:

- § Appointment of a guardian for minor children.
- § Survivorship provisions that establish a presumed order of death in case you and your spouse or other beneficiary die in the same accident and there is no proof of which one died first. (This component in the Will should also include provisions that will serve to avoid the expense of double administration in case two parties, one inheriting from the other, die within a short time of each other.)
- § Appointment of a financial advisor to be consulted for continuity in managing the assets of the estate.
- § Appointment of trustee(s) when the Will contains a trust.
- § Establishment of trusts to hold specific or residuary bequests for certain beneficiaries who may need ongoing assistance in handling their bequests.
- § Provision for contingencies. (For example, you should select alternate beneficiaries in the event the expected beneficiary dies before you.)
- § Maintenance, disposition or distribution of a family business.

Disposition Instructions: Although it is possible to include instructions for the disposition of your body in your Will, it is also advisable to discuss and communicate your wishes to your executor and family. The reason for this is typically a Will is not read until after any disposition arrangements/services have occurred and therefore, your wishes may not be carried out.

Keep your Will in a safe place where your executor can get to it quickly and easily. The original Will might best be kept by your lawyer. Another copy can be kept in your safety deposit box but find out first what procedure would have to be followed to open the box after your death. Keep another copy with your financial records at home for easy reference. It might be a good idea to also summarize and discuss the important provisions of your Will with the people affected by it.

Witnesses: For a Will to be properly executed it must be executed by two witnesses in the presence of each other and the testator. The witnesses must be of legal age and must not be a beneficiary. The following people must never act as witnesses to a Will:

- (i) The spouse of the testator
- (ii) The child, grandchild, great-grandchild, etc. of the testator or the spouse of any of these persons
- (iii) Anyone who may possibly receive anything under the Will or the spouse of that person
- (iv) Anyone who may claim under any of the people above.

It must be stressed that a beneficiary under the Will, or their spouse, should not witness the Will as it would void their entitlement to any part of the estate.

Changing Your Will: Once you have a Will, you should review it every few years to make sure it continues to meet your goals. Substantial changes in your financial situation, such as a large inheritance, may necessitate changes in the provisions of your Will. Depending on the nature of the changes, a Codicil may be more appropriate. There may also be changes in tax laws that affect your Will. Thus, it's important to review it periodically, along with your other financial affairs. Specifically, alteration by a revised Will or Codicil may be required in the event of any of the following:

- 1) Change of name of anyone mentioned in the Will
- 2) Adoption of children
- 3) Change in your own marital status
- 4) If an executor dies or becomes unsuitable to act
- 5) Sale or alteration of any property mentioned
- 6) If one of the beneficiaries dies

In a well-drawn Will, however, the last two circumstances would be addressed via alternate executors and specifics of distribution in the event of the death of one or more of the beneficiaries.

Family Law Act: The Family Law Act (FLA), 1986, came into force on March 1, 1986 but could have retroactive effect back to June 4, 1985. This legislation (or other similar legislation such as the Matrimonial Property Act in BC) applies to many aspects of law and is of concern in several areas, only some of which are addressed here.

Basically, in the event of the death of a spouse, the value of the net family property may be equalized between the spouses, subject to certain conditions. The intent is to encourage and strengthen the role of the family, and to recognize the equal position of spouses. It ensures that at death the surviving spouse is not left in an insecure financial situation.

With an outright distribution, (everything passing to the survivor) there are few problems with this legislation. However, an application by the surviving spouse must be filed within six months from the time of death to show that the estate will be distributed under the Will, and not under the Family Law Act (or other similar legislation). Otherwise, the estate cannot be distributed under the Will prior to the six months expiry. When a Will establishes a spousal or other trust, there is always a possibility that a surviving spouse's claim for an equalization payment can upset the testator's intended distribution under the Will.

Minimizing Tax: We currently have no death or succession taxes in most Canadian jurisdictions; however, death may trigger some unforeseen tax liabilities. This stems from the fact that when you die, you are deemed to have disposed of all of your capital assets at fair market value (capital assets include such things as corporate bonds, land, shares in public and private companies and personal effects) the day before your death. This deemed disposition may produce capital gains or losses. If you own property that you have depreciated (i.e. a rental income property), your estate may also be liable for recapture. Since you are deemed to have disposed of your capital assets in the year of death, the capital gains or losses must be reported.

A few points should be kept in mind with regard to the potential tax on capital gains. If you leave capital property to your spouse, either directly or through a spousal trust, there may be a rollover for tax purposes. This means your spouse can take the property at your tax cost. Thus, the tax liability may not be payable until your spouse disposes of the property or dies.

While the spousal rollover provisions also apply to depreciable property (i.e. rental income property), there are special rules which can be used to reduce the amount of tax payable for depreciable property left to someone other than your spouse (i.e. other family members). RRSPs and other pension benefits can also be rolled over to a spouse with no tax consequences. However, it is important to ensure that the spouse be named as the beneficiary under these types of plans, in order to make sure that this rollover provision is available.

Non-capital assets (cash, Canada Savings Bonds, term deposits and life insurance proceeds) can be left to anyone with no tax consequences. This is because these types of assets represent income on which taxes have already been paid. In the case of life insurance, the proceeds are not taxable since the policy premiums are not deductible. In a similar manner, there are no taxes

payable as a result of any gains that may have taken place in the value of your principal residence, regardless of the intended beneficiary.

In summary then, the basic means of reducing taxes at time of death are:

- § Use the spousal rollover provisions for RRSPs and other pension benefits
- § Use the spousal rollover provisions for other capital assets
- § Take advantage of current tax-free capital gains on principal residence and tax free life insurance proceeds

In situations where an individual has accumulated substantial assets, some consideration should be given to a technique known as an "estate freeze". The purpose of an estate freeze is to have the future growth on capital assets taxed in the hands of the ultimate beneficiaries, as opposed to the deceased. However, planning of this nature is beyond the scope of this summary.

Since there are a number of tax deferral and tax savings options available, it is wise to give your executor the power to make various tax elections which may not be foreseeable at the time that your Will is drafted or revised. This can normally be accomplished without upsetting the integrity of your estate distribution plans at time of death.

In conclusion, planning in contemplation of making a Will is an important part of everyone's financial obligation to their heirs. By not taking the necessary steps to ensure that your estate is settled, at time of death, according to your wishes and in the most effective manner possible can mean the difference of leaving your heirs adequately provided for or leaving them in considerable difficulty, if not hardship.

This information summary is intended to increase the awareness of Estate Planning for the reader. You should consult your personal advisor for individual recommendations and other Estate Planning issues not covered in this summary.