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REFERENCE GUIDE

WEALTH PLANNING GROUP

WHY YOU NEED A WILL

Having a will drafted and executed is the best way to ensure your property is distributed according to your wishes after your death.

This reference guide provides some general information regarding wills including:

- some of the adverse consequences of not having a will
- making and changing a will
- how marriage, separation and divorce may affect an existing will
- tax planning using a will
- the important elements of a will.

Consequences of not having a will

A will is a legal expression of your wishes regarding the distribution of your property after death.

A person who dies without a will is referred to as intestate and the estate is referred to as an intestacy. In the absence of a will:

Your property will be distributed on your death according to the legislation governing intestacy in your province or territory, rather than according to your directions. Intestacy legislation is inflexible and only benefits certain family members in a prescribed order. As a result, other relatives, close friends or charitable organizations will not benefit, despite what you might have wished or the close relationship you may have had with them.

- You will have no control over who administers your estate. On your death, interested parties will have to apply to court, and the court will appoint the estate administrator(s) based on the information presented, taking into account the order of priority set out in the applicable legislation. This is especially significant when you consider:
    - These court proceedings could cause conflict within your family as well as unnecessary costs and delays.
    - The court may decide to appoint someone you would have opposed.
    - In some provinces, the court can only appoint a person who lives in the same province as you, which may exclude the people you would have preferred. This restriction does not apply to executors appointed in your will.
- The court may require the person appointed as administrator to post an administration bond. This is essentially an insurance policy to protect the estate and beneficiaries in case the administrator does not act appropriately. This expense, which would be payable by your estate, may be avoided by appointing an executor in your will.

- You lose the opportunity to establish testamentary trusts for your beneficiaries, which can be a valuable planning strategy in many situations. This means that each beneficiary would receive his or her share directly, which could result in unintended consequences that you may not have considered. For example:
    - The shares of minor beneficiaries may have to be held and managed on their behalf by the Public Guardian or Public Trustee, who would control all payments of income and capital to the beneficiary. Furthermore, once the beneficiaries become adults (at age 18 or 19 years depending on the province or territory), the entire inheritance would be paid directly to them, regardless of the amount or the beneficiary's ability to properly manage it at the time.
    - The share of an adult beneficiary living with a disability, such as someone who is mentally impaired, would be paid directly to the beneficiary. This could result in the beneficiary being ineligible to receive social assistance payments and related health care and other benefits until he or she depletes his or her inheritance.
    - The share for a beneficiary who has an addictions issue may indirectly cause harm to him or her as an outright gift.
    - The share for a beneficiary who is irresponsible with money may allow his or her inheritance to be squandered rather than benefitting him or her over the long-term.
- Other potential opportunities for tax planning and strategic planning are lost.

With proper planning and the preparation of a will, these adverse consequences could be avoided or minimized.

Making and changing a will

A will is only valid if it meets the requirements set out in the wills' legislation in the province or territory in which you live.

Generally, the formalities of making a will include:

- dating the will
- having the maker of the will (the testator) sign it in the presence of two adult witnesses, who must also sign in the presence of the testator and each other. The witnesses should not be beneficiaries or spouses of beneficiaries under the will, as this could void the gifts intended for them.
- only one copy of a will should be signed.

You must also have the appropriate mental capacity to make a will and must sign it willingly, without duress or improper influence by other individuals. Otherwise, the will could be subject to a legal challenge following your death and may be found to be invalid. For this reason, it is

important to have your will prepared while you are competent and capable, to ensure your beneficiaries will benefit as you intend.

Most provinces and territories also allow for the preparation of a holograph will - a document that is completely in the handwriting of the testator and is dated and signed by the testator. However, because of many drafting and other problems, holograph wills are often a source of conflict and litigation, so their use should be discouraged.

For similar reasons, the use of will kits is also not recommended.

Given the broad range of legal areas and issues that must be considered in planning and preparing a will, some of which are outlined in this Reference Guide, there is really no substitute for the professional legal advice of a lawyer whose practice is focused on will, estate and tax planning.

It is also generally recommended that you review your will every three to five years or more frequently if circumstances change.

How marriage, separation and divorce may affect an existing will

After you have prepared a will, it is important to ensure it remains valid and continues to reflect your personal circumstances.

MARRIAGE

In some provinces, when a person gets married, his or her existing will is *automatically revoked*, unless the will expressly contemplated the marriage. Note that in most jurisdictions in Canada, entering into a common law relationship does not affect an existing will.

SEPARATION OR DIVORCE

A separation or divorce does *not* revoke a will. Accordingly, if you separate or divorce, you should have a new will prepared as soon as possible to reflect your likely very different intentions regarding matters such as who should be your executor and how your estate is to be distributed.

Note however, that a divorce may have an effect on certain provisions in an existing will. Under the laws in most jurisdictions in Canada, if a former spouse is appointed as executor and/or named as a beneficiary under a will, these provisions are revoked on divorce and the will takes effect as if the former spouse had predeceased. As a result, the alternate provisions in the will regarding the executors and beneficiaries would apply. In some jurisdictions, this also applies on the termination of a common law relationship.

Notably, most jurisdictions have no similar provisions dealing with a will of a person who is separated but not divorced.

In general, it is advisable to have a new will prepared following a separate or divorce (or termination of a common law relationship) to revoke and replace any wills or codicils made during the marriage or relationship and ensure your current circumstances and intentions are reflected.

Tax planning with a will

The use of trusts created under the will, known as testamentary trusts, can provide some tax-planning opportunities.

The *Income Tax Act* provides that, on death, a person is deemed to have disposed of all of his or her capital property at the fair market value of the property. This can result in considerable taxes being payable.

However, through the use of a will, there are ways to reduce or defer these and other taxes in certain circumstances.

A deferral is available when assets are transferred to a surviving spouse or common-law partner, or to a qualifying spousal or common-law partner trust. A qualifying spousal or common-law partner trust is a specific type of testamentary trust. If the requirements under the tax laws are met, the taxes otherwise payable on capital gains at death can be deferred until the asset is disposed of or the surviving spouse or common-law partner dies. For further information regarding spousal trusts, please refer to our reference guide on spousal trusts.

Note that the rules with respect to the transfer of registered plans to a surviving spouse or common-law partner are quite different. In this case, a tax deferral is available only when a registered plan is transferred to a surviving spouse's registered plan and there is no tax deferral for a transfer of the registered plan to a spousal or common-law partner trust.

While tax changes in 2016 curtailed much of the tax planning opportunities associated with testamentary trusts, planning benefits exist in certain circumstances, for example where the income of the trust can be allocated to your beneficiary's children or other family members, to allow the income to be taxed in lower tax brackets.

Further information regarding testamentary trusts can be found in our reference guide on testamentary trusts.

Elements of a will

While a will is designed to reflect a testator's circumstances and intentions, there are a number of common elements in most wills:

- appointment of executors
- appointment of guardians if there are minor children
- provisions regarding retirement plans
- distribution of personal effects
- cash gifts to relatives, friends or charities, if applicable
- distribution of the balance of the estate (the residue)
- description of the powers provided to the executors and trustees.

Each of these elements is discussed below.

APPOINTMENT OF EXECUTORS

An important advantage of making a will is that it enables you to appoint the executor who will administer your estate.

See our reference guide on the duties of an executor.

When choosing an executor, you should consider certain factors, including:

- the complexity of your assets and your estate;
- how your estate is to be distributed. A will leaving only outright gifts to intended beneficiaries will generally be less complex to administer than an estate under which trusts are to be established for one or more beneficiaries;
- the age of the proposed executor. It is generally preferable to name an executor who is younger than you, as this makes it more likely that your executor will be available and able to act when and for as long as required;
- whether a proposed executor has the necessary skills and abilities to administer your estate effectively;
- where the proposed executor lives. Executors who do not reside in Canada may have to post a bond as security before being allowed to administer an estate and can create considerable complexity for the estate and for the beneficiaries since they may also cause the estate to be non-resident for tax purposes. Additionally, there can be significant tax ramifications imposed by the foreign country to your estate where the executor resides; and
- the relationship between your proposed executor and your beneficiaries.

You may decide to have two or more executors act together as co-executors. If so, the will should specify how decisions are to be made if the co-executors are not able to agree. If only two co-executors are named, then one of them could be given the deciding vote; if three are named, then decisions could be made by the majority.

As well, you should always name an alternate executor in your will to act in case your first choice dies or is otherwise unable or unwilling to act or continue to act.

Executors are entitled to be reasonably compensated by the estate for their care, time, and trouble in administering the estate. It is also possible to expressly set out the executor's compensation in your will and/or in a fee agreement (in most provinces). In some cases, the court will have to approve any compensation taken by an executor.

GUARDIANS

If you have minor children, your will should include a clause indicating your choice of guardians for the children.

It is important to be aware that a guardian appointment in a will is viewed only as an expression of your wishes and is not legally enforceable. This is because the Court maintains primary jurisdiction over decisions regarding the best interests of the child. However, the wishes of the parent can be persuasive.

RETIREMENT PLANS

Generally, the designation of beneficiaries of a retirement plan may be made in the retirement plan document itself. Such designations may also be made in a will.

A tax deferral is available where a retirement plan is designated to a surviving spouse. (There is also a limited deferral available where a retirement plan is designated to a financially dependent child or a grandchild.)

PERSONAL EFFECTS

To avoid or minimize potential disputes among family members or others after your death, it is both sensible and advisable to leave instructions or at least guidelines regarding the distribution of your personal and household effects. When considering this matter, it is important to keep in mind that disagreements could arise among beneficiaries not only regarding valuable items such as jewelry, artwork, vehicles or antiques, but also about items of sentimental value or even clothing, household furnishings and the like.

One way to deal with the distribution of personal and household items is by setting out specific gifts in your will or in a separate schedule that is made a part of your will. However, this means that any future changes would have to be made by amending the will.

Many testators simply prepare a separate list or memorandum dealing with their personal effects, rather than including specific provisions directly in the will. While such a memorandum is not legally enforceable, it is generally expected that the executors would follow the testator's wishes, and beneficiaries will not object. Using a memorandum such as this can be useful since it would allow the testator the flexibility to make changes from time to time without formally amending the will.

Another possible way to deal with personal and other items is to include in your will a mechanism for how items are to be divided among intended beneficiaries.

SPECIFIC CASH GIFTS

Gifts to individuals or to charities can also be made in your will. When considering leaving gifts of cash (sometimes referred to as bequests), it is important to keep in mind that substantial cash gifts will reduce the amount that will be available to be distributed to the beneficiaries of the residue of your estate. Accordingly, you should ensure that the total amount of the bequests is appropriate.

Where gifts to registered charities are made by will, a charitable donation tax credit can be claimed to offset the testator's income taxes in the year of death. Any excess credit may also be applied to reduce the taxes for the year prior to death. Further information about charitable giving can be found in our reference guide on charitable giving.

DISTRIBUTION OF THE RESIDUE

One of the most important provisions in a will deals with the distribution of the residue of the testator's estate. The residue is the amount of the estate that remains after payment of all debts, taxes, cash gifts, and other specific gifts.

Where a testator has a spouse (or common-law partner), children, siblings or other family members, he or she needs to decide how to provide for them.

For example, when providing for a surviving spouse or common-law partner, the testator might consider the use of a spousal trust instead of an outright gift. The decision about whether to use a spousal trust depends on several factors, including the competence of the surviving spouse and marital or family property issues. It is also important to be aware that leaving an interest in a spousal trust may not fully satisfy legal obligations to provide for a spouse or common-law partner under marital or family property laws, so a spousal or cohabitation agreement may be required.

When providing for children or other family members, the testator might consider issues such as whether each child or family member should be treated equally, whether there should be any special provisions made for any of them, and whether testamentary trusts should be used instead of outright gifts. Testamentary trusts can provide the ability to preserve and protect an inheritance (whether from a beneficiary's own spending or from claims by others such as creditors or a former spouse or common-law partner of a beneficiary).

Where a testator is married or has a common-law partner, and also has a child or children from a previous relationship, making a will is particularly important to ensure that the testator's intentions with respect to providing for these individuals are clearly set out. Otherwise, the intestacy laws will govern the distribution, which may result in the testator's intended beneficiaries being excluded or not benefiting as intended.

In making a will, a testator should also decide who should benefit if there are no surviving family members.

A will is still important even where a testator has no family members or does not wish to provide for family members, since a will enables the testator to determine how and to whom the residue of his or her estate is to be distributed. This may include charitable organizations, for example. As noted earlier, without a will, the estate would be distributed to relatives of the testator based on the applicable intestacy legislation, despite what the testator might have wished.

In making decisions regarding the distribution of your estate, tax-planning opportunities should also be considered, as discussed earlier. In addition, it is often desirable to consider ways to minimize the potential exposure of estate assets or inheritances to creditors and to marital or family property claims.

PROTECTION OF BENEFICIARIES' MARITAL OR FAMILY PROPERTY

Including a provision in your will stating that all gifts to a beneficiary under the will (and income and gains arising from such gifts) are intended to benefit only the beneficiary and not the spouse or common-law partner of that beneficiary can help to ensure that the gift does not form part of the beneficiary's assets on the breakdown of the marriage or common-law relationship.

POWERS FOR THE TRUSTEES

Giving the executors and trustees a broad range of powers in your will ensures that your executors and trustees have the appropriate authority and flexibility to administer your estate effectively.

In dealing with investments, it is advisable to empower executors and trustees to make whatever investments they consider prudent, including using mutual funds and pooled accounts. The executors and trustees should also be authorized to delegate investment decisions to a discretionary money manager.

Conclusion

As outlined above, there are numerous compelling reasons to have a will prepared.

A properly drafted will is a fundamental component of an estate plan and will give you the peace of mind that comes with knowing your affairs are in order.

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For more information, we encourage you to speak to your advisor or visit us at assante.com