from ***Every Canadian's Guide to the Law*** *(HarperCollins 2005)*

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Planning for a Will

A last will and testament, usually called simply a will, is the document of instructions that a mentally competent person (called a "testator") signs to permit a trusted person (executor, sometimes called trustee or estate trustee) or persons to dispose of property in a specified manner on his or her death.

Planning carefully for a will ensures that an individual's wishes are respected after death and avoids leaving a mess for the family to sort out. Those planning their will need to think about who will need protection from the effect of their death; to whom they should leave their property; who should care for their children; and whom they should appoint to carry out their wishes.

Before meeting with a lawyer to give instructions, a person planning a will may find these guidelines useful.

Preparation

The person's preliminary preparations will save time and enable a lawyer to give informed advice, especially if the situation is complicated or estate planning is involved. Testators should take a list of questions to be discussed; a list of assets, such as property, investments, RRSPs, pensions, insurance policies and bank accounts; a list of debts; and copies of relevant documents such as insurance policies and RRSP statements. Documents can help the lawyer identify property and verify ownership. For example, if both spouses are joint tenants, one spouse cannot bequeath the property to someone else in the will; ownership will automatically go to the surviving joint tenant.

Testators should also bring information on beneficiary designations on life insurance and RRSPs. They may name either their estate or a specific person; when a person is named, the proceeds pass "outside" the will and are therefore not governed by the will. A lawyer should be consulted about the advantages and disadvantages in a particular situation. For example, if property does not pass through a person's estate, the court processing fees may be lower because they are normally based on the value of the assets

that are governed by the will. As well, creditors may not be able to touch assets that pass outside the estate. Therefore, if a testator has significant debt and worries about leaving his dependants destitute, he may wish to name the beneficiaries of his life insurance policies and RRSPs outside his will.

Although there are no estate or succession duties in Canada at present, the impact of large hikes in court processing (probate) fees can be significant to an estate. In 1998 the Supreme Court of Canada (*Re Eurig*), held Ontario's probate fee was unconstitutional as it was a tax in disguise. The government was given 6 months to pass necessary laws if they wished to validate the charge. Ontario and other provinces, not wishing to lose this source of revenue, not only validated future charges, they back-dated the law to try to avoid claims for reimbursement for charges from previous **years.** With all the negative publicity on probate fees, avoidance plans have become very popular.

For example, the testator may be encouraged to hold property in joint tenancy with right of survivorship. Property owned in this manner—with the other spouse or with third parties—passes outside the will and does not normally form part of the estate (except in exceptional circumstances). Think this through carefully and with legal advice. In a 1989 Ontario case, a husband died without a will, holding three properties jointly with third parties (various members of his family). The wife wanted a share of these properties as his widow, but since they passed to the joint owners by survivorship, they did not form part of his estate, so she had no claim to them. If a testator decides to hold their home jointly with an adult child and later wants to sell, rent or mortgage it, they will need that child's consent. Similarly, if savings for several children are held in a joint account with one child to avoid probate fees, there should be documentation to enforce that obligation on the testator's death.

Testators should also bring their most recent tax return, which is often helpful, especially if advice on tax planning is required. There may be a capital gains tax at death on assets that are worth more than their cost, except for a principal residence.

Marriage contracts or separation agreements are also useful because they may contain provisions binding on a spouse's estate. If the testator is preparing a will before marriage, the will must say so, or it may become invalid on a subsequent marriage. (Wills may lose their validity on marriage or divorce, depending on the jurisdiction where the testator resides.)

A list is needed of the full names and addresses of all beneficiaries, executors and guardians, as well as a list of any charities to receive a legacy, noting any specific purpose intended for the bequest. A charity may also be named in the event that none of the other beneficiaries survive to receive a share of the estate. A lawyer may need to consult with the particular charity to ensure that the terms of the legacy are appropriate. There may also be tax considerations to discuss.

Instructions about desired funeral arrangements and organ donations, if any, should be prepared before the meeting. Even if testators include these instructions in their will, they would be wise to tell their next of kin ahead of time, as executors may not have access to the will immediately.

Mutual wills impose enforceable obligations on a surviving spouse that must be taken into account in any future estate planning. A B.C. couple who held all their property jointly made mutual wills to donate their life savings to a scholarship at the University of Manitoba. The surviving husband re-wrote his will after his wife's death and decided not to follow through on this provision. Instead, he left only one quarter of their $1.7 million dollar estate to the university and the rest to relatives. A trial judge dismissed the university's claim to the entire estate, reasoning the husband was not bound by the mutual wills as he received no benefit from his wife's will. The B.C. Court of Appeal disagreed, stating that revoking a mutual will after one party has died is tantamount to fraud.

Finally, they should bring a list of any specific personal possessions, such as family mementos or heirlooms, to be left to certain beneficiaries. In some circumstances, a lawyer may advise the client to make a reference in the will to a letter that will inform the executors of such specific bequests. In this way, if the maker of a will has a change of mind, or if a specific personal possession no longer exists, the list may be changed without changing the will itself.

Executor Or Executors

People making a will should choose an executor or executors they trust. Usually family members are chosen; often, when the estate is straightforward and the assets will be immediately distributed on death, one of the main beneficiaries can act as executor. If the estate is complex, the will could include instructions that permit the executor to retain the assistance of a financial advisor or other professional. Alternatively, the person making the will could consider appointing a trust company as executor, to benefit from its professional expertise.

Perhaps the most effective solution for a person with a complex estate is to have two executors, one a professional and one a relative or friend. Be aware, however, that unless a will provides otherwise, all trustees, including professionals, must act unanimously. It is always wise to ask these people if they are prepared to act; otherwise, they may refuse when the time comes and someone else would have to be appointed.

Executor's compensation may be a factor in the choice. An executor is entitled to be paid by the estate for services rendered, which can be substantial. Family members (who may also be beneficiaries) often waive payment or reduce their fee, but the customary unofficial compensation in Ontario, for example, has been 2.5 percent on capital receipts and 2.5 percent on capital payments, 2.5 percent on income received and 2.5 percent on payments made, as well as a management fee of .4 percent per year on the average gross value of the estate. Although it has been approximately 25 years since the Supreme Court of Canada provided any guidance on the matter of what was a fair and reasonable allowance for executor's compensation, the Ontario Court of Appeal recently considered 3 cases. Ultimately the Court up-held the unofficial "tariff" approach, unless there were special circumstances or provisions in a will specifically dealing with this compensation. A trust company, on the other hand, charges according to its own fee schedule, which is frequently higher.

It is wise to name alternate executors in case one or more predecease the maker of the will or are unable or unwilling to carry out their duties.

Most wills give executors complete discretion to do the job. However, if the will has no discretionary clause, the general law will apply and require the executor to make relatively conservative investments. Recently Ontario, B.C., Quebec, and Newfoundland amended their legislation to replace previously limited investment powers with a less restrictive "prudent investor" standard of care. Alberta's Law Reform Commission has also recommended this. While this more relaxed standard of care has yet to be interpreted by courts, it may significantly broaden not only the investment powers but also the level of competence to which executors and trustees will be held.

An executor or trustee is responsible for arranging the burial, gathering assets and investments, paying debts and taxes, and distributing property according to the will. If there are underage children and a trust has been established in the will, then the executor may be charged with the responsibility of managing the

trust funds. An executor has the authority to act from the moment of death.

Beneficiaries

There are no restrictions on the choice or number of beneficiaries. If a person has several, it may be advisable to simply bequeath equal shares of the estate to "issue," a statement that would provide for children and, if the children predecease the testator, grandchildren.

The testator should decide on alternative beneficiaries in case any of those named predecease him or her. He or she should also remember that a failure to adequately provide for former spouses, stepchildren or children born out of wedlock, as stipulated in a separation agreement or marriage contract, could trigger a claim against the estate.

If any beneficiaries named are minors at the time of the testator's death, they become entitled to the bequest at the age of majority in their province, unless a later age is stipulated in the will itself.

If beneficiaries are minors, mentally disabled or financially irresponsible, a trust fund may be established by will, coming into effect on death, to provide them with investment income while preserving the capital.

If a husband and wife who left their estates to each other should die simultaneously, or in circumstances where it is impossible to determine who died first, the law in some provinces stipulates how their property is to be divided and whose will takes precedence. For example, Ontario law provides that when two or more people die simultaneously, the property of each person is distributed as if each person had survived the others. Since the law is not that clear in every jurisdiction, testators should stipulate in a will what they want to happen if they should die at the same time as any of their beneficiaries. A common provision in a will states that a person inherits only if he or she survives the testator by 30 days.

Beneficiaries may include a beloved pet. The owner may want to consider not only naming someone to care for the animal, but also providing financial assistance for this care. Local humane societies may be able to help. The Toronto Humane Society, for example, provides a "stewardship program" in exchange for a charitable bequest. The organization matches a pet with a suitable adopting

family, conducts an annual check on the pet's welfare and provides free medical treatment.

Certain laws can interfere with intended distribution under a will. For example, matrimonial property legislation in a province or territory could prevent a person from leaving less to his or her spouse than that spouse is entitled to by law.

Dependent Children

If children are under the age of majority, the testator should choose someone who is willing to act as guardian in case both parents die before the children are grown. One person may be appointed to be both personal and financial guardian, or separate individuals may be chosen for these different roles. For example, the executor could be the financial guardian, with someone else raising the children.

The parent writing the will must leave the trustee instructions about the exercise of discretion in managing the funds on behalf of the children. Directions should state whether to provide the guardian with only the investment income, or to provide some of the capital as well, if the children need it for any reason or for specified reasons such as health and education needs.

There may be other dependants, such as parents or siblings, who relied on the testator. Provision should be made for them as well.

Execution Of The Will

Once the will is prepared, it should be signed and witnessed at the lawyer's office to ensure that it is executed in accordance with rules established by law and is therefore valid and enforceable. The document must have two witnesses, present at the same time, who watch the testator execute the will and watch each other witness it.

A careful lawyer will prepare and have executed an affidavit of execution to be signed by one of the witnesses, confirming due execution. If the affidavit is signed when the will is executed, the trustee will not need to go hunting for witnesses when the testator dies, unless the will has been altered.

A beneficiary cannot be a witness. If a beneficiary witnesses a will, he or she is thereby prevented from receiving anything from the will. A person who is asked to act as a witness should refuse if he is a named or possible beneficiary. In fact, independent, unrelated

witnesses can help protect against claims of undue influence in situations where one person or relative is favoured over other family members. If necessary, the witnesses can take notes about the mental capability of the person writing the will. They can also engage the testator in some conversation to satisfy themselves that he or she is signing voluntarily, and understands the will's purpose. To prevent other questions being raised about undue influence, the person who is to benefit from the will should not pass along instructions for the will or accompany the testator to the lawyer when the instructions are given or the will executed. Certainly, the beneficiary should not be present in the same room when the will is executed.

As there is only one original will, the testator should decide where it will be kept once it is executed.

Reviewing And Updating A Will

Testators should keep a copy of the will accessible and review it every two to five years to ensure that it is still current. With this copy, they should keep a current list of names, addresses and relevant account numbers with respect to bank accounts, life insurance policies, broker or investment dealers, employer pension or other benefits and RRSPs, as well as the amount and whereabouts of other investments such as Canada Savings Bonds and GICs. The location of tax returns and the original will's location can also be noted on this list.

If a person remarries after executing a will, the will is automatically invalid in all provinces and territories (except Quebec, where the law is silent on the effect of marriage), unless the will clearly says that it was made in contemplation of the marriage.

On separation or divorce, testators should consult a lawyer about changing or making a will. Prince Edward Island, Ontario, Quebec, Manitoba and Saskatchewan presume that a divorce invalidates a bequest to the divorced spouse, unless the will specifically states otherwise. In B.C., legislation cancels a bequest to a spouse where a judicial separation has been ordered. But no change in the deceased's circumstances other than remarriage or divorce will raise the presumption that he or she intended to change the will.

C Linda Silver Dranoff 2005