THE BASICS OF PLANNING YOUR WILL

A. Overview.

A Will is the document by which you tell your heirs of your wishes for the disposal of your property (your "estate") after you die. While you generally have a wide degree of freedom as to how you dispose of your estate, in most places the law requires that you make reasonable provision for your spouse and children. You may also choose to give charitable bequests. Often people give specific items that are sentimental to named people or specific sums of money.

If you have a Will, distribution of your property is ordered under the terms of your Will. If you have no Will, your property will be distributed according to the laws of intestacy. (a person who dies *with* a Will is said to have died "testate," and is called the "Testator." A person who dies without a Will is said to have died "intestate.")

What is included in your estate? All solely owned property, plus any and all other property interests that do not pass to somebody else by operation of law. (eg., if a house is held jointly with right of survivorship ("joint tenancy"), the survivor gets 100% ownership at the very moment of the other owner's death. The house would not be part of the testator's estate.) Also, the proceeds of life insurance or registered investments (eg., RRSPs) where the policy or investment has a named beneficiary do not form part of your estate but are paid directly to your surviving named beneficiary.

B. Do I need a Will?

Every adult person will benefit from having in place a valid last Will. If you have minor children, you most certainly will wish to have a Will. If not, probably so. Remember that the laws of intestacy may differ greatly from your own wishes and may deprive your family of your estate assets. You also lose control over the settlement of your estate and may create additional costs by requiring ongoing Court proceedings. If your intentions differs from intestacy law, you had better have a Will. Please avoid the following excuses:

"Everybody already knows who's supposed to get what."

"In my desk drawer there's a list of my possessions, and the persons to whom they should be given."

"I don't have much. The kids can just come in and divide it among themselves however they decide."

"I put name tags on the bottom of every nick-knack and piece of furniture, so

they'll know who gets it."

"Last year I put all my money in a joint account with my oldest daughter. After I die, she knows to split it three ways with her brothers."

All the common situations above (and any others you might add) are prescriptions for trouble, for various reasons. There is simply no way for anyone to enforce your intended plan if it is not contained in a Will. Families can be forever torn apart, jockeying for position over the distribution of even small amounts of property.

Many people acknowledge the pitfalls of not having a Will. But *their* kids, so they say, would respect the parents' wishes and never stoop to fighting over the estate. Even if these people are right, what about the kids' spouses? In-laws can be a problem. Whether it is well intentioned or not, meddling is a specialty with some of these people. Unless you spell out your wishes in a Will, the door may be open, for example, for your son-in-law to have his say about things, or to pressure your daughter. Never mind that the issue is absolutely none of his business!

Do you care who your *personal representative* will be? Somebody must be given responsibility and the necessary authority to preserve, gather and distribute your assets in accordance with the instructions provided by your Will.

If you die intestate, the court will choose the person responsible for wrapping up your affairs. This person is called an *Administrator*, and might not be the person you would have wanted. Sometimes, sadly, family bickering develops over who should be appointed by the judge. Sometimes, a neutral person is appointed, and must be paid with estate funds. So, one important function of the Will is to name this person, who in Ontario is called the *Estate Trustee* (formerly the "Executor") of the Will.

The following is an excerpt from the *Succession Law Reform Act (Ontario)* that describes how property is distributed in the case of an intestacy. This can give an idea of how these rules might apply in different circumstances. Note that the "preferential share" referred to in the Act is set from time to time by Regulation and is currently set at $200,000.00. Therefore, it can be seen that for estates with a value of more than $200,000.00 a surviving spouse is not automatically entitled to the whole estate but must share with children or other issue:

PART II
INTESTATE SUCCESSION

Intestacy where spouse and no issue

44. Where a person dies intestate in respect of property and is survived by a spouse and not survived by issue, the spouse is entitled to the property absolutely. R.S.O. 1990, c. S.26, s. 44.

Preferential share of spouse

45. (1) Subject to subsection (3), where a person dies intestate in respect of property having a net value of not more than the preferential share and is survived by a spouse and issue, the spouse is entitled to the property absolutely.

Same

(2) Subject to subsection (3), where a person dies intestate in respect of property having a net value of more than the preferential share and is survived by a spouse and issue, the spouse is entitled to the preferential share absolutely.

Same

(3) Despite subsection (1), where a person dies testate as to some property and intestate as to other property and is survived by a spouse and issue, and,

(a) where the spouse is entitled under the will to nothing or to property having a net value of less than the preferential share, the spouse is entitled out of the intestate property to the amount by which the preferential share exceeds the net value of the property, if any, to which the spouse is entitled under the will;

(b) where the spouse is entitled under the will to property having a net value of more than the preferential share, subsections (1) and (2) do not apply. 1994, c. 27, s. 63 (1).

Definition

(4) In this section,

"net value" means the value of the property after payment of the charges thereon and the debts, funeral expenses and expenses of administration, including succession duty. R.S.O. 1990, c. S.26, s. 45 (4).

Preferential share

(5) The preferential share is the amount prescribed by a regulation made under subsection (6).

Regulation

(6) The Lieutenant Governor in Council may, by regulation, prescribe the amount of the preferential share. 1994, c. 27, s. 63 (2).

Residue: spouse and one child

46. (1) Where a person dies intestate in respect of property and leaves a spouse and one child, the spouse is entitled to one-half of the residue of the property after payment under section 45, if any.

Idem: spouse and two or more children

(2) Where a person dies intestate in respect of property and leaves a spouse and more than one child, the spouse is entitled to one-third of the residue of the property after payment under section 45, if any.

Idem: issue of predeceased children

(3) Where a child has died leaving issue living at the date of the intestate's death, the spouse's share shall be the same as if the child had been living at that date. R.S.O. 1990, c. S.26, s. 46.

Issue

47. (1) Subject to subsection (2), where a person dies intestate in respect of property and leaves issue surviving him or her, the property shall be distributed, subject to the rights of the spouse, if any, equally among his or her issue who are of the nearest degree in which there are issue surviving him or her.

Share of predeceasing issue

(2) Where any issue of the degree entitled under subsection (1) has predeceased the intestate, the share of such issue shall be distributed among his or her issue in the manner set out in subsection (1) and the share devolving upon any issue of that and subsequent degrees who predecease the intestate shall be similarly distributed.

Parents

(3) Where a person dies intestate in respect of property and leaves no spouse or issue, the property shall be distributed between the parents of the deceased equally or, where there is only one parent surviving the deceased, to that parent absolutely.

Brothers and sisters

(4) Where a person dies intestate in respect of property and there is no surviving spouse, issue or parent, the property shall be distributed among the surviving brothers and sisters of the intestate equally, and if any brother or sister predeceases the intestate, the share of the deceased brother or sister shall be distributed among his or her children equally.

Nephews and nieces

(5) Where a person dies intestate in respect of property and there is no surviving spouse, issue, parent, brother or sister, the property shall be distributed among the nephews and nieces of the intestate equally without representation.

Next of kin

(6) Where a person dies intestate in respect of property and there is no surviving spouse, issue, parent, brother, sister, nephew or niece, the property shall be distributed among the next of kin of equal degree of consanguinity to the intestate equally without representation.

Escheat

(7) Where a person dies intestate in respect of property and there is no surviving spouse, issue, parent, brother, sister, nephew, niece or next of kin, the property becomes the property of the Crown, and the *Escheats Act* applies.

Degrees of kindred

(8) For the purposes of subsection (6), degrees of kindred shall be computed by counting upward from the deceased to the nearest common ancestor and then downward to the relative, and the kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree.

Descendants conceived but unborn

(9) For the purposes of this section, descendants and relatives of the deceased conceived before and born alive after the death of the deceased shall inherit as if they had been born in the lifetime of the deceased and had survived him or her. R.S.O. 1990, c. S.26, s. 47.

When there are minor children, a Will should always be used to name a guardian(s). Of course, if there is a surviving parent, he/she automatically is guardian, if living in the same household. In a divorce situation, the parent with legal custody of the child(ren) should designate a guardian. Understand, however, that if somebody besides the other parent is named, this designation might not be binding; when a custodial parent dies, the non-custodial parent always has priority in seeking guardianship and custody, unless unfit.

Be aware, too, that the court will probably have to approve the proposed guardian eventually, even if named in a Will (unless he/she is the surviving parent, in the same household). The purpose of the Will in this regard, though, is to guide the court, and to avoid family arguments over who is better qualified.

If significant assets are to be set aside for the benefit of your minor children, a Trust is the way to go. This will ensure that funds are held and managed for the benefit of minor children with the capital and income available to meet their needs while they are still minors. An important consideration when structuring a Trust for minor children will be setting the age at which the Trust is wound up and the funds distributed to the children. There are various ways to do this and it may be that such provisions can be overturned by the children. However, parents often wish to ensure that some measure of control is exercised past the usual age of 18 years.

C. The simple, “reciprocal” or “mirror” Will.

This is what most married couples first think of. Each spouse's Will is a "mirror image" of the other. If the nature of your estate is such that tax considerations do not come into play (which tax considerations must be addressed separately), this may be all you need.

This kind of Will provides as follows:

1. Naming of Estate Trustee - usually the spouse, but there should be an alternate, too.

2. Payment of debts and taxes – this will be a mandatory obligation of the Estate Trustee.

3. Specific bequests of tangible property, e.g., heirlooms, jewellery, other valuables.

4. Disposition of the remainder (“residue”) of property.

This consists of everything that remains after steps 1 through 3, above. Usually, people want it this way: "If I die first, everything goes to my spouse. If my spouse has already died, all to the children, in equal shares, *per stirpes*." (Latin for, "If a child dies before the parent, that child’s children split the share.") The Wills are mirror-images of each other.

A question of many parents with young children is: "What happens if we both die at once?" The answer, of course, depends on whether any planning has been done. The most important planning, however, is practical, not legal. First, have you found a capable and willing guardian for the children? Secondly, are funds available to support them? Without a good answer to both questions, legal advice is not going to help much.

Most simple Wills prepared for parents have a clause to deal with the "common disaster" situation. Each spouse's Will says, in effect, “All my property to my spouse, if he/she survives me by at least 30 days. Otherwise, all to the children.” (There's nothing special about using "30 days,"; this simply avoids a “double probate” situation.)

If the children are minors, the gift to them will be held in a Trust on their behalf and the Estate Trustees will be directed to manage these Trusts with specific instructions as to how to carry out this management responsibility, eg., can funds held in trust be used for the children’s benefit? Are there any restrictions on how or for what purposes funds can be used? What investment decisions and investment criteria should the Estate Trustee be subject to? Do all the children receive their trust funds at the same time or as each reaches a certain age? At what age are the Trusts wrapped up and the funds distributed? These are all questions you can decide in the drafting of your Will.

Another issue that arises in passing estates to minor children is what happens if one or more children of the children do not survive their parents or do not live until the age at which the Trust is to be wrapped up. The Will should specify whether this gift then goes to the child’s children, their surviving spouse or to the other surviving children. Furthermore, the Will can then go on to describe what happens if, for example, there are no surviving children. An alternate gift can then be made to surviving parents, siblings or other relatives in whatever shares may be desired.

There are many special situations not addressed by this scenario such as, for example, children from different marriages, disabled or dependent children with special needs or “spendthrift” children. In each of these cases, further planning and careful drafting will be required.

D. Tax Planning Considerations

The following section explains in very rudimentary terms some planning considerations that may affect the drafting of Wills based upon the *Income Tax Act (Canada)*. Readers are cautioned that this commentary does not constitute legal, accounting or other advice and should not be relied upon unless specifice advice is obtained concerning your own particular individual circumstances.

Spouse Trust

Because of the rule that there is generally a “rollover” for property passing to a spouse or qualifying *spouse trust*, this particular type of trust assumes a substantial degree of importance in Will and estate planning. A properly drafted spouse trust will help to protect assets that are set aside in the trust. An improperly drafted spouse trust can create numerous problems.

Spouse trusts may be used either for “inter vivos” (lifetime) gifts, or “testamentary” (established under a Will) bequests. In order to qualify for “rollover” treatment, the spouse trust must provide that:

- the spouse is entitled to receive all of the income of the trust that arises before the spouse's death; and

- no person except the spouse may, before the spouse's death, receive or otherwise obtain the use of any of the income or capital of the trust.

Several comments can be made in respect of these requirements:

(1) As noted above, the spouse must be entitled to obtain all of the income of the trust during his or her lifetime. However, if the trust is combined with a corporation or other vehicle held by the trust, it is possible to effectively control the amount of income received by the trust and, consequently, to which the spouse is entitled. For example, where a corporation is held by a trust, the dividends paid on the shares may be “regulated” by the directors of the corporation.

(2) The requirement that no other person can receive or obtain the use of capital does not mean that the spouse is entitled to receive the capital. In other words, as long as no one else may receive or obtain the use of the capital, the trust will not be disqualified as a spouse trust.

(3) In respect of the “use of capital” requirement, careful drafting is required in order to ensure that this requirement is not violated. For example, a loan to a relative, even at commercial interest rates, might be interpreted as allowing someone other than the spouse to obtain the use of capital. Provisions in a trust that allowed this could throw the trust “offside” (at least, technically), especially if such loans are actually made.

(4) Note, however, that the Act and related provisions allow a “tainted” spouse trust to be purified, in respect of particular testamentary debts. Certain debts that would otherwise taint the trust — because someone other than the spouse is entitled to the trust's capital — may be satisfied by specified assets, with the remaining assets qualifying for “rollover” treatment.

Trusts for Minors

Instead of leaving assets outright to beneficiaries, taxpayers should consider leaving such assets in one or more “testamentary” trusts. The advantage is that income on assets left in a trust established under a will is eligible for the low marginal rate of tax that applies to ordinary individuals. Thus, by establishing a number of testamentary trusts, one can effectively multiply low tax brackets.

Even if the terms of the trust allow the beneficiary to actually be “paid out” income (or capital gains) of the trust, it is still possible to have such income taxed in the trust, even though it is distributed — as long as the income-earning assets themselves remain in the trust. (If beneficiaries need money from the estate, the estate should consider lending it to them; if the beneficiaries can pay back the estate, the ability to take advantage of low tax rates will be restored.)

There is, however, an anti-avoidance rule in the Act that permits the CCRA to treat a number of trusts established under a will as a single trust if the various trusts are set up on the income accruing to the same beneficiary, or “group or class” of beneficiaries. However, this rule seems to be imposed infrequently.

E. Establishing Mental Capacity

In order to be valid, the Will maker must have "testamentary capacity." This requires that the Testator be of "sound mind," which means he/she must be aware of the nature and extent of his property and the nature of his/her family or other beneficiaries. Additionally, the Testator must be aware that by signing the Will, he/she is making a final disposition of his/her property.

It is significant to point out that the Testator is not required to be mentally "sharp" or be reasonable or fair. He must only know what he is doing, to the extent described above. If he does, the law will respect whatever disposition he cares to make, subject to lawful claims that must be paid first, and the rights, if any, of the surviving spouse.

Generally, the validity of Wills cannot be attacked in court by reason that beneficiaries or potential beneficiaries do not like or do not agree with the provisions of the Will. There must be a claim that the Testator was mentally weak and under "undue influence" or duress from another party. These claims can be very difficult to prove and generally a court will uphold Wills that appear to be valid. Never mind if the Testator had been acting quite "funny" in his last months during which the Will was written. Never mind if the Will is unfair and one child is favored over the rest. By themselves, those kinds of facts would virtually never be enough to convince a judge to declare a Will invalid. (If a Will *is* thrown out, the estate is handled as if there had never been one to begin with.)

Attorneys are frequently consulted by adult children, concerned because their parents have no Will. Often, the mental condition of the parent in question is deteriorating rapidly, but there are still "good days." It is perfectly proper for the Testator to execute a Will during such a "lucid interval," if testamentary capacity truly exists at the moment of signing.

F. Signing the Will

If typed, the Will must be signed in the presence of two witnesses, who must sign in the presence of the Testator and each other. The witnesses cannot be beneficiaries under the Will, or the gift in their favour will be invalid. The witnesses must be able to declare that all of them were present with the Testator and each other, that the Testator is of sound mind, knows he is signing his Will, and has asked the witnesses to so attest. No witnesses would then have to appear in court to verify the document.

In Ontario, *holographic* Wills - in which the Will must be *entirely* written in the handwriting of the Testator – are valid with no witnesses required. However, there are many other jurisdictions in which such wills are not considered vaild.

“Codicils” are amendments to an earlier Will. No written additions or changes should ever be made on the original document. Instead, a separate page should be prepared, referring specifically to the original Will, and executed with the same formalities required of the original Will. Keep the codicil with the Will, and keep it simple. If the desired changes are at all complicated, subject to more than one interpretation, or potentially in conflict with other provisions of the Will, it is better to just start from scratch and do another Will. (Remember to destroy the old one to avoid any confusion.)

Read your Will before signing. It is important to remember that your Will is a particularly personal and individual document and should not be based on “form” documents, stationary store pre-printed forms or someone else’s Will.