

Wills and Power of Attorney – What is it? And why do I need it?

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If a man dies and leaves his estate in an uncertain condition, the lawyers become his heir

- Edgar Watson Howe

An astounding about fifty percent (50%) of Canada's adult population does not have a will. Those who do not have great wealth believe a will is not necessary. Others avoid the topic is too dreadful. Then there are the numerous procrastinators who will get around to it some day!

FIVE GOOD REASONS

If you have not prepared your will (or it is out of date) here are five good reasons for making your eternal statement.

- 1) **Your Family**- If you die without a will, your property will be divided according to a legal formula. The outcome may have nothing to do with your family's needs or your wishes.
- 2) **Your Children** – The court will appoint a guardian to care for your children, if you do not.
- 3) **Costly Delays** – Your assets are immediately frozen if you die without a will. Before anything else can happen, the court must appoint an administrator for your estate. The result is delays and extra legal costs.
- 4) **Taxes** – To avoid the potentially heavy tax burden of death,

proper estate planning, including a will, is essential.

- 5) **Peace of Mind** – When you have a will you can feel confident your affairs are in order and your family will be protected and will not endure needless work and expense following your death.

TYPE OF WILL

You should consider retaining a lawyer to draft your will. Although you can write your own, if you want to be sure your instructions are clear, it is best to get the advice of someone with the expertise. In addition, if the language is vague or the technical requirements of the law are not met, your homemade will may not stand up to a court challenge. The same caveat applies to do-it yourself kits.

THE DETAILS

Before meeting with a lawyer, you should prepare a list of what you own and what you owe. There are also a number of questions; you should give some advance thought to. Here are few of the illustrations:

- Who are the people that depend upon on me for financial support?
- Do I have certain possessions that I want to go to particular people?

- Whom do I want to look after my children?
- Who is going to be the executor of my will?
- At what age should my children have control of their inheritance?

Although there is a lot to think about and many decisions to make, a lawyer will guide you through the process.

REVIEWING YOUR WILL

Once you have a will, you should review it periodically, every three to five years. Changes in your financial and family situations may require revisions. For instance, marriage voids a will but separation does not. If you divorce, your will is read as if your ex-spouse predeceased you. Although a move from one province to another does not nullify a will, practical changes, such as the executor, may be necessary.

Preparing a will should rank high among your financial and family priorities. For assistance, please contact me.

Useful Tip: Make a detailed list of all your investments, assets and debts as well as their location and contact name. ATTACH TO YOUR WILL

POWER OF ATTORNEY

What if you are involved in a serious accident that leaves you in a coma? Or you are disabled by a stroke? Who will make decisions about your finances and your health care?

Contrary to what many people believe, your family has no automatic legal right to look after your financial affairs. Further they may not have an automatic right to make choices about your health care. If you have not appointed someone to act on your behalf, an application to the court will be necessary.

Powers of attorney are straightforward but powerful documents. They help guarantee that appropriate decisions are made if you are unable to decide for yourself. They give the person you appoint automatic legal authority to deal with your money and property and to make decisions about your health and personal care.

The word “attorney” is a legal term and does not mean that you must appoint a lawyer. Your attorney can be anybody you choose.

POWER OF ATTORNEY FOR PROPERTY

A power of attorney for property allows you to name someone to deal with your property. You can name someone to deal with your property. You can give someone temporary authorization as a matter of convenience. For instance, if you winter in India, your attorney can pay your bills and file your tax return.

You can also make a continuing power of attorney for property. This document lets your attorney act on your behalf in case of your mental or physical incapacity. Without this designation, your assets may be frozen,

possibly impairing your family's financial situation.

Choosing your attorney

When selecting your attorney, choose someone you trust completely with everything. The person must be able to make good financial decisions on your behalf. You should also consider naming an alternate attorney in case your first choice is unable or unwilling to act.

Coming into effect

A power of attorney comes into effect immediately and this person has the same authority to deal with your money and property as you do. Therefore, you may want to include certain safeguards.

POWER OF ATTORNEY FOR PERSONAL CARE

A power of attorney for personal care permits you to name someone to make decisions about your personal and health care when you cannot. This particular document comes into effect only in the event that you are unable to make decisions for yourself.

The decisions to be made may range from what you should eat, to where you should live, to whether you should see a doctor. You want to choose someone you trust and who understands your values. You want a person who will make choices that are in your best interest.

Living Will

In your power of attorney for personal care, you can include various instructions for your attorney. One of the most common, concerns instructions about the type of

medical treatment you do and do not want. This directive is often referred to as a living will. You have a right to consent to or refuse treatment. If you are unable to speak, the assumption is you have consented to any help considered necessary. The degree of relief could vary greatly.

If you have strong feelings about the treatment, you would like to receive if you are unable to speak, you should prepare a living will. In order to make an informed choice it is important that you talk to your doctor so that he or she can explain various medical scenarios and treatments.

Your instructions must be clear. For instance, saying that you "do not want to be kept alive on life support" is too vague. This statement does not differentiate between life support and the continuance of dying. Your attorney should not be left in doubt as to your wishes.

A power of attorney for personal care should be reviewed periodically. As treatment options and your life goals change, you may want to revise it.

The importance of planning in advance for your potential incapacity, cannot be overstated. It is now that you should choose someone to act as your hands and voice, if you are unable to.

Choosing your Executor

Who is going to carry out your final wishes following your death? This challenging and time-consuming job can be more of a burden than an honour. Therefore, it is important that you choose the right person to act as your executor.

The Responsibilities

An executor's responsibilities begin immediately following the death and may continue for more than a year. They include everything from finding the valid will, to cancelling the newspaper, to filing income tax returns. In addition to the various duties, the executor may be personally responsible for financial mistakes he or she makes.

Type of Executors

There are three categories of executors

- A trusted friend or family member;
- A professional, such as a lawyer or an accountant;
- A corporate executor, usually a trust company.

There are a number of things to keep in mind when selecting your executor(s) as well as an alternate.

- The person(s) should be someone you trust and who will get along with your family;
- As a practical matter, he or she should live reasonably close to you;
- He or she should have enough time to devote to the job;
- Familiarity with your financial affairs is also helpful.

Once you have made your decision, be sure to discuss it with that person(s). This is not something you want sprung on him or her

after your death. Ask if they are prepared to undertake the responsibilities of an executor. Let them know that they can decline. Review the Executor's Checklist with the person(s).

Compensation

The person(s), who undertakes this demanding job, is legally entitled to be compensated. The best way to resolve this issue is to discuss it up front and put something in your will. As a general rule, an executor is paid between three and five percent of the estate's value. However, this will depend on the actual time and effort involved.

Choosing who will manage and distribute your assets is a key decision when drafting your will. Think about it carefully and let your head, not your heart, guide you.

Executor's Checklist*

- Locate the most recent will
- Make funeral arrangements
- Notify the beneficiaries
- Review the deceased's financial affairs
- Take care of the surviving family's immediate financial needs
- Secure personal valuables and documents
- Cancel subscriptions, credit cards, telephone, cable, driver's licence, etc
...
- Change car registrations
- Obtain at least a dozen copies of the death certificate (Every financial institution will want a copy)
- Probate will and pay probate fees
- Locate and value assets
- Claim life insurance proceeds
- Pay funeral expenses
- Pay ongoing bills on the deceased's home
- Pay outstanding debts, including mortgage, credit cards, car loan, etc
...
- Deal with insurance policies, company pension plans, registered deposits
- Collect income from bonds, GIC's and other investments
- Set up and possibly administer trusts
- Examine contents of safe deposit box
- Apply for Canada Pension Plan death benefit
- Distribute inheritance
- Complete and file income and estate tax returns

**Depending on complexity of estate there may be additional duties*

Avoiding Probate Fees

When planning your estate, one factor to consider is the estate administration tax, commonly referred to as probate fees that your estate may have to pay out.

Probating a will is the act of judicially certifying a will's validity as well as confirming the executor's authority. Although a will is a legally binding document and the executor derives his or her authority from the will, probate may be necessary.

When a will is probated, an estate administration tax must be paid. The taxes are calculated based on the fair market value of all the property belonging to the deceased, at the time of his or her death, less any encumbrances on real property. The rates shall be checked from the court office.

In order to pay less in probate taxes, many people have begun to look at ways of reducing the size of their estates. For many, the most valuable asset is their home. Therefore, one mechanism that at first seems ideal, because of its simplicity, is to transfer title to your home into a joint tenancy with one or more of your children.

Joint tenants each own the whole of the property. On the death of one of the joint tenants, the property passes automatically to the survivors. The property does not become part of the estate and therefore is not subject to probate taxes. However, before you rush down to the registry office, there are few things to consider:

a) Possible tax consequences

When a principal residence is sold, the tax payer is exempted from paying taxes on any capital gain. You risk losing this valuable principal residence designation if you make

your children joint tenants. If the children do not live in the home, you will lose half of the principal residence exemption. In addition, if there are any outstanding mortgages on the property, land transfer tax, will have to be paid.

b) Exposure to creditors

As joint tenants, your children become full legal owners of your home. As a result, the property is exposed to any outstanding or future debts of your children.

c) Family law considerations

In the event of your child's marriage breaking down, the value of his or her interest in your home may be exposed to an equalization claim.

d) Loss of control

All joint tenants have an equal say in what should be done with the property and none can act independently. Therefore, the possibility of an eventual conflict between the owners should be carefully considered.

e) Psychological element

Most people have worked hard for their home and they may be reluctant to make their children equal owners while they are still active and healthy.

Before taking any measures to avoid probate taxes, speak to an experienced professional. A person with the expertise may spell out the advantages and disadvantages as well as help you work through the math. If you require assistance with your estate planning, please contact me.

Note: This article is necessarily of a general nature and is not meant to solve specific issues. I would ask you to speak with me or your lawyer, before applying them to particular situation.

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