

Client Information Summary

Issues to Consider When Drafting a Will

Your Will: The primary means to distribute an estate at time of death is a will. A will is a legally binding document that tells your executor how to distribute your property after death.

Your Objectives: The purpose of planning when making your will is to review, analyze, prepare and document a strategy for which the eventual outcome is consistent with your primary objectives. In the case of a will, the primary objective is to provide for your survivor(s) and the orderly management and distribution of your estate at time of death. Another common objective is to ensure that unnecessary taxes and other estate settlement costs are avoided. A final objective is to make sure that the estate has adequate liquidity to meet the needs of the intended beneficiaries.

Distribution of Assets: There are two basic types of distributions under a will: wills with “outright” distributions and wills with a “life interest” trust. A will with outright distribution passes assets directly, or outright, to a surviving beneficiary. A will providing for a 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 are a number of assets that pass directly to the last survivor, joint tenants or designated beneficiaries and 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

It is important for you to note that your will can distribute only assets for which you have sole ownership.

Specific Bequests: While certain assets are excluded from distribution by a will, conversely, 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 should be handled in your will or by a memorandum to the will. A general rule-of-thumb however, is to have personal items identified in a memorandum.

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 spouse), or may be time consuming and complex if you have a wide variety of assets and a complex will.

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 but non-professionals, such as friends or family, seldom are.) It is important to check with the potential executor to make sure that they will accept this responsibility before you name them in your will. It is important to provide for alternate executors in case an executor decides to decline the position or dies.

The choice of an executor is yours. You should choose someone you can trust and, as well, someone who is capable of handling the job. For example, a spouse and/or children may be appointed as co-executors along with a trust company or professional advisor. If your estate is complex you may wish to consider appointing a professional trustee along with family members as co-executors in the administration of the estate.

Other Provisions: Consider the following provisions when drafting or revising a will:

- 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.
- 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 disposition of your body in your will, it is more advisable to discuss and communicate your wishes to your family and your executor. The reason for this is that any disposition arrangements/services will have occurred long before the will is read.

Keep your will in a safe place where your spouse or executor can get to it quickly and easily. The original (signed) will is best be kept by your lawyer. A copy can be kept in your safety deposit box but find out 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 persons affected by it.

Witnesses: For a will to be properly executed in compliance with the formalities of the Wills Act (Ontario), a will must be executed by two witnesses. The witnesses must be at least 18 years of 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 ensure it reflects your wishes. 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 could be prepared (a codicil is a means of changing your will without having to completely redo it). There may also be changes in tax laws that affect your Will. Thus, it is 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) Change in your own marital status
- 3) Sale or alteration of any property mentioned
- 4) Adoption of children
- 5) If an executor dies or becomes unsuitable to act
- 6) If one of the beneficiaries dies

Family Law Act: The Family Law Act (FLA), 1986

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. This means that if spouse A has assets of \$200,000 and spouse B has assets of \$50,000; spouse A must transfer \$75,000 to B.

The intent of the Family Law Act 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 (or in marriage breakdown, one of the spouses) is not left in an insecure financial situation.

With a will that provides for an outright distribution, (everything passing to the survivor) there are few problems with this legislation. But when a will establishes a spousal or other trust, there is always the possibility that a surviving spouse's claim for an equalization payment can have an unexpected result in the distribution under the will. 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.

Minimizing Tax: We currently have no death or succession taxes in Canada. 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 in your final tax return.

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 will be a spousal rollover for tax purposes. This means your spouse will assume the asset at your tax cost. Thus, the tax liability would 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). RRSP's 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 is 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. In the case of life insurance, the proceeds are not taxable. In a similar manner, there are no taxes payable as a result of any gains which may have taken place in the value of your principal residence, regardless of the intended beneficiary.

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

- Use spousal rollover provision for RRSP's and other pension benefits
- Use spousal rollover provision for other capital assets
- Take advantage of 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, when making a will, is an important part of everyone's financial obligation to their family. By not taking the necessary steps to ensure that your estate is settled according to your wishes and in the most effective manner possible can mean the difference of leaving your family 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.



Page Client Information Summary

Edited by:

Jonathan Flawn, CA, CFP, CLU

CIS #121-E 20091214

Copyright **Page and Associates**

Permission to quote or reproduce in whole or in part is hereby granted provided credit is given to the source.

Head Office:

405-95 Mural Street

Richmond Hill, Ontario L4B 3G2

Phone: (905) 884-5563

Fax: (905) 884-3365

www.askpage.com