



Ross & McBride LLP

Planning Ahead.

Commonly Asked Questions
about Estate Planning.

4th Edition

Index

Chapter 1: Commonly Asked Questions	2
Chapter 2: Estate Planning	5
Chapter 3: Estate Administration	9
Chapter 4: Definitions	14
Chapter 5: Getting Help	16

This booklet is a very general introduction to the topics covered and should not be substituted for legal advice. Please consult a lawyer for specific information to be applied to specific situations.

Chapter 1

Commonly Asked Questions

Why should you prepare a Will?

Making a Will is an excellent opportunity to plan not only for your future but also for that of your loved ones. A Will performs several important functions; it organizes your wishes into one legal document. It tells your survivors, business partners and loved ones who will receive what, when they will receive it, and in what manner they will receive it. If you have children, you can also name a Guardian for your children should something happen to you while they are still minors.

If you do not have a Will, provincial governments, through Intestacy Laws, mandate the distribution of your estate. As impartial as these laws may be, they require the court to appoint someone to administer your estate. This can be both time-consuming and expensive for your estate. Intestacy Laws are designed to create a structure that the court can apply for the distribution of your estate; however, this may not represent your wishes.

It could mean that someone you would wish to remember will receive nothing from your estate or, conversely, it could mean that someone you would not wish to be entitled under your estate would be entitled to receive a portion of your estate. You, more than anyone, know how best to distribute your assets.

Because your Will is a legal contract, it also simplifies the process of releasing your assets by the custodians of those assets – such as banks holding your savings and investments, insurance companies or investment advisors.

Perhaps most importantly, a thoughtful and considerate Will can greatly reduce the strain on your family at a difficult time.

When should you up-date your Will?

While most people believe that a Will is something that you prepare once and then forget about, in fact your Will is affected by what is happening in your life and should be reviewed and updated when significant changes in your life occur.

Some events that may have occurred since you last prepared a Will and which may impact your Will include:

- You were married
- You were divorced
- You had children (or you now have more children than when your previous Will was drawn)
- You purchased a home or other property
- Your children are now all adults
- You have grandchildren
- You own a business or other significant asset which was not dealt with in your previous Will

Marriage automatically revokes a Will; however, a divorce does not revoke your Will. As a result, if you made a Will prior to your marriage, your Will may no longer be valid.

Conversely, if you made a Will prior to a divorce, beneficiaries that you no longer wish to benefit may still be entitled to a portion of your estate under the terms of your Will. Your previous Will may have been prepared at a time when your children were minors and accordingly many of the provisions may no longer be appropriate. Perhaps your concern is no longer ensuring that your children's care and education are provided for, and has now shifted to the same concerns for your

grandchildren. Alternatively, if your children are still minors, your choice of Guardians may no longer be appropriate. For example, the person(s) may now be elderly or have moved. Consequently, it may be time to think about a more appropriate person to act as Guardian for your children.

What is Power of Attorney?

A Power of Attorney is a written document by which a person grants someone else the authority to act on their behalf with respect to either personal care decisions or property decisions. There are currently two types of Powers of Attorney recognized in Ontario; (i) a Power of Attorney for Property, which grants authority to someone else to deal with any and all of your assets; and (ii) a Power of Attorney for Personal Care, which grants authority to someone else to make medical and health care decisions on your behalf..

What is a Living Will?

A Living Will is simply a document which outlines your wishes regarding medical and health care decisions in the event that you are not able to express those yourself. It does not grant anyone the authority to make those decisions on your behalf. These types of wishes or instructions may also be contained within a Power of Attorney for Personal Care.

Chapter 2

Estate Planning

Statutory Regime (Succession Law Reform Act)

Common Law and Same-Sex Partners?

While common law spouses and same-sex partners have gained many legal rights in the last number of years the statutory regime governing estate administration where a person dies without a Will (called “intestacy”) still provides limited protection and rights to them. Under the Succession Law Reform Act (SLRA) when a person dies intestate their spouse is entitled to the “preferential share” (currently \$200,000). However, “spouse” under this section of the SLRA is defined as “married.” Therefore, a common law spouse or same-sex partner is not entitled to a claim against the estate for the preferential share under the SLRA.

Under the SLRA a common law spouse or same-sex partner is entitled to make a claim against the estate, whether there was a Will or not, for what is called “dependant’s support.” In order to make a claim for “dependant’s support” they must be a “dependant” at the time of death or immediately prior to death. In this section of the SLRA “spouse” is more broadly defined to mean “married” or cohabited continuously for at least 3 years, or in a relationship of some permanence where they are the natural or adoptive parents of a child. Additionally, regardless of the ability to fall under the definition of “spouse,” a common law spouse or same-sex partner may be able to advance a claim for dependant support provided that they can show that they:

- (i) were receiving support from the deceased prior to the time of death;
- (ii) should have been receiving support from the deceased prior to the time of death; or

(iii) that they have a real need (this will be judged as against the provisions in the Will or the needs of others making claims for dependant support).

The creation of a valid Will allows for you to distribute your assets as you wish, including providing for a common law spouse or same-sex partner without the requirement of an application to the Court which leaves the ultimate determination as to the amount of support, if any, to be given to such person in the hands of a judge.

Beneficiaries with Disabilities - Protecting Benefits

When someone starts planning their estate the primary concern is how to provide for their loved ones when they pass on. This is especially true if one of your dependants is disabled or has special needs and is collecting Ontario Disability Support Program (ODSP) benefits. If you leave them too much money, or do not leave them money in the proper manner, they could very well lose their government benefits and be forced to live off your gift. Once the money in that gift has been exhausted, they will then be eligible to re-apply for benefits under the program, however, they will be no further ahead.

An absolute discretion trust (commonly known as a “Henson Trust”) prevents the legal control of the assets forming the trust from entering directly into the hands of the beneficiary leaving absolute discretion and control in the hands of the Trustee of the trust.

The primary benefit of a Henson Trust is that an unlimited amount of money may be placed in the trust and can then be spent on what the government considers to be “disability related expenses.” Disability related expenses has been interpreted broadly to mean anything from necessary modifications to a house or vehicle, home care or even the increased cost of having pre-prepared food delivered to individual. Essentially, disability related expenses means anything that can be used to make life easier for the disabled person in their day-to-day life.

Government guidelines provide that the first \$6,000.00 a person on ODSP receives by way of voluntary gift in any twelve-month period is excluded from the income test. This means that in addition to the money received from ODSP and any payments made for disability related expenses unrestricted payments of up to \$6,000.00 can be made to the beneficiary every year to be used in any way they choose.

Finally, in addition to the aforementioned payments several assets are also excluded from the means test used to determine ODSP benefits. These excluded assets include a principal residence and car, regardless of their value. Therefore, since these assets are exempt, the Trustee may use funds from the Henson Trust to purchase any of these assets for your beneficiary without impacting their entitlement to ODSP benefits.

Corporate Assets and the use of multiple Wills

Traditionally, following a person's death and in order for the executor to be able to collect assets from banks and other financial institutions or to transfer real property, the executor is required to obtain a Certificate of Appointment of Estate Trustee (formerly "Probate") from the Court. This is required by the financial institutions, etc. in order to protect themselves from claims that they improperly released or transferred assets.

At the time of the application to the Court a fee is payable. This fee is called Estate Administration Tax and is calculated based on the formula of \$5.00 per \$1,000.00 for the first \$50,000.00 of the estate's value, and \$15.00 per \$1,000.00 on the amount exceeding \$50,000.00. As you can imagine, the Estate Administration Tax payable at the time of the application can end-up being quite substantial.

However, the Court has held that the use of multiple Wills is a valid method of estate planning in Ontario. The way that it works is that one Will deals with assets, such as shares in private corporations (as opposed to shares in companies which are publicly traded), which do not require the Certificate

of Appointment in order to be transferred and the other Will deals with all other assets. In the event of multiple Wills, the Estate Administration Tax payable can be substantially reduced. By creating multiple Wills you can effectively avoid paying Estate Administration Tax on the value of the assets held by the private corporation.

Example: John Does owned his own private company, a house valued at \$250,000.00 (no mortgage), a bank account with a balance of \$2,500.00 and an investment portfolio valued at \$360,000.00. At the time of his death John's private corporate shares were worth \$1,525,000.00.

Using the current rates the Estate Administration Tax payable would be as follows:

	Single Will	Non-Corporate Will	Corporate Will
House	\$50,000.00	\$250,000.00	
Bank Account	\$2,500.00	\$2,500.00	
Investments	\$60,000.00	\$360,000.00	
Private Corporate Shares	\$1,525,000.00		\$1,525,000.00
Gross Estate	\$2,137,500.00	\$612,500.00	\$1,525,000.00
Estate Administration Tax Calculations			
First \$50,000.00	\$250.00	\$250.00	No Estate Admin. Tax
\$15.00 per \$1,000.00 on the balance	\$31,320.00	\$8,695.00	No Estate Admin. Tax
Total Estate Admin. Tax Payable	\$31,570.00	\$8,945.00	\$0.00

In this example, the Estate Administration Tax is reduced by \$22,625.00 when multiple Wills are used. The use of multiple Wills is one possible way to structure your estate plan to minimize the taxes and other fees payable by your estate. Depending on what you hope to achieve through your estate plan there may be other ways such as the use of spousal trusts or alterego trusts in which to structure your estate to further minimize the taxes and other fees payable by your estate.

Chapter 3

Estate Administration

Executor's Role and Duties

Whether you are considering who to appoint as Executor of your Will (also referred to as "Estate Trustee") or you have been appointed as the Executor of someone else's Will it is crucial that you have an understanding of what the role entails.

Your first obligation is to ensure that all funeral and burial arrangements are made and paid for and to safeguard the assets of the deceased. The Executor is the only person with the legal authority to contract for funeral and burial arrangements. These expenses can be paid out of the deceased's assets and banks will issue a bank draft directly to the funeral home once provided with a copy of the death certificate and a copy of the funeral account. The Canada Pension Plan death benefits are intended to cover at least a portion of the funeral expenses and should be applied for as soon as possible.

Once these initial arrangements have been made the next step is to compile a list of all the assets of the deceased and estimate their value as of the date of death. Typically, the Executor will need to contact the banks and investment companies that the deceased used in order to complete the list. Additionally, the Executor needs to determine all the debts and liabilities of the estate.

Acting as an Executor can involve a significant time commitment and it is recommended that an Executor maintain a record of all money spent or received as Executor/Estate Trustee. An Executor is entitled to be repaid from the estate for reasonable expenses, including funeral expenses. It is also a good idea to keep a record of the steps taken as Trustee: telephone calls made, interviews attended,

mail sent or received, time spent, and so on.

An Executor/Estate Trustee is responsible for preparing and file income tax returns. This usually involves hiring an accountant who can assist in determining the tax liabilities of the deceased and the Estate Trustee's responsibilities. The accountant can file the returns.

As Executor it is necessary to compile a list of the names of all those who must be legally notified, and include addresses. These people would include the beneficiaries named in the deceased's last Will, or those entitled to share in the Estate under the Succession Law Reform Act in the case of an intestacy (where there is no Will), as well as the Children's Lawyer if there are any beneficiaries who are minors. Depending on the circumstances, these people may include current or previous spouses whether common-law or not, all children, other next-of-kin, and anyone else who might make a claim on the Estate.

Generally it is a good idea to sit-down with a lawyer to discuss the estate and determine what needs to be done given the specifics of the deceased and their assets. Meeting with a lawyer helps to ensure that you are aware of your obligations and often significantly reduces the time that it takes to administer an Estate. Additionally, there are certain things that can only be completed with the assistance of a lawyer (i.e. transferring title to property, etc.).

Executor's Compensation

Executors are entitled to compensation for the services that they render to an estate. Traditionally, executor's compensation was determined by the application of percentages or "tariff guidelines." The Ontario Court of Appeal has, however, stated that executor's are no longer automatically entitled to the "usual percentages" or "tariff guidelines" which were traditionally calculated as 2.5% of the assets collected plus 2.5% of assets distributed (roughly 5% of the value of the estate). The process for determining executor's compensation is now a two-step process in which the "usual

percentages” or “tariff guidelines” are first applied, then the appropriateness of the result is checked against the following five factors:

- (i) the actual time spent by the executor in completing the administration of the Estate;
- (ii) the size of the Estate;
- (iii) the care and responsibility the executor undertakes;
- (iv) the skill and ability they demonstrate; and
- (v) the results achieved by them.

When is it Necessary to Obtain a Certificate of Appointment of Estate Trustee

It is not always necessary to obtain a Certificate of Appointment of Estate Trustee. A grant is not necessary to transfer jointly-held real property, jointly owned bank accounts, insurance or pension plan proceeds payable to a named beneficiary, registered government securities (under certain circumstances) or Canada Pension Plan survivor’s benefits. For other types of property and in certain circumstances, however, it will be necessary to obtain a grant.

Intestacy - If there is no Will, the proposed administrator must make application for letters of administration and the entire estate will be subject to probate.

Litigation - If the estate is involved in litigation, probate will be necessary.

Infant Beneficiaries - Whenever there are infant beneficiaries, the executor will want the protection of having his or her accounts approved by a court, and should therefore seek probate. Similarly, if the Will provides for continuing trusts, probate is advisable.

Real Property - Land registered in the Registry system may be transferred either before it vests in the beneficiaries or after, with or without obtaining a Certificate of Appointment of Estate Trustee, if the

original Will, a notarial copy of the Will, or Certificate of Appointment of Estate Trustee is registered together with the affidavit referred to in clause 53(1)(a)(i) and (ii) of the Registry Act. This practice has been confirmed by the courts in a number of cases. Under Land Titles, the Registrar of Land Titles certifies title to property. Where a deceased dies testate, the Registrar will require a Certificate of Appointment of Estate Trustee before it will transfer property registered in the land titles system if the value of the property exceeds \$50,000.00. If the value of the property is less than \$50,000.00 it can be transferred on the basis of an unprobated Will.

Bank Accounts - It is the practice of banks and trusts companies to require a Certificate of Appointment of Estate Trustee before assets in excess of \$10,000.00 - \$15,000.00 are transferred. In the case of joint accounts, the assets can be transferred to the survivor upon production of a notarial copy of a death certificate. The transfer of the contents of a jointly held safety deposit box is effected in the same manner.

Shares - Most transfer agents take the view that shares of an Ontario corporation worth more than \$1,000.00 require Certificate of Appointment of Estate Trustee. The same conclusion applies to companies governed by the Canada Business Corporations Act, however, shares may be transferred to a surviving joint tenant without a grant.

Canada Savings Bonds - Probate will not be necessary if the Canada Savings Bonds to be transferred do not exceed \$20,000.00 and if the applicant is entitled to the entire estate; if the entire estate passes to the surviving spouse, the limit is increased to \$75,000.00. Bonds can be transferred to a surviving joint tenant without limitation. The same holds true for other bonds issued by the Government of Canada. Unless joint tenancy is specified, a tenancy in common is presumed by the Bank of Canada.

Surviving Spouse's Rights with respect to the Matrimonial Home

Under section 19 of the Family Law Act (FLA), both spouses have an equal right to possession of

the matrimonial home, even if only one of the spouses legally owns it. When only one spouse has a legal interest in the matrimonial home, the other spouse's right of possession is personal against the first spouse and ends when they cease to be spouses, unless a separation agreement or court order provides otherwise.

The effect of this is that a spouse's right to make a claim against the matrimonial home ends upon the death of the spouse who holds legal title to the property.

However, when one spouse dies, the surviving spouse is entitled under the FLA to remain in the home for sixty day period after the first spouse's death. An "order for possession of matrimonial home" can be obtained and will provide that regardless of ownership of a matrimonial home and its contents, and despite section 19, the court may on application order a number of different remedies to the surviving spouse. One such order being that one spouse be given exclusive possession of the matrimonial home or part of it for the period that the court directs.

In addition to the rights under the FLA the Succession Law Reform Act provides further rights to the surviving spouse. Specifically, the court may, on application, order such support as it considers adequate (this may include an order the title to the matrimonial home be transferred to the surviving spouse). Further, the court may, on an application by or on behalf of the dependants, or any of them, may made an order suspending in whole or in part the administration of the deceased's estate, for such time and to such extent as the court may decide.

Such an application must be made within 6 months of the grant of probate, however, under the FLA an election under section 5 for equalization must be made within 6 months of the date of death so it is crucial to be aware of deadlines when determining what, if any claims will be made.

Chapter 4

Definitions

Power of Attorney:

A written document by which a person grants someone else the authority to act on their behalf with respect to either personal care decisions or property decisions.

Power of Attorney for Personal Care:

A written document by which a person grants someone authority to make personal care decisions on their behalf if they become mentally incapacitated. This document may include instructions that would otherwise be included in a Living Will.

Power of Attorney for Property (Continuing):

A written document by which a person grants someone authority to someone else to act on their behalf with respect to decisions relating to their property (includes bank accounts, real estate, investments, income taxes, etc.).

Attorney:

The person named in a Power of Attorney document to act on behalf of the person granting the Power of Attorney. The term “attorney” does not mean lawyer.

Intestacy:

This occurs when a person dies without leaving a valid Will. In this case the Succession Law Reform Act dictates the division of the person’s assets.

Trust:

The legal arrangement in which one person transfers legal title to a Trustee to manage the property for the benefit of a person or institution (the beneficiaries of the trust). A Testamentary Trust is set up in a Will and takes effect only after death.

Trustee:

A person who acts in a position of trust in administering assets on behalf of someone else (the beneficiary). The Trustee is required to follow the terms of the trust (the instructions) and may be an individual or an institution.

Will:

A written document which instructs executors how the property of the deceased is to be distributed. In order for a Will to be valid it must conform to strict provincial rules relating to form and signing. Content and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications.

Chapter 5

Getting Help

For information on how we can help you and your loved ones please contact us.

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