

ESTATE PLANS & WILLS: A PRACTICAL GUIDE

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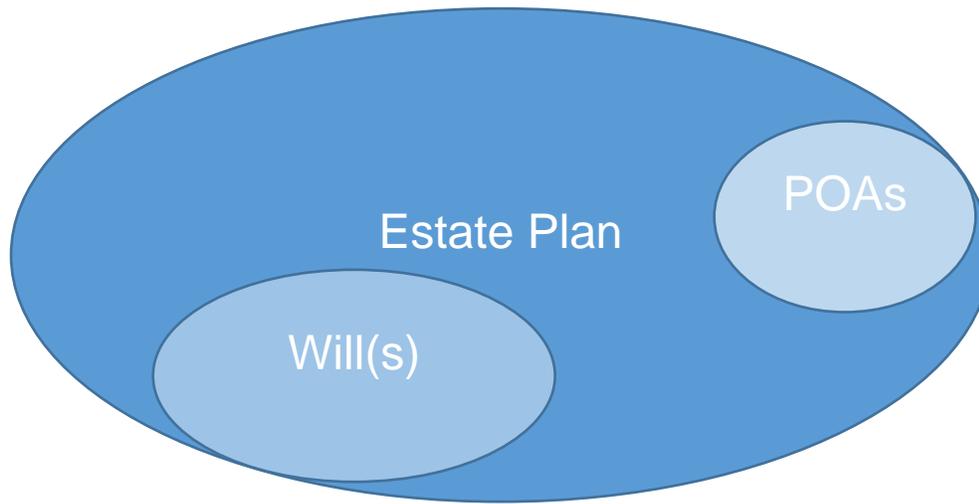
THE PURPOSE OF THIS BOOKLET

The purpose of this book is to give you a basic understanding of the key issues related to estate planning and will drafting in Ontario. Obviously, it is not legal advice and it is not a substitute for legal advice. This booklet is current to the law in Ontario in April 2020. The law in other places can be very different. The law in Ontario will change.

This booklet is a high-level summary of key principles in lay terms. It does not cover every situation, and it is deliberately written to be accessible and is not written in careful legal language.

This booklet is intended primarily as a primer for our estate planning clients, to inform them prior to our discussions with them.

The Plan is Paramount



Estate planning is much more than will drafting.

Drafting a simple will is often quite simple. In fact, many wills are prepared using websites and automatic tools. However, in the abstract it is impossible to tell whether these simple wills are “good wills” or “disastrous wills”.

The place to start is with a proper estate plan. It is only against this plan that the will can be judged: does the will properly implement the plan?

The will is just one of the key documents that implements the estate plan.

As this booklet explains, proper estate planning is fairly straightforward, but not simple. Our role is to guide you through the

A elements of a good estate plan

A good estate plan should be:

- Fair.
- Effective. I should ensure that your legitimate estate goals are met.
- Efficient. It should ensure that your goals are met at minimum cost, hassle and delay.

A fair plan must address:

- Your debts and legal obligations
- Your moral obligations
- Subject to these obligations, it should reflect your goals and aspirations, morals and choices.

An effective estate plan must not only succeed now, but in the foreseeable future. Ideally, the plan works in the face of reasonably foreseeable delay and changes in circumstances.

An efficient estate plan:

- Minimizes the risk of any challenge (recognizing that even unsuccessful challenges cost time and money).
- Minimizes the risk of successful challenge.
- Includes legitimate income tax minimization.
- Minimizes estate administration time and expense, including probate fees, legal and executor fees, and other fees, taxes, and expenses.

These goals may conflict. Frequently it is important to balance them and to make trade-offs.

Who should have an estate plan? Every adult.

There is no excuse for not having a plan unless you have a strong desire to inflict an expensive mess on your family.

Who should have a will? Almost every adult.

Sometimes your entire estate plan can be dealt with via beneficiary designations and joint ownership. Everyone else needs a will.

Estate planning basics

Getting started: gather the facts

A good estate plan can only be built on a proper foundation of facts. It is crucial to gather key information about:

- your assets, including values and precise ownership (sole, joint, trust ...)
- your obligations, including fixed debts, commitments, and future legal requirements
- your family,
- your commitments
- your goals and expectations.

Fact gathering is a crucial part of the estate planning process. The better we understand the facts, the better the advice we can provide to you.

Know and consider your obligations and your options

An estate plan must take into consideration your obligations and commitments. If it does not, it is likely that your estate will be tied up in expensive claims.

The obligations that must be addressed include:

- debts, such as mortgages, credit cards, funeral and burial expenses, and unpaid bills;
- income tax liabilities from both before and after death;
- obligations to spouses, former spouses and children under separation agreements and the *Family Law Act*;
- obligations to individuals who are financially dependent on the deceased under the *Succession Law Reform Act* (“dependent support claims”);
- moral obligations, including to spouses, former spouses, children, and other relatives.

Rights of spouses and ex-spouses and dependants

Your **married** spouse has the right, on your death to elect:

- To receive from your estate in accordance with your will (for instance, if your will gives everything to your spouse), or
- Under the Family Law Act, to receive from your estate as if you had been divorced immediately prior to your death.

In other words, if you give less in your will to your spouse than they would be entitled to in a divorce, then it is likely that they will in effect ‘challenge the will’ and make the election that permits them to receive as if you were divorced the day before your death.

Note: a common law spouse does **not** have this right in Ontario.

If you owe a duty to support a former spouse, then this duty likely forms a debt due by the estate. If it does, it must be paid before there is any estate available for distribution to beneficiaries (for instance, your new spouse or children). The precise nature of your debts and the consequences for your estate will depend on the terms of any agreement with your former spouse or Court order. For instance, determining the value of an on-going support payment for children can be very complex.

Equalizing gifts/dealing with loans and advances

It is not uncommon for a parent to lend or gift money to one or more of their children. Disputes after the fact among the children are common. Accordingly, a good estate plan addresses these head on up front. The issues include:

- a) Properly documenting loans including the principal, the interest if any, and any repayment terms and whether they are to be forgiven on death of the parent;
- b) Properly documenting gifts (a gift to a child may be set aside if they cannot prove it was a gift) and whether they are or are not an advance of their inheritance;
- c) If appropriate, providing a mechanism in the will to equalize the inheritances of the children having regard to prior gifts or loans (often called a ‘hotchpot’ clause).

More information on gifting now, rather than on death, as a component of implementing the estate plan is discussed below

The scope of the estate plan

All assets, all obligations, from now to death and beyond

A properly constructed estate plan needs to consider:

- Your current and future assets,
- Your current and future obligations,
- Any gifts to be made before your death (known as *inter vivos gifts* – discussed below)
- Management of your finances during any period of incapacity prior to your death (usually address via powers of attorney: see our eBook *Powers of Attorney: A Practical Guide*)
- What occurs on your death (your will), and
- If there is to be an intentional deferral or delay in distribution of any of your estate after your death (any trusts established in your will, also discussed below)

Understanding ownership and consequences: beneficiary designations and joint ownership

**Many assets can pass 'outside an estate'.
Assets that pass outside an estate are not
governed by the will.**

For many Canadians it is possible to transfer their most valuable assets outside their estate via joint ownership and beneficiary designations. How these assets are dealt with is, therefore, the most important aspect of the estate plan, and yet by definition, if they pass outside the estate, **they are not governed by a will**.

Because this issue is so important, 'drafting a will' can never be a substitute for developing a thorough estate plan.

This issue applies to:

- Homes and other real estate. Real estate owned by two or more people 'in joint tenancy with a right of survivorship' is not governed by the will and does not pass through the estate of a deceased joint tenant – the surviving joint tenant automatically becomes the sole owner of the property.
- RRIF / RRSP / TFSA. All of these assets can pass directly to a designated beneficiary. When they do, they are not governed by the will and do not form part of the estate, even though this can have serious tax implications for the estate itself.
- Pensions. If you have a spouse, then receipt of the pension is governed by the *Pension Benefits Act*. If you do not have a spouse, many pensions permit designation of benefits to either your estate or an individual. When an individual designated beneficiary receives from a pension, the pension is not governed by the will and the pension does not form part of the estate of the deceased.
- Life insurance. Life insurance passes a) to a designated beneficiary outside the estate, unless b) the estate is designated, or no beneficiary is designated.
- Joint bank accounts. Joint bank accounts normally pass outside the estate to the joint holder. However, bank accounts that are joint between a parent and an adult child should be "treated as if" they form part of the estate unless the parent clearly indicates otherwise.

Just because assets can pass outside the estate does not mean that they should. A fundamental question of estate planning is whether these assets **should** pass outside the estate, or whether they should be brought in to the estate and governed by the will.

The use of beneficiary designations and joint tenancy works very well for married couples who intend to leave 100% of their estate to each other, with no restrictions on how the surviving spouse deals with the assets later.

Beneficiary designations can be extremely dangerous when used for most other estates. They can, when used carefully, still be efficient and effective, but care must be taken to ensure that the entire plan hangs together.

Warning: taxes!

Having assets pass directly to named beneficiaries is a common strategy for reducing probate taxes and executor fees. However, it is not without risk if the beneficiary is anyone other than your spouse who is also the principal beneficiary of your estate. It can result in some real unfairness.

You can roll your RRIF/RRSP over to your spouse or disabled child without income tax consequences.

If the recipient of your RRSP/RRIF is **not** your spouse or disabled child, then the entire value of your RRSP/RRIF must be included in your taxable income in the year of death. This can result in you having a very high income and your estate having very high income tax payable (often, at least 50% of the value of the RRSP/RRIF).

If the named beneficiary of the RRSP is not your estate, that individual will receive 100% of the RRSP *without any deduction for the taxes payable*. The liability for the tax will be borne first by the estate (and thus the beneficiaries of the estate) and by the beneficiary of the RRSP.

Using wills to amend designations

It is possible to amend beneficiary designations of life insurance and registered investment plans (RRSP/RRIF/TFSA using a properly drafted will. This is a good way to ensure that designations are consistent with the estate plan and the will.

*Caution: the will provision will **not affect** designations made after the will is drafted, so great care must be taken with insurance or plans opened after the will is drafted.*

Joint ownership with your spouse

If you own an asset (for instance a house or bank account) **in joint tenancy with a right of survivorship** with your spouse then on your death 100% of that asset should belong exclusively to the other joint owner. The asset will not be part of your estate, and no probate is necessary.

A house may be:

- Owned by one spouse alone
- Owned by the two spouses 'as joint tenants with a right of survivorship'
- Owned by the two spouses as joint tenants.

If you are not absolutely certain as to how title to your house is held, a title search must be done. Estate planning without clarity on home ownership is a waste of time, and likely to cause great hardship.

When a house in Ontario is owned by spouses as joint tenants with a right of survivorship, the surviving spouse immediately becomes the sole owner of the house. The house does not fall in to the estate of the first spouse to die, and no probate is required. This can be a very efficient and effective way to hold assets, especially with your spouse (whether married or common law). It is a very common and effective way to hold title to your principal residence (home).

Conversely, if you and your spouse own your home 'as tenants in common' then each of your respective shares of the house will fall in to your respective estates. This means that on the death of the first spouse, the tenants-in-common are the estate of the deceased spouse and the surviving spouse. Unless the parties agree to defer sale of the house, either owner can seek an order for partition and sale to force the sale of the house and distribution of the proceeds among the two tenants-in-common.

A joint tenancy can be severed and converted to a 'tenants-in-common' ownership, but it is crucial to document and register on title any such change. Converting from joint tenancy to tenants-in-common is sometimes a crucial component of an estate plan.

Joint ownership with children

Joint ownership with an adult child is very different from joint ownership with your spouse:

1. Unless the child can prove that you intended to give the asset to them, the asset is deemed to form part of your estate and is subject to probate. Jointly owned bank accounts and houses are an invitation for family disputes and expensive litigation. If you really want to make a gift to an adult child, you absolutely must document your intention, and better yet, you should probably give them the asset outright and not retain a joint interest in it.
2. Adverse income tax consequences can be triggered from a poorly documented gift to an adult. For instance, if you give your house to your child, then you can no longer claim the principle residence exemption for sheltering from capital

Joint ownership with spouse = likely good

Joint ownership with adult child = very risky!

gains taxes, any increase in its value after the date of gift, and unless it is the child's principal residence, all gains will be taxable.

If you want to put any property in joint tenancy with anyone other than your spouse, get good legal advice. The advice of a bank teller is not good legal advice.

If you want to make arrangements so that an adult child can pay your bills, use a properly drafted power of attorney for property, not a joint bank account.

Consider making gifts now

An important component of estate planning is determining whether you want to make some gifts now, while you are still alive.

Common gifts include donations to charities, and gifts to children and grandchildren to support their educations or purchase homes.

Gifts now has pros and cons, although on balance we believe that many more people should consider making modest *inter vivos* gifts now rather than waiting.

Pro:

- The gift gets put to work immediately – addresses the current need of the recipient.
- You have certainty that the gift is received as intended.
- You see your gift in action, and the recipient has an opportunity to thank you personally.

Cons:

Gift now, but ensure that you document them

Many *inter vivos* gifts are not documented properly. This leads to unnecessary acrimony and litigation.

In the absence of proper documentation, a gift to someone 'in a special relationship' with you may be challenged and set aside. Children, friends, and professional advisors are some of the people likely to be in the special relationship category.

Gifts are wonderful. However, to avoid future acrimony and expense, if you intend to make a gift to a child or close relative or friend it should be properly documented.

We can help.

- A gift will reduce your assets. This may be a concern if you are uncertain about your ability to meet your own financial needs.
- May cause jealousy or complaints
- Difficult to do anonymously
- **Unless documented properly, gifts and loans can cause disputes and litigation**

BASIC PRINCIPLES OF WILL DRAFTING

A will is a document that implements some but not all of your estate plan. Specifically, it addresses what happens to the assets that fall in to your estate are distributed after your death (immediately, or on a deferred basis).

Testamentary Freedom

Subject to the obligations discussed above for debts, spouses, and for dependent support, the basic rule in Ontario is that the testator (the person who makes the will) has almost complete freedom to decide who they want to be the executor of their estate, and how they want their estate distributed.

This means that in Ontario there is no obligation to treat your children 'equally', assuming that they are no financially dependent on you.

Simple v. Complex Wills

Some wills are very simple, but very effective. If it is consistent with the estate plan, "Everything to my spouse" can accomplish all that a will needs to.

What makes a will simple is 'clear, immediate disposition after death of all assets'.

What makes a will complex is delayed or staggered distribution of assets. For instance, if you desire is to have “each of my children’s shares of my estate held by someone else who gives them financial support for some things, like school, but not others, like cars and trips, and then gives the principal to the child when they turn 25” then you need a will that contains one or more trusts.

Trusts

Trusts are a very powerful tool but they are complex.

An improperly considered or drafted trust can result in very harsh or unfair outcomes.

The most common trusts and the rationale for them are:

- Spousal trusts, whereby the spouse of the testator has the right to use certain assets (such as a house) during their lifetime, with a gift over to children on the death of the second spouse (known as the life tenant). There are two key drivers for spousal trusts: a) to defer taxes on assets that have increased in value substantially, and b) to address a second marriage situation where you want your estate to ultimately benefit your children, not your spouse’s children. Key considerations for spousal trusts include the choice of trustee, who pays for what expenses such as taxes, utilities, maintenance and renovations, and when the trust terminates – for instance, what happens if the beneficiary must move in to a nursing home?
- Trusts for minor children, which may extend beyond their early adult years to avoid improvident spending (trusts lasting to age 25 or 30 are not uncommon). These trusts can last a long time. Key questions include who is an appropriate trustee, and what expenses may be covered during the trust: education? Housing? Entrepreneurship?
- Trusts for adult children, especially to provide for them without disqualifying them from access to social assistance such as ODSP. Disability Support Plans and Henson Trusts are some of the options. The purpose is to provide on-going

financial support to the disabled child without providing them assets that disqualify them for support.

Trusts are very powerful. They can be enormously helpful for deferring and minimizing taxes, and for ensuring that your estate benefits the people that you want in the way that you want. However, they are complex and must be drafted with care. The key considerations for every trust are:

- Who is the trustee? Can they be trusted to respect the interests of all beneficiaries? What happens if they are unable or unwilling to act at any time?
- Who are the beneficiaries – of income? Of the capital? Is there a ‘residual beneficiary’ after the death of a beneficiary?
- How much discretion will the trustee have to allocate or distribute income or capital? Will the trustee’s decisions align with the beneficiaries’ interests?
- How long will the trust last, and what will happen when it terminates?

Decisions, decisions

Here is a “simple” example to demonstrate the complexity of drafting a trust well. Perhaps you want to leave funds to your child, who is under 25 now and thus may be under 25 when you die. Who will you trust to leave funds with? The child’s parent, your ex-spouse, or your current spouse who has a strained relationship with this child, or someone else? Will the trustee be able to encroach on capital to support the child? If so, for schooling? What about music lessons, or ski trips, or so the child can start a business? What if the payments indirectly benefit your ex-spouse? What happens if the child passes away before 25? Will the child receive 100% of the trust when they turn 25?

These considerations should not scare you from using a trust when appropriate. But they illustrate the care and thought required to draft them properly.

Choice of executor

The executor is the person chosen by the testator to administer their estate in accordance with the will.

The executor also has authority to handle funeral and burial arrangements.

The Courts generally defer to the testator's choice of executor, but, are not obliged to.

In Ontario, when an estate is probated the Courts appoint **an estate trustee**, who is the person with ultimate authority to administer the estate. The executor is the presumptive estate trustee, and has the first right to apply for appointment, but the Courts retain discretion to pass over the executor if they are unable or unsuitable.

Choose carefully: being an executor is a job not a favour

Being an executor is a demanding job that requires skill, integrity and judgment. It is not easy, or quick, or just a favour.

Choosing an executor is not about choosing who is nicest or closest to you.

At the best of times being an executor requires a lot of paperwork and handling forms and money. The executor needs to collect assets (eg. clean out your house and arrange to have it sold), invest funds prudently, hire and instruct professionals like lawyers and accountants, open and close bank accounts, and complete and file probate forms and tax returns. The executor needs to send and receive considerable correspondence, get advice, make decisions, and keep detailed accounting records throughout. The executor needs to be detail-oriented, prudent, but decisive, and able to carry on the task for months and perhaps several years. Make sure that you choose someone who has the right skills and aptitude.

Where does the executor live?

Your executor does not have to be a resident of Ontario, but it makes life easier if they are. Subject to occasional practical issues dealing with assets like houses and personal possessions, there is no impediment to appointing an executor resident in Canada outside Ontario.

Difficulty arises when the executor does not live in Canada or the Commonwealth: probate is likely to be more difficult and expensive. For instance, there are two potential problems with appointing a child who lives in outside the Commonwealth (for instance, in the United States) as the (sole) executor of your will:

- a) Probate will be more difficult. The executor will be required to either post a bond, or secure a court order dispensing with a bond. Bonds are difficult and expensive to obtain. Court orders to dispense are not readily granted. The Court may even refuse your chosen executor, and instead appoint someone in accordance with the default provisions of the *Succession Law Reform Act*.
- b) CRA and the IRS may argue that the trusts established by the will are non-resident in Canada, and subject to Canadian and US taxes as a result.

If you have assets in more than one jurisdiction you should consider multiple wills (see Multiple Wills).

Compensation

Being an executor is a demanding job. Executors are commonly compensated (in rough terms 5% of the value of the estate).

Avoid conflicts of interest

It is very important not to choose an executor who will automatically be in a conflict of interest. This is guaranteed to create distrust and often creates acrimony and disputes. These disputes can destroy families!

For instance, if one of your children lives with you, and the others do not, generally it is a bad idea to choose the live-in child as the sole executor of your estate because they will have a large conflict of interest related to dealing with the house.

Successor executors

Wills can last a long time. Someone who was a perfectly suitable executor at one time, may no longer be able or willing to act many years later. You should name at least one alternate executor.

Consider using a professional

Unless you have a relative or friend who happens to enjoy filing legal forms and doing taxes and accounting, we strongly recommend that you consider appointing an independent professional who is not a beneficiary of the estate to be the executor. Often, this will get the job done 'better, faster' and without the risk of poisoning family relationships. In addition, many professionals, especially trust companies, will have made arrangements to have someone ready, willing and able to fill the role when the time comes.

GUARDIANSHIP

Most parents with a child under 18 name a guardian for that child to cover the possibility that on the parent's death the child's other sibling(s), if any, is/are unable or incapable of looking after the child.

The Courts retain ultimate authority

The appointment of a guardian in a will is only binding for 90 days. The Courts - not parents - retain the ultimate authority to appoint a guardian of a child.

Obviously, the expressed wishes of the parent are an important factor that the Courts will consider, but it is just one of many factors that will be considered.

Key points to remember

- For some families, the choice of guardian is obvious. For many others, the choice is very difficult. There is no shame in that, but do not let it derail the whole process. It is better to have a will that does not address guardianship than to have no will at all.
- Who is most suitable can vary on a number of factors, including the age and development of the child, and the most suitable guardian for your child can change over time. Remember, guardians age too!
- Guardianship can be difficult, and can consume a lot of emotional and financial resources. Make sure that your proposed guardian has the ability and capacity to look after for the child.
- If you can, make sure that you provide sufficient resources for the guardian to provide for your child. Seriously consider adding compensation for the guardian.
- Make sure that the potential guardian agrees to accept the appointment.

LEGACIES & BEQUESTS

The heart of the will is 'who gets what'.

When the primary beneficiary is your spouse

A very common form of "simple" will is 'if they do not pre-decease me, everything to my spouse'. However, there are several very important planning considerations often overlooked in these situations.

Mirror wills and mutual wills

Spouses have 'mirror wills' when their current wills are identical. Usually mirror wills contain these 'everything to my spouse' bequests.

Mutual wills are much rarer and harder to implement. Spouses have mutual wills if they have agreed not to change their wills after the first spouse dies. This is a restriction on the normal testamentary freedom to make new wills and dispose of one's will as one wishes. Mutual wills, therefore, involve a contractual commitment that restricts testamentary freedom.

Many people believe that they have mutual wills when they do not.

It is particularly important in 'blended' family situations, if you want your spouse to be protected during their life, but your children from a prior relationship to benefit from your assets after your spouse passes away, to consider whether you want mutual wills, or to use other techniques such as 'life interests/spousal trusts' or the like (discussed above).

Common disaster clauses.

If both spouses die within a very short period of time (for instance, from a car accident, house fire, or other calamity), it is preferable to have the will of the first to die not 'pour over' their estate to the second die. If it did, there would be a requirement for double probate of all of the assets of the first to die. Instead, it is very common to include a

'common disaster' clause that provides that if the spouses die within a 10-30 day period, then the will of the first is read as if the second spouse had pre-deceased.

Planning with mirror wills

When spouses have mirror wills, it is important to ensure that bequests are not doubled, and loans and gifts are properly equalized.

When there is more than one beneficiary

When there is more than one beneficiary, there are two primary strategies for setting out who gets what from your estate:

- The 'pool then split' strategy, which involves pooling all assets, paying all expenses and all specific bequests, and then dividing the monetary value of the balance (the residue) among the beneficiaries in 'shares'; or
- The 'named gift' approach, which involves giving specific assets (or the proceeds from specific assets) to specific beneficiaries.

For instance:

- "give my daughter, Jane, my RRSP, and give my son John, my house" is a 'named gift' or 'specific bequest' type of disposition.
- "sell my assets, pay my debts, and then divide the residue equally between my daughter Jane and my son John" is a 'pool then split' approach.

Warning

Generally, the 'pool then split' approach has a much higher chance of being 'fair' or 'in keeping' with your original intentions, because the 'named gift' approach often fails to deal with changes in value over time (assets that have gone up in value, or been depleted) and who pays what debts and expenses (such as taxes and executor fees). For instance, in the example above, if you withdrew the RRSP to live, and the house went up in value, Jane may receive nothing and John a very valuable asset.

Don't over-complicate

Complex legacies can really complicate the process of applying for probate, and administration of the estate.

Gifts to minors

We understand the desire to leave a legacy directly to some children, especially grandchildren. However, gifts to minors (ie. Someone who is under 18 at the time of death of the testator) make a) probate, and b) estate administration considerably more difficult and expensive. The Office of the Children's Lawyer must be notified of any gift to a minor over \$10,000, and lengthy trusts can impose on the trustee (often the executor) long term duties to manage money for the children.

Therefore, for modest gifts, in order to reduce cost and hassle you should consider gifts that take the form of contributions to RESPS or directly to a parent of the child.

If you want to make a gift to a minor, please see the discussion above about trusts and the requirements for properly drafted trusts.

Philanthropy

Bequests to charities are a fundamental part of estate planning. We recommend them. However, some key points to consider include:

- Make sure that you identify the charity properly; use the full proper legal name;
- Make the gift clear and simple;
- Get advice to make the gift tax efficient;
- Consider making gifts before you die – that way you can be certain that they are made right, and you get to see your donation in action.

Lapses

A lot can happen between the time you make your will and when you die. In particular, some of your beneficiaries may pre-decease you. Do not assume that everyone younger than you will outlive you. It is very important to structure your legacies in a

manner that provides clearly, for all aspects of the estate, what happens if any beneficiary pre-deceases you. If you do not, you risk creating a partial intestacy for your estate. This rule applies to trusts, which require a gift over to address the beneficiary pre-deceasing the testator, and, if the beneficiary dies after the trust is settled.

RETENTION, REVOCATION, DESTRUCTION, LOSS

Retention

There should only be one original of a will, and the original is required when applying for probate. Therefore, it is very important to keep the original will in a safe place **where it can be easily located when needed and without being tampered with or destroyed by nefariously**. It is important to tell people where your will is located. Where appropriate, it is useful to share the contents of the will – copies of the entire signed will, with as many beneficiaries as suitable. When a will cannot be located the increase in expense and delay for the beneficiaries is significant, and the entire estate plan may be voided. Will that a shock to children and other beneficiaries invite lawsuits.

There are three options for storage:

- Keep it yourself. If you choose this option, you should file the original will in a safety deposit box, safe, or similar location.
- Leave it with your lawyer. This was the norm at one time. It has advantages (safe keeping and security) but in light of people's mobility and longevity, is not without some downsides. The key question to ask yourself is whether, under the circumstances, it is realistic to assume that when the will is needed the survivors will be able to locate the lawyer or law firm that has custody of the original will?
- Deposit it with the Court. For a small one-time fee, you can deposit an original will for safe keeping with the Courts in Ontario. We think that this is a very interesting option, especially if you tell folks what you have done.

Revocation

Unless you are doing 'multiple wills' (see Multiple Wills, below), generally you should revoke all prior wills when you make a new one. Revocation should be done expressly in the text of the new will.

Destruction

A will that is destroyed by the testator is revoked. You can revoke a will by tearing it, burning it, or the like. Generally, if you make a new will you may wish to destroy previous ones. However, if there is any concern about the validity of a new will, then retaining a prior valid will can be helpful.

Loss

Normally, only an original will can be probated. If the original has been lost, the presumption is that the testator destroyed it and thereby revoked it. This presumption can be overcome, but with considerable difficulty. If a will cannot be located, it is common to advertise, especially to local lawyers, to try to locate it. It is very difficult to deal with a lost or misplaced will, and thus it is very important to keep original wills in a safe location while also ensuring that they can be located when required. **Accordingly, we strongly recommend making an electronic copy of the completely signed will.**

Wills & Marriage & Divorce

A will is automatically revoked upon your subsequent marriage, unless the will was made in contemplation of the marriage (ie. Specifically referred to the marriage and your intention that the will remain valid after the marriage).

A will is **not** automatically revoked by a divorce. Instead, it is read as if your ex-spouse died immediately prior to your death. Thus the ex-spouse as executor and beneficiary but leaves the rest of the will intact, for better or worse. Generally, if you get divorced, you should immediately do a new will and revoke all prior wills.

MULTIPLE WILLS

You should only have one original of each will that deals with any given asset.

However, it is not uncommon to have more than one will, with the different wills dealing with different assets. This technique is particularly useful for:

- Reducing probate taxes. For instance, some assets, such as shares in a private company, often do not require probate and yet can be very valuable. If these assets are dealt with in one will that is not probated, the other assets (for instance real estate) that do require probate can be dealt with in another will. Probate taxes are only payable on the value of the assets covered by the will that is probated.
- Dealing with assets in another jurisdiction. If you own property in Ontario and property in Florida, it is quite possible that it would be best to have two separate wills. You may even have two separate executors. This may make getting probate in each jurisdiction and administration of each estate simpler.

Obviously, it requires some finesse to properly draft multiple wills. In particular, it is very important to make it very clear which will deals with which assets, to make sure that all assets are dealt with, that the overall disposition of the estate to beneficiaries meets your intentions, to ensure that each will is valid and enforceable in the jurisdiction where it applies (no point following Ontario law for a will that will govern assets in Greece) and to ensure that one will does not revoke the other(s).

SIGNING WILLS THE RIGHT WAY

Handwritten (holograph) wills

You can create a valid will if you write the entire document in your own handwriting, date it, and sign it. Do not put any additional gifts or instructions below your signature. Handwritten wills do not require witnessing.

Typewritten wills

In Ontario, a typewritten will must be:

- Signed by the testator
- Witnessed by two witnesses who
 - o were present when the testator signed; and,
 - o Are not a beneficiary, or the spouse of a beneficiary.

It is good practice to have the testator and the witnesses initial each page of the will, and to identify the name, address and occupation of both witnesses.

Affidavits of execution

When it comes time to probate the will, an affidavit of execution is required.

This affidavit should be sworn by one of the witnesses, and it should be sworn at the time the will is signed by the testator – otherwise, someone has to try to track down the witnesses years after the fact and hope that they remember the event.

When the affidavit of execution is signed, the original will should be stamped on the back of the last page and identified as an exhibit to the affidavit of execution.

While a will can be valid without an affidavit of execution, a will prepared without an affidavit of execution is not ready for probate.

Many will preparation services and some lawyers prepare wills without affidavits of execution – in our view, this defeats one of the key principles of estate planning, as the will is not ready efficient, effective probate.

AMENDMENTS

The best practice when making substantial changes to a will is first to **revisit and if necessary update the estate plan, and then, second, if necessary**, make an entirely new will from scratch. Remember, making changes to will without confirming that they are consistent with the estate plan is very risky.

Historically, when typing was difficult wills were amended by “codicil”. To be admitted to probate, a codicil must meet all of the formalities of execution as a will:

- a holograph codicil must be entirely handwritten by the testator in their own handwriting, and signed at the bottom by the testator;
- a typewritten codicil must be signed by the testator in the presence of two witnesses who witness the testator and each other sign.
- In order to probate a typewritten codicil, an affidavit of execution **of the codicil** sworn by one of the two witnesses is required.

Making changes on your will is not recommended. Handwritten notes and edits on the face of a signed will are often invalid as they do not meet the execution formalities

above, and frequently create great confusion and cost – a court application to determine the validity of the changes will likely be required.

Appendix: the consequences of intestacy

In Ontario, when you die without a will (“intestate” or “intestacy” are the formal legal phrases), virtually every aspect of your estate is different from the norm if you had made a will.

Key differences include:

- who can/should apply for probate;
- who will be responsible for administering your estate; and,
- who will inherit what.

In particular, you absolutely must make a will if:

- you are separated but not divorced. If not, it is very likely that your ex-spouse will be the administrator of your estate and will inherit some or all of your estate;



NO WILL = BIG DIFFERENCE

(OFTEN, NO WILL = BIG MESS)

- if you are not legally married but live common law with a spouse. If you do not, it is very likely that your common law spouse will not inherit anything, and your estate may pass to your parents or children (or former spouse!) instead;

- you have a blended family and want to ensure that your children receive some of your assets, rather than them all passing to your spouse and in turn to your spouse’s children.

If you do not have a will, the cost to your estate will usually be at least several thousand dollars in extra expense, not to mention the pain and cost to your executor, spouse, and family that poor planning will inflict.

The rules for distribution of estates with no wills in Ontario are fixed, and often very harsh. They are:

- Zero to common law spouses: not legally married, no inheritance;
- If married and no children, 100% to the spouse;
- If married and children, the first \$200,000 and then a percentage (usually 1/3) to the spouse, the balance to the children equally;
- If no spouse, and surviving children, then to the children *per stirpes*;
- If no spouse and no children, then 100% to parents;
- If no spouse, no children and no parents, then 100% to the surviving closest level of kin.

Pricing

| Estate Plan & simple Will for one person | Estate Plan & not-so-simple Will for one person | Powers of Attorney for one person |
|--|---|--|
| <p>Includes full consultation of your obligations and choices</p> <p>Includes estate plan</p> <p>Simple will:</p> <ul style="list-style-type: none"> • No trusts • Immediate distribution to beneficiaries • No dependents <p>Includes affidavit of execution necessary for probate</p> | <p>Includes full consultation of your obligations and choices</p> <p>Includes estate plan with some deferral of distribution after death</p> <p>Complex Will:</p> <ul style="list-style-type: none"> • One or more trusts • Deferred distribution to beneficiaries • Dependents • Assets outside Ontario • Multiple wills <p>Includes affidavit of execution</p> | <p>Includes power of attorney for property</p> <p>Includes power of attorney for personal care</p> |
| \$500 | \$1000+ | \$200 |

Additional fees apply (see last page, and our website for more information)

| Estate Plan & simple Wills for a couple | Estate Plan & Not-so-simple Wills for a couple | Powers of Attorney for a couple |
|--|---|--|
| <p>Includes full consultation of your obligations and choices</p> <p>Includes estate plan</p> <p>Simple mirror wills:</p> <ul style="list-style-type: none"> • No trusts • Immediate distribution to beneficiaries • No dependents <p>Includes affidavit of execution (necessary for probate)</p> | <p>Includes full consultation of your obligations and choices</p> <p>Includes estate plan with some deferral of distribution after death</p> <p>Complex Wills:</p> <ul style="list-style-type: none"> • Wills are not mirrors • One or more trusts • Deferred distribution to beneficiaries • Dependents • Assets outside Ontario • Multiple wills <p>Includes affidavit of execution (necessary for probate)</p> | <p>Includes one power of attorney for property for each person</p> <p>Includes one power of attorney for personal care for each person</p> <p>POAs are granted to the spouse and one alternate</p> |
| \$1000 | \$1500+ | \$300+ |

Additional fees may apply:

- For real estate title searches
- For documentation of gifts and loans made while alive (\$250 +)
- If the clients do not complete our online intake questionnaire.
- For any on premise consultations or signing of documents (ie. not by video conference)
- If any issues with respect to testamentary capacity and voluntariness must be addressed and documented (\$250+)
- For storage in our vault or deposit with the Court
- For plans that include assets outside Ontario

These issues are discussed on our website and in our eBook *Estate Plans and Wills: A Practical Guide*.

About Us

We are Miltons Estates Law

Ontario wills & estates lawyers.

Learn more: www.ontario-probate.ca