O'SULLIVAN
ESTATE LAWYERS

Advisory

Considerations in planning your will

WHAT HAPPENS IF YOU DIE WITHOUT A WILL?

Most importantly, the law, not you, will determine distribution of your estate, which in most cases will not reflect your intentions and desires.

As an example, under Ontario law, if your spouse and one child survive you, the first $350,000 of the estate passes to your legal spouse. The estate in excess of $350,000 would be divided evenly between your legal spouse and one child. If there is more than one child, one-third of the value in excess of $350,000 passes to the legal spouse, and the remaining two-thirds is divided among children, however many there may be. If there is no legal spouse or children or other lineal descendants, the estate is divided first among parents, failing which siblings, and then among the closest living next-of-kin as determined under provincial law. If your child is under age 18, his or her entitlement would have to be paid into court, or to the legal guardian of the child appointed by the court. In Ontario, common-law spouses do not have rights to share in the estate on an intestacy. These results do not meet the expectations and wishes of most people, including from the viewpoint of the needs of the surviving spouse.

On an intestacy, no one has the immediate power to represent the estate or deal with estate assets. Only when an estate trustee has been appointed by the court, which in many cases takes considerable time, will the estate have a legal representative who can act on its behalf. An executor appointed under a will, in contrast, takes his or her powers from the will, and has the legal authority to represent the estate and deal with its assets immediately on death.

Not having a legal representative immediately in office on death can be particularly problematic if the surviving spouse requires funds to pay family expenses, if the deceased is a professional carrying on a practice, or is a business owner. Until an estate trustee is appointed, the estate is left in limbo, with no person having legal control or authority.

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Some people may be of the view that they do not need a will if all of their assets are held jointly with their spouse, and if their insurance and RRSPs are designated to their spouse. However, this will not address the problem that will arise if both spouses die in a common accident, particularly where there are young children. A will also provides the opportunity to appoint guardians and custodians of any minor children.

CHOOSING EXECUTORS AND TRUSTEES

The issue of who you should appoint as an executor and trustee of your will often presents difficulty. Perhaps the prime issue to consider is who you feel will act in the best interests of your estate and its beneficiaries. In the situation of married spouses, the usual first choice is to appoint the spouse if an outright distribution of most of the assets to the surviving spouse is contemplated. Factors that may not favor this choice include a spouse's advanced age or unfamiliarity in dealing with financial assets, particularly where they are complex.

It is also common practice to appoint one or more alternate executors to provide for the possibility that one of the named executors may predecease the testator or, if he or she survives the testator, may be unwilling to act, pass away, or be unable to complete the administration of the estate.

If a will provides for a continuing trust, it is often advisable to appoint one or more individuals to act as co-executors, and as well to provide for alternate appointments. Where a financial conflict of interest is created because the income of the estate is to be paid to a person (the "income beneficiary"), with other individuals to receive the capital of the estate on the income beneficiary's death (the "capital beneficiaries"), it is often advisable to ensure that the interests of both the income beneficiary and the capital beneficiaries are represented, and that one or more "neutral" executors are appointed.

Such a conflict can arise if a spouse is left the right to receive income of the estate for his or her lifetime, with power in the executors to encroach on capital for his or her benefit, and with the remaining capital ultimately passing to children. Because of the conflict of interest between the spouse and children, particularly with regard to exercising the power to encroach on capital, a difficult situation is often created. A third neutral party acting as executor in this situation is often desirable.

Unless the will provides otherwise, executors must make their decisions unanimously. A majority decision clause can be included to provide that a majority of executors may make any decision to provide more flexibility and ensure the executors do not become

"deadlocked" in their decision-making. Where appropriate, it can be specified that the spouse must be one of the majority to provide further protection to him or her.

Of prime importance is to ensure that individuals are appointed who are trustworthy, and who will be prepared to assume what can be an onerous role. In brief, an executor is responsible for administering the estate and carrying out the terms of the will, including collecting in all of the assets of the estate, satisfying all debts, filing income tax returns and paying all taxes owing, paying legacies, carrying out bequests, and distributing the remainder of the estate to those entitled under the will. If there are continuing trusts, the trustees appointed under the will have the responsibility of managing the trusts until they are terminated in accordance with the terms of each trust, including filing income tax returns on an ongoing basis, and maintaining accounts for each trust. Often the same persons are appointed as both executors and trustees, but they can be different.

Another consideration in the choice of executors and trustees is whether or not a professional trustee should be appointed. A professional trustee can be an appropriate choice where the complexity of the assets requires special expertise; where the administration is complex and will be too onerous and time-consuming for one or more individuals to bear; where there is a likelihood of a family dispute and the need for an independent disinterested party; or where trusts are established which will endure for a lengthy period of time. Alternatively, professional estate administration services can be obtained on an agency basis.

One factor to bear in mind is that if an individual executor is also a beneficiary or close relative, often compensation for acting as executor and trustee is not requested, whereas a professional trustee will require compensation.

CHOOSING GUARDIANS OF MINOR CHILDREN

Although many parents know that they may appoint guardians for their children under their will, and in many cases this factor provides the major impetus for contacting a lawyer to arrange for preparation of a will, uncertainty surrounds what the effect of this appointment is.

In Ontario, the right of a testator to appoint a guardian of a child under age 18 is provided by statute. The *Children's Law Reform Act* (Ontario) confers the limited right of a parent under his or her will to appoint a "custodian" of his or her child. This appointment applies only if no other person is entitled to custody of the child at the date of the parent's death, and is effective for only ninety days from the date of death of the parent. On or before the

expiry of this ninety day period, an application can be made to court for a permanent order.

Although the appointment of custodians does not create long-term legal rights regarding custody of a child, the expression by parents of their wishes on this issue is important. If a court has to determine the issue of permanent custody, the parents' wishes as expressed in an appointment made in their wills can be persuasive evidence in support of their choice. This is particularly important in the event of a dispute as to custody arising after the death of the child's parents.

CONSIDERATIONS IN GIFTING AND DIVIDING YOUR ESTATE

(a) Specific Bequests and Personal and Household Articles

In your will, you might wish to include a provision to distribute specific personal effects or household effects or other types of property, including real estate. A "specific bequest" of such property can be provided in your will.

Generally, in the case of personal items, it is not advisable to include too long a list of items because each time you wish to make a change, you will need to re-execute your will, following all formal legal requirements for such purpose. If you are confident that your executors and family members and/or friends will follow your wishes, you may choose to leave your personal and household effects to your spouse or named individuals, with a non-binding memorandum or "letter of wishes" expressing your wishes with regard to distribution of specific items.

In respect of real estate, a specific bequest can be made of a particular property, including recreational properties. Where appropriate, consideration can be given to any special terms upon which the property should be held, for example, use of a trust to hold a cottage property for the long-term use of several generations of family members.

(b) Cash Legacies and Funds

You may also wish to leave a specific amount of money to children, grandchildren, friends or relatives, or to a charity, which is termed a "cash legacy". A trust fund could also be created for specific amounts, for example, for a relative or friend to provide ongoing financial support, or to provide for grandchildren, including for educational purposes.

(c) Residue of the Estate

After you have provided for payment of debts and liabilities, the distribution of specific property, your personal and household items, and any cash legacies or funds, the remainder of your estate is called the "residue".

Your will can provide that the residue of your estate be immediately distributed, for example, if you are married, that the residue pass outright to your spouse. Sometimes, however, an immediate distribution of all of the residue may not be the best way to minimize tax and ensure succession of capital to children and others.

Instead, use of one or more trusts under the will may be appropriate. By way of a trust, the property can be held in accordance with the terms of the trust for the beneficiaries. A right to all of the income can be provided, or it can be discretionary, i.e. the trustees determine how much is paid, to whom, and when. As well, rights to receive capital can also be provided.

If children are to inherit under the will, even on a contingent basis, for example, in the event a spouse does not survive, most parents are concerned that the child's inheritance be deferred past age 18, which in Ontario is the legal age at which the child would be entitled to demand that his or her share be paid. These sorts of concerns can be effectively dealt with by establishing a trust under your will. With respect to a child's share, it is very common to provide that until the child reaches a more financially mature age, the executors have discretion to use the trust funds, including capital and income, for the child's benefit, and that at specified ages the child receive part or all of his or her share, for example, one-half of the capital at age 25, and the remainder at age 30. In such event, until the child reaches the age of 30, the executors will have some control over the child's entitlement in the estate, and be in a position to use it for the child's benefit. Similar trust provisions can be incorporated for grandchildren or others who may inherit to ensure distribution occurs at one or more appropriate ages. More intricate trust provisions for children and others can be included to provide continuing wealth protection, including on marital or relationship breakdown, probate fee minimization, capital succession to issue, and income splitting to reduce tax.

Many factors must be taken into account in deciding whether or not use of a trust is desirable, including the size of the estate, the ages of the beneficiaries, the ability of the beneficiary to manage funds, the appropriateness of tax minimization techniques, and any special considerations. If there are individuals who have special needs, including because of physical or mental disabilities, special trust provisions may be appropriate. All of these considerations can be properly planned and provided for in the will.

In addition, most well-drawn wills provide for various contingencies. It is important to consider how you would wish your estate to be distributed if there is a common accident and your spouse and children or other primary beneficiaries do not survive you. A common plan between spouses is to determine the family members of each spouse and/or charities to receive a share and, in what proportions. Often, if appropriate, depending on individual circumstances, "mirror" provisions are adopted so that each spouse's will reflects the same plan of disposition. Particularly where assets are held jointly, this avoids an unfair result should one spouse survive the other, if only briefly, and by right of survivorship become the owner of jointly held property.

INSURANCE DECLARATIONS AND RRSP DESIGNATIONS UNDER A WILL

A will is a document under which you may make a valid declaration of insurance proceeds and designate a beneficiary of Registered Retirement Savings Plans ("RRSPs") and Registered Retirement Income Funds ("RRIFs"). It is a good idea to review any declarations and designations you have made to ensure they are current, particularly where there is a change in circumstances, for example, a marital breakdown. A common misconception is that if a person separates from his or her spouse, on death their spouse will automatically lose entitlement to such proceeds under existing designations and declarations naming the spouse, which is not the case. To change the beneficiary, it is necessary to make a new designation or declaration.

In a simple situation of husband and wife where they wish their estates to pass outright to each other, it is generally advisable to name the spouse as the beneficiary of any insurance proceeds rather than the deceased's estate. If the spouse is named directly, under relevant provisions of insurance legislation, insurance proceeds pass directly to the spouse and are not exposed to creditor claims. Similarly, where a spouse is designated as beneficiary of proceeds of RRSPs or RRIFs, the proceeds pass directly to the spouse and are not exposed to creditor claims. In addition, if there is a designated beneficiary of RRSPs, RRIFs or insurance policies, the proceeds are not subject to Ontario Estate Administration Tax (formerly "probate fees"), since they will not be computed in the value of the estate upon which this tax is based. In other situations, including for tax minimization purposes, use of one or more trusts may be appropriate to deal with insurance proceeds.

Further information on declarations and designations are explored in our Advisory "Succession Planning with Life Insurance and Registered Savings".

TAXATION ON DEATH

There are no "death" taxes or succession duties imposed by the Federal Government or any of the Provinces of Canada. There are income tax consequences triggered by your death, and these consequences should be taken into account in planning your will. For example, capital gains are generally taxed on your death since under the *Income Tax Act* there is a deemed disposition of all capital property on an individual's death. There are relieving provisions available where assets pass between spouses in order to defer such taxation.

In some jurisdictions, such as the United States and the United Kingdom, there are death taxes. It is possible that these taxes would also be triggered by virtue of owning assets in those jurisdictions or if you have an affiliation with them such as by citizenship or domicile. As well, if you have beneficiaries with affiliations with these or other jurisdictions which have death taxes, including your spouse, special planning for their inheritance may be desirable to minimize exposure to such taxes.

For these reasons it is critical to seek advice in planning your estate. Your will can be an effective tax planning instrument, both at the time of your death and afterwards. It is important to ensure that your will has been drawn with tax considerations taken into account in order to ensure that tax is minimized, that your estate has sufficient liquidity to pay for any income tax liability arising on death, and that the distribution under your estate can be effectively carried out.

RATIONALIZING YOUR ESTATE PLAN

There are planning techniques by which through use of appropriate insurance declarations, RRSP designations and the structuring of your assets, you can ensure that most of your assets flow outside of your will and will not be subject to Ontario Estate Administration Tax, and potentially higher administration costs. Holding property, where appropriate, as joint tenants with right of survivorship, and ensuring that insurance proceeds do not form part of the estate, but instead are designated directly to beneficiaries, are planning options that may be appropriate to minimize exposure to such tax. All of these considerations should be borne in mind in planning an estate, based on professional advice particular to each individual situation, in order to ensure minimization of the cost of administering the estate and attendant legal fees and taxes.

THE NEED TO REVIEW YOUR WILL

As a general rule, it is advisable to review your will at least every three years, and earlier if any significant family or financial changes occur in your life. As children mature, you will

wish to consider their changing needs, review your choice of guardians and custodians and executors, and ensure that your estate plan makes sense in the context of your current circumstances. If a will is not regularly reviewed, it can result in a document and plan of distribution which is outdated, does not reflect your present intentions, is tax inefficient, creates family disharmony and sometimes litigation and attendant legal expense.

In Ontario, it should be borne in mind that if a person marries, any will in place prior to marriage is automatically revoked, unless the will is expressly made in contemplation of an intended marriage. This has since been repealed by Bill 245 – Accelerating Access to Justice Act, 2021. Sometime after January 1, 2022, at a date to be named, marriage will no longer revoke an existing will.

Separation of married spouses does not affect the terms of their wills. Only if there is a decree absolute of divorce will Ontario law apply to revoke provisions made to a former spouse, unless there is a contrary intention expressed in the will. However, this too has been amended by Bill 245. At a date to be named later, a gift in a will to a spouse will be revoked if the spouses are deemed to be separated as of the date of the testator spouse's death.

It is also a good idea to ensure that your financial information is well-organized, and that a current list of assets is maintained with information indicating where the assets can be located. Lack of good records can lead to needless waste of time and expense, and sometimes result in assets never being identified or located, resulting in a financial loss to the estate.