Wills, Estates & Powers of Attorney

Public Legal Education

FACL ONTARIO - COMMUNITY OUTREACH COMMITTEE

DISCLAIMER

- All information in this presentation is legal information, not advice
- For legal advice regarding your particular situation, please consult a Wills & Estates lawyer

WHAT IS A WILL?

- A person's will is a written document that says how they want their money and other property to be taken care of after they die
- It takes effect when the person dies

WHAT IS AN ESTATE?

- An **<u>estate</u>** is the property that a person owns or has a legal interest in
  - Calculated as the **net worth** left by a person after death

- **Net Worth =** Property you own - Debts you owe

WHO CAN MAKE A WILL?

- Anyone over 18 years of age
- When you make a Will, the law says that you have to be of "**sound mind**"
  - **Sound mind** means that you do not have a mental impairment that stops you from knowing what you are doing

HOW DO I MAKE A VALID WILL?

A valid will needs to be:

1. Prepared for a testator (the person who is making the will)
2. Made for a testator over 18;
3. In writing;
4. Signed by the testator; and
5. Witnessed by two attesting witnesses in the presence of the testator

DIFFERENT KINDS OF WILLS

1. **Handwritten Will** A handwritten Will is called a **"holographic"** Will and is legal
   - It has to be totally handwritten in your own handwriting. Then you have to date it and sign it at the end.
2. **Typed Will** A typed Will has to be dated and signed in front of two witnesses
   - The two witnesses must also sign the Will. All three (you and your two witnesses) must be together when signing. The two witnesses should not be people who will get something from your estate when you die, or the spouses of people who will get something from your estate when you die.

- **<u>A videotaped Will is not valid in Ontario.</u>**

LIVING WILLS

- A “living will” means a document in which you write down what you want to happen if you become ill and can’t communicate your wishes about treatment
- A common reason for people to write a “living will” is to say they do not want to be kept alive on artificial life supports if they have no hope of recovery

DO I NEED A LAWYER?

There is no law that says a lawyer needs to make your Will. You should, however, get legal advice in any of the following situations:

a) if you are about to be married (a Will made before the marriage may be cancelled by the marriage);
b) if you are under 18 years of age and want to make a Will;
c) if you have a past history of mental impairment;
d) if you are a senior (to find out about the question of "mental capacity");
e) if you are separated from your spouse;
f) if your estate is likely to be very large (to get advice on tax saving);
g) if you own assets outside of Canada.

MAKING CHANGES TO YOUR WILL

There is no requirement to update your Will, but you should consider revisiting a previously executed Will at the following times:

a) If you get married or divorced;
b) If you buy a house, sell a house, or other large changes to your money;
c) Following the birth of a child or grandchild;
d) Following marriage of a child; and
e) Following the death of your previously appointed Estate Trustee.

WHAT HAPPENS WHEN YOUR SPOUSE DIES?

- When a married spouse dies and has **left a will**, the surviving spouse can elect (choose) to receive:
  - An equalization payment under the Family Law Act (half of the value of the property accumulated during marriage), **or**
  - His or her entitlement under the will.
- When a married spouse dies and **there is no will**, the surviving spouse can make an election to receive:
  - An equalization payment, **or**
  - His or her entitlement as a spouse under the Succession Law Reform Act

WHAT HAPPENS WHEN YOUR SPOUSE DIES?

- A surviving spouse has six months from the date of the spouse's death to make an election.
- If an election is not made within six months, the spouse will automatically be granted his or her entitlement under the will, or under the Succession Law Reform Act if there is no will.
- The election is important!
  - Surviving spouses should seek legal advice before making an election.

HOW DO I FILE AN ELECTION UNDER THE FAMILY ACT?

- An election must be filed in-person or by mail with the Estate Registrar for Ontario within six months of the spouse's death. To file an election, complete the form (it can be found online) and send to:

  Estate Registrar for Ontario
  c/o Toronto Estates Office
  Superior Court of Justice
  330 University Ave
  Toronto ON M5G 1R7

  If you have any questions about filing an election, please call the Estate Registrar for Ontario at 416-326-2940 or toronto.estates@jus.gov.on.ca. (Please note that elections may not be filed by email.)

ESTATE ADMINISTRATION TAX

- The estate administration tax is calculated on the total value of the deceased's estate on the application for a certificate of appointment of estate trustee
- The formula for calculating the amount of the tax is
  - $5 for each $1,000 (0.5%), or part thereof, of the first $50,000 of the value of the estate, and
  - $15 for each $1,000 (1.5%), or part thereof, of the value of the estate exceeding $50,000.
- Use the estate administration tax calculator to find out the estate administration tax payable for estates valued between $1,000 and $5 million.

INTESTACY: IF YOU DO NOT HAVE A WILL

- Your estate will be distributed based on the Ontario *Succession Law Reform Act*
  - Gradual scheme of succession but has simplified rules of intestate succession for family
- May also be costly - banks and insurance companies may require a certificate of appointment of estate trustee before they release any money or property

RELATIONSHIP HIERARCHY
S. 47 of the *Succession Law Reform Act*

1. If no spouse or children survive, the surviving parents take all equally or, if only one survives, he or she takes all.
2. If no parents survive, the brothers and sisters share the estate equally. If any brothers and sisters have died before, their share goes to their children;
3. If no brothers or sisters survive either, however, the nephews and nieces share equally;
4. If no nephews or nieces survive either, any other next of kin of equal degree will share equally; and,
5. If no next of kin survive, the property becomes the property of the Crown (Court).

WHAT HAPPENS WHEN YOU CANNOT MAKE DECISIONS FOR YOURSELF?

- You can name someone to make financial decisions for you, such as paying your bills, with a **continuing power of attorney for property**.
- For personal care and health decisions such as where you live, what you eat or what medical care you will receive if you get sick or injured, you can name someone in a **power of attorney for personal care**.
- **Tip:** No one can make you sign a power of attorney if you don't want to. But, if you don't choose one, the government may have to appoint someone to make certain decisions for you.
    - It's better if you choose someone you feel you can really trust, who knows your wishes.

WHAT IS A POWER OF ATTORNEY?

A power of attorney is a legal document, often referred to as a "POA", that gives someone else the right to act on your behalf.

In Ontario, there are three kinds of Power of Attorney:

1. Continuing Power of Attorney for Property
2. Power of Attorney for Personal Care
3. Non-continuing Power of Attorney for Property - *cannot be used if become mentally incapable.*

Note: Powers of Attorney deal with matters while you are alive. A Will deals with matters after your death.

POWER OF ATTORNEY FOR PROPERTY

- The attorney (may not be a lawyer, can be whoever you choose) may be given the power to make any type of property-related decision that the person could make themselves, except make a will. The power can be limited in scope.
  - For example, the power of attorney could say the attorney cannot deal with certain types of property. The power of attorney may put conditions on how the property is to be managed.
  - It might also say that loans to individuals or certain types of investments cannot be made

POWER OF ATTORNEY FOR PERSONAL CARE

- A power of attorney for personal care authorizes the attorney to make care decisions:
  - About treatment, admission to a long-term care facility, or personal assistance services provided within such a facility; or
  - About other personal care if the attorney has reasonable grounds to believe that the grantor is incapable of making the decision.
- It may be important to include in the POA for personal care how to determine if the grantor is incapable of making decisions
  - For example, if a particular doctor should issue a report

POWER OF ATTORNEY KIT

- The Office of the Public Guardian and Trustee has a Power of Attorney Kit online that will help you appoint the person you want to make decisions for you when you are no longer able to do so for yourself.
- Power of Attorney Kit (PDF)
- Visit your local Public Guardian and Trustee office, or
- Call 416-314-2800 in Toronto, or toll-free 1-800-366-0335.