WILL PLANNING TO MEET YOUR ESTATE NEEDS

Many people recognize that a Will is an essential component of the estate planning process but they fail to give this subject the time or consideration that it requires. It is important to remember that a properly structured Will is generally the most effective way to make sure that your estate assets will be managed and distributed according to your wishes.

Although there are many do-it-yourself Will kits and software packages available in the marketplace today, this is one area where you are strongly urged to seek assistance from a legal professional. If your affairs are complex, then you should also make sure that this is someone who specializes in estate matters. Some estate complexities are highlighted in our section on Executors, but you may require customized Will planning advice if you own assets with special income tax considerations, are divorced or in a second marriage, or if potential beneficiaries of your estate are facing marital difficulties, bankruptcy, special medical requirements or other challenges.

In no way is this report intended to replace the advice of a legal professional. It merely aims to give you a basic overview of some of the major issues that you may wish to consider before you meet with your legal advisor. If you do not yet have a valid Will, or if you have a Will but you suspect that it may need review, take steps to address the situation without delay.

THE LAWS OF INTESTACY

If you die without a Will, you die "intestate," and your assets will be distributed according to the laws of intestacy in your province. These laws are inflexible and could cause unforeseen problems and undesirable consequences. For instance, in all provinces these laws provide for some immediate sharing of the estate between a surviving spouse and any children. In some cases, this could require the liquidation of key family assets and an untimely allocation of assets to children. If you do not have a spouse or children, then your estate is generally distributed to family members in the following priority order: your parents, and if they are not alive, your brothers and sisters, and if they are not alive, your nephews and nieces, and so on. If you have no next of kin, your estate goes to the government. Friends or charities are not taken into consideration. Dying without a Will can also mean needless complications to the estate-administration process. This could cause delays, extra expense, considerable inconvenience and even hardship for survivors.

Basic Elements of a Will

Your legal advisor should be able to help you review your personal and family circumstances, clarify your estate objectives, and explore Will planning options. This is a brief overview of some issues for discussion:

Will Provisions

Some fundamental decisions to consider:

- Executors/Trustees/Alternates
- Guardianship of Children
- Gifts of Personal Property
- Cash Legacies
- Residue of the Estate: primary distribution (first choice of beneficiary); secondary distribution (if primary beneficiaries predecease you)

Common Clauses

Your legal advisor should be able to customize any Will clauses that may be appropriate. Here are some common ones:

- **Broad Executor/Trustee Powers**: To invest, encroach on capital, make tax elections, etc.
- **Representation in Favour of Issue**: Deceased child's share to his/her children?
- **30-Day Survival Clause**: To avoid double probate if spouses die within hours or days of each other

- **Staggering of Distribution to Children**: For example, 1/3 at age 20, 1/3 at 25, remainder at 30
- **Common Disaster**: Alternate provisions if all family members perish
- **Family Law Clauses**: For example, inheritance to be excluded from inheritor's shared marital assets

Holograph Will

This is a Will you have completely handwritten and signed. No witnesses are required. Although this type of Will is legal in some provinces, it is generally not recommended for obvious reasons. Your handwriting may be impossible to understand, your instructions may be ambiguous, and it is very likely to be incomplete and inadequate for your estate needs. Whether you execute a holograph Will or a more formal type of Will, be aware that a badly planned Will could leave you even worse off than having no Will at all.

LEAVING ASSETS OUTRIGHT OR VIA A TESTAMENTARY TRUST

In your Will, you can leave assets outright to your beneficiaries with no strings attached. Another alternative is to control and distribute assets via a "testamentary trust." A testamentary trust is set out in your Will, and like your Will, it only arises upon your death. A testamentary trust can provide substantial long-term tax advantages and it can also serve as an appropriate vehicle if you wish to have assets managed for minor children or other dependants.

A testamentary trust can provide education funding, especially if there are significant age differences among children. For example, if you have already paid university expenses for older children, and there are younger children who have not yet had the chance to enjoy the same benefit, an unfair situation could arise. That is, if you passed away before the younger children reached university age, they would have to use some of their inheritance to fund their education. A testamentary education trust could be designed to effectively equalize the situation.

You might also consider a testamentary trust if you wish to provide lifetime income for your spouse but maintain capital for other beneficiaries upon your spouse's death. It should be noted, however, that provincial family-law legislation may allow your spouse to overturn this type of arrangement. For instance, in Ontario, your spouse has up to six months after your death to choose to receive an equalization payment under the Family Law Act rather than accept the terms of your Will.

Basic Elements of a Will

Testamentary trusts can be powerful and flexible tax-planning tools. They can allow you to achieve family income splitting and significant long-term tax savings. As you may know, when you transfer assets to a spouse or minor children during your lifetime, certain types of income from those assets are attributed back to you for tax purposes. (Also, the transfer of assets may give rise to a taxable disposition.) It is important to realize, however, that the government's "income attribution rules" do not apply after death. In addition, a testamentary trust is taxed more favourably than a trust that takes effect during your lifetime (an "inter-vivos" trust) in that testamentary trust income is taxed at the same graduated rates that apply to individuals.

If you have substantial capital to leave to your spouse or children at death, it may be appropriate for you to distribute it to them outright, however, this may mean that they will be missing out on a major tax-planning opportunity. For instance, if you have adult children in a high tax bracket and you leave them your substantial capital in an outright distribution, any income they earn on that capital will be taxed at their high tax rate. If, on the other hand, you direct the capital to testamentary trusts for them and their children, any future income can be designated to them, or to their children, or to the trusts, at their respective tax rates. This strategy may be particularly attractive to adult children who wish to fund their own children's school, camp, hobby and other expenses in a tax-efficient manner.

If you have a spouse and three children, you could actually establish four testamentary trusts, one for each child and one for your spouse. Each child's trust could include that child's children as potential beneficiaries. Income distributed to beneficiaries could be taxed at their tax rates, or, if the appropriate designation is made, the income could be taxed in the trust as if it were an individual. We do want to caution you, however, that professional advice and guidance is needed because of the complexity and continuous amendments of our tax laws, and the care required in properly drafting these trusts into your Will.

EXECUTORS AND ALTERNATES

In Ontario, executors are officially called "estate trustees with a Will" and in Quebec, they are called "liquidators." However, you may be more likely to hear the term "executors" and you should note that this is generally used interchangeably with the term "trustees." Regardless of the job title, this is the person, persons or institution you charge with the responsibility of carrying out the provisions of your Will. You can name one or more executors and you can also name alternate executors in the event an executor is either the event an executor is either unable or unwilling to act.

You may generally wish to name someone younger than yourself who is in good health. However, it is not only important to choose an executor who is able to act; it is also wise to choose someone who is willing to act. Executorship can potentially be a major undertaking. Once the job is accepted, your executor must fulfill his or her obligations or risk exposure to personal liability.

Some Duties of an Executor

- Gather information to determine the nature, location and value of the deceased's assets and debts
- Apply to court for appointment as executor
- Advertise for creditors
- Collect any money or benefits owing to the estate
- Liquidate all the assets and dispose of personal effects
- Pay debts, including funeral and other expenses
- Initiate or defend legal proceedings on behalf of the estate
- Establish who the lawful heirs are and locate them
- Account to the heirs and distribute the money
- Administer trusts set out in the Will

Co-Executors

Some people may suggest that a compromise solution would be to appoint a professional executor as co-executor with family members. This often strikes a reasonable balance when there is a desire to ensure family harmony, as well as independent and professional estate administration. It is important to realize, however, that this is unlikely to create any significant fee savings over naming a professional executor as sole executor/trustee.

Professional Executors

In cases where executorship is expected to be particularly complicated and involved, it may be appropriate to appoint a trust company, lawyer or other professional as sole executor, even though their fees may appear to be substantial. You may especially wish to consider this in the following circumstances: possibility of significant family conflict; serious disputes regarding the distribution of the estate; impartiality of your executor; estate assets require careful management (e.g., there is a business).

Non-professional executors may wish to perform the bulk of their executor duties on their own, or else they may prefer to assume a more supervisory role. In many cases, it is clearly appropriate for them to hire specialized professionals including legal, tax and financial advisors to take on selected tasks. In fact, you may wish to specify in your Will, that your executors are strongly urged to hire agents where any particular expertise is required and that any corresponding professional fees are to be paid out of the estate. In this way, your executors can retain complete control of the estate, while enjoying peace of mind that the estate is being administered to the best possible advantage. In most cases, you should be able to personally pre negotiate the fees to be charged for various professional services.

Here are some circumstances that may require this kind of help:

- A sizeable estate
- Significant tax issues
- Sophisticated investment strategies
- Minor children/dependants require ongoing support
- The estate includes valuable collections, commercial real estate or business interests
- Foreign assets and cross-border considerations
- Multi-jurisdictional complexities

Subject to provincial trust law, you can add a clause to your Will which specifically authorizes your executors to invest in mutual funds, managed accounts or any investments which they consider to be appropriate. If you do not give your executors this authorization, they will be bound by investment restrictions under trust law. In some provinces, there is a severely limited list of conservative investments which a trustee must follow. In other provinces, the "prudent investor rule" applies. (Basically, a trustee must use the judgment and care that a person of prudence, discretion and intelligence would use in managing the property of others.)

EXECUTOR COMPENSATION

Executors are entitled to receive compensation, and may charge fees subject to prescribed restrictions in provincial legislation. There is considerable range in the amounts which executors charge, and, it is quite common for professionals to enter into a pre-arranged contract that sets limits and fees. Executors who are family members do not usually charge for their services, especially if they are beneficiaries of the estate. (Please note that executor fees are taxable income to executors.) If you wish, your Will may stipulate that non-professional executors are not to receive compensation for discharging their duties

Professional Investment Services

Nowadays, executor/trustee obligations are considered to include a reasonable level of investment planning. This generally requires a clear investment policy that is sufficient to ensure long-term capital growth, as well as income for beneficiaries of the estate. Given the complexities of today's marketplace, it is prudent to enlist the assistance of a professional financial advisor.

If you currently have a trusted relationship with a CIBC Wood Gundy Investment Advisor, you may wish to encourage your executors to maintain this relationship. Your Investment Advisor is well-equipped to help your executors review your estate objectives and design appropriate investment guidelines. Your Investment Advisor is also able to support your executors with a comprehensive selection of investment products, and professional investment services.

EXECUTING YOUR WILL

Your Will must be signed in the presence of two adult witnesses. The witnesses are not to include a beneficiary of the Will or a spouse of a beneficiary. Some legal advisors prepare an affidavit of execution to certify that the Will has been properly witnessed.

You Can Alter Your Will as Your Circumstances Change

Your Will only comes into effect at your death and you can alter it as often as you wish, as long as you are mentally competent to do so. As a general rule, it is recommended that you review your Will at least every three years, but if you experience any significant changes in your personal or financial circumstances, make sure to review it immediately. You should be aware that marriage may automatically revoke your Will in some provinces unless the Will was prepared specifically in contemplation of the marriage.

You are advised to leave the original of your Will in safekeeping with your legal advisor or in a safety deposit box, however, you may wish to have photocopies available with instructions as to the location of the original.

Action Plan

Never delay your Will planning. If you do not have an up-to-date Will, arrange a meeting with your legal advisor immediately. In preparation for the meeting, gather all of your important personal documentation and any details regarding your assets and liabilities including:

- Family birth certificates
- Marriage certificate
- Marriage contract
- Divorce, separation and support agreements
- Statements for RRSPs and other registered plans
- Investment statements for non-registered accounts
- Information about real estate holdings and other investments
- Mortgage and other loan documentation
- Employee benefits and pension statements
- Life insurance policies
- Any documents indicating beneficiary designations
- Business and partnership agreements

The information-gathering process often appears to be an overwhelming task, however, you should not postpone your Will planning, even if your fact gathering is not yet complete. If you wish, your Investment Advisor can help you to get organized.

COMMON WILL PLANNING QUESTIONS

1) I would like to set up a testamentary trust in my Will but what if my personal financial situation changes, and I need some of the assets during my lifetime?
A testamentary trust only comes into effect at your death. During your lifetime, these assets continue to belong to you to do with as you please.

2) My wife and I both have children from previous marriages. Can I leave assets outright to my spouse and stipulate that any assets remaining at her death must be left to her children and my children in equal shares?
You cannot attach conditions to an "outright" distribution. Once your spouse receives assets via an outright distribution in your Will, she is free to dispose of these assets however she chooses, even if this is contrary to your express wishes. If you would prefer to give your spouse a "life interest" only in your assets, speak to your legal advisor about setting up a trust in your Will. Your legal advisor should be able to guide you regarding family law legislation, which could potentially override your wishes.

3) I am thinking about placing all of my assets in joint ownership with my husband in order to avoid probate taxes or fees. However, in my Will I have left some of these assets to children from my previous marriage. Is it safe to assume that my Will instructions must still be honoured?
No it is not. Your Will cannot distribute assets that legally belong to your husband. You should clearly understand that joint ownership with right of survivorship means that your husband is a joint owner now and will automatically become sole owner of the assets at your death. It is always important to realize that assets placed in joint account with right of survivorship will by pass your estate, and hence defeat the purpose of a Will. (Rules differ in the province of Quebec.)

4) Can I cut my spouse and children right out of my Will?
A spouse is protected to a significant degree under provincial family law acts. Minor children, and others who have been dependent on you for financial support may generally be able to expect some continued support, whether this has been promised contractually or not. You can generally exclude non-dependent adult children from your Will provisions but provincial law should be reviewed with your legal advisor to determine potential consequences.

5) What is the best way to distribute personal effects such as jewelry and family heirlooms?
In many cases, leaving a private memorandum to your spouse and children is a desirable route. However, if difficulties are expected, the Will may specifically direct personal effects to individual family members, or may provide a method of selection, for instance, by age or by lot.

6) If I wish to make changes to my Will, is it better to amend the Will by codicil or just execute a new Will?
Adding a codicil (an amendment to your existing Will), may be appropriate, depending on the number of amendments and the nature of the amendments. However, you should understand that the same formalities for executing a Will apply to a codicil. If there are several detailed changes to be made or there will be multiple codicils in place, then it may be advisable to execute a new Will. You might also wish to consider a new Will if the changes are particularly sensitive in nature. (For instance, if you noticeably excluded someone from the Will, you may wish to correct the situation without drawing attention to the original provisions.)

7) Where can I obtain professional and corporate executor services?
Our partners at CIBC Trust Corporation (CIBC Trust) have been providing estate, trust and agency services to clients for over 80 years; CIBC Trust can be appointed as executor, co-executor or contingent executor in a client's Will. Utilizing the CIBC Trust team of experts ensures the efficient and professional estate and trust administration. Contact your Investment Advisor for more information on CIBC Trust services.

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