Why do You Need a Will?

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There are generally four equally important aspects of an effective estate plan, being:

1. The Will;
2. Planning while an individual is alive;
3. General (Enduring) Power of Attorney; and
4. Health Care Directive or Living Will.

The four parts of the estate plan should achieve the following objectives: are maximize the proceeds available for the heirs of the individual, distribute the assets of the individual in accordance with his or her wishes and name a trusted personal or corporate executor to administer the estate.

Things that the estate plan should seek to avoid are needless taxes, family strife, delays in settling the estate, legal challenges, probate fees charged by the Province of Manitoba (0.7% of value of assets in Estate), and loss of control of family assets.

In addition to achieving the foregoing objectives, it is important to remember the effective time line for the various aspects of the estate plan (i.e., Health Care Directives or Living Wills and General Powers of Attorney are **only** effective while an individual is alive and Wills are only effective upon death, with Inter Vivos Trusts continuing both before and after death).

THE WILL

People will frequently ask why they need a Will or question what will happen if they do not have a Will. The rules that apply in the distribution of an estate where there is no Will are set out in The Intestate Succession Act. While the general rules are not in most instances unreasonable or unduly harsh, they may not result in the distribution preferred by an individual.

In addition, The Dependants Relief Act allows a dependent in financial need to make application to the Court for an order that "reasonable provision be made out of the estate of the deceased for the maintenance and support of the dependant" if the deceased's Will, if there was one, does not make adequate provision to support a family member who was financially dependent on the deceased.

The provisions of Part IV of The Family Property Act, must also be kept in mind when preparing a Will. Part IV of The Family Property Act contains rules for the splitting of a deceased's assets that are similar to those that apply on marriage breakdown. If the entitlement of the spouse or common-law partner under the Will, whenever the Will was made, is less than that to which the spouse or common-law partner would be entitled under The Family Property Act, he or she may apply to Court for an accounting and equalization, thus effectively overruling the provisions of the Will.

The effects of the provisions of The Wills Act pertaining to marriage, divorce and termination of common-law relationships should also be considered with respect to an existing or future Will. The Wills Act provides that the Will of an individual is revoked upon his or her marriage unless it can be shown that the Will was made in specific contemplation of marriage. In addition, upon divorce or termination of a common-law relationship, a Will is interpreted such that one's spouse or partner is deemed to have predeceased him or her, unless a contrary intention is specifically stated in the Will.

The Common-Law Partners' Property and Related Amendments Act was proclaimed effective on June 30, 2004. This Act has the effect of making many existing laws, including those noted above, apply equally to common-law relationships, including same-sex relationships, as these laws currently apply to married couples. In almost all cases, a common-law relationship would be affected if the parties live together for three years and there are no children of the relationship or union; if the parties – for the purposes of certain statutes – live together for one year and there is a child of the union; or the parties choose to register their common-law relationship. These changes are extremely far-ranging and must be kept in mind when reviewing your estate plan.

Finally, while it is possible to make a Will without involving a lawyer, either through a holograph Will (a document all in the handwriting of the testator and signed and dated by him or her) or a pre-printed Will or Will kit, these can have their drawbacks and can lead to further expense in the long run.

LIFETIME PLANNING

It is also possible to do certain planning during your lifetime in order to achieve the goals and avoid the problems noted above; however, previous estate planning **must** be reviewed in order to ensure that steps contemplated will not have the effect of disrupting the existing plan. The estate planning considerations that should be reviewed include holding assets jointly so that the asset will go to the surviving joint owner outside the client's Will and are not affected by the terms of the Will; however, the person's intentions should be made clear. If, for example, a bank account is made joint to avoid probate fees or for a convenience but is not to be kept by the surviving joint holder, this should be set out in writing, as should an intention that the survivor IS to keep the asset. In addition, there can be negative tax consequences to transferring an asset, like a family cottage, to the joint names of the individual and a child. If the transfer to joint names is made after the initial purchase and the asset has appreciated in value, Canada Revenue Agency deems you to be disposing of the interest in the asset for fair market value. You could end up with a large capital gains tax bill and no money from your child to pay the bill. Even worse, if you were unaware of the issue and Canada Revenue Agency figures it out years later, there would likely be penalties and interest payable as well.

Another planning tool is the naming of individuals as designated beneficiaries or annuitants under insurance policies, RRSPs and pension plans. While this may have the effect of avoiding probate fees, it should be remembered that, unless specifically referred to in the Will, these assets are generally not affected by the terms of that individual's Will, and in addition to the negative tax consequences noted above, there may also be a loss of control of the assets.

GENERAL POWER OF ATTORNEY

As part of an individual's estate plan, the use of a general power of attorney should be considered. These may be prepared such that they do not become effective until the happening of a specified event (i.e., mental infirmity) and can (and generally should) provide that they survive the loss of mental capacity (enduring). It should be kept in mind that The Homesteads Act states that a spouse or common-law partner may not act as the attorney for the other spouse or partner when dealing with the homestead property. Accordingly, if the person's spouse or partner is to be the named attorney, the person should name another attorney to act on matters involving homestead and complete the appropriate acknowledgment form.

In addition, it is possible to specify who is to receive an accounting of the attorney's activities while using the power of attorney. If the document is silent, the "nearest relative" of the maker of the document is entitled to request that information.

HEALTH CARE DIRECTIVE

A health care directive or living will is a document expressing an individual's wishes about his or her future health care. The person may appoint a "health care proxy" to decide for the individual or the individual may give specific instructions, or both, and this document is only referred to when the person does not have the ability to make decisions about their health care, either through mental incapacity or an inability to communicate.

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