

WILLS

FREQUENCY ASKED QUESTIONS

Who needs a Will?

- All Adults, regardless of age, marital status, or net wealth

Why do I need a Will?

- CONTROL – If you don't make decisions about who will administer your estate and who the beneficiaries will be, the legislation will dictate who will become the Personal Representative(s) and beneficiary(ies).
- EASE / EFFICIENCY - Having a Will specifies who has authority to access information relating to your estate, as opposed to waiting for a Grant issued by the Court to verify who has authority.
- SAVINGS – pre-mortem planning can minimize taxes and maximize efficiencies within your estate.
- CARE FOR DEPENDENTS – having a Will allows you to ensure that you have adequately provided for those who are financially dependent upon you, in addition to any others you want (but are not legally required) to provide for.

What are the responsibilities of a Personal Representative? (formerly “executor” OR “executrix”)

- Making arrangements for the disposition of the body and funeral, memorial or other similar services.
- Determining the names and addresses of those beneficially entitled to the estate property and notifying them of their interests.
- Determining the full nature and value of assets and debts of the deceased as at the date of death and compiling a list, including the value of all land and buildings and a summary of outstanding mortgages, leases and other encumbrances, as well as list of contents of safety deposit box.
- Examining existing insurance policies, advising insurance companies of the death, and placing additional insurance, if necessary.
- Protecting or securing the safety of any estate property, including protection and supervision of vacant land and buildings.

- Retaining a lawyer to advise on the administration of the estate and to apply for a grant from the court or to bring any matter before the court, and instructing a lawyer to act in any litigation within the estate.
- Applying for any pensions, annuities, death benefits, life insurance or other benefits payable to the estate.
- Advising any joint tenancy beneficiaries of the death of the deceased, and any designated beneficiaries of their interests under life insurance or other property passing outside the will.
- Arranging for the payment of debts and expenses owed by the deceased and the estate.
- Determining whether to advertise for claimants, checking all claims and making payments as funds become available, and dealing with finalizing amounts if the legitimacy or amount of a debt is in issue.
- Filing all necessary income tax returns, paying any tax owing and obtaining income tax or other tax clearance certificates before distributing the estate property.
- Setting up and administering any trusts required in the Will.
- Distributing the estate property in accordance with the Will or intestate succession provisions of the *Wills and Succession Act*.

Getting Started

Where to Start? When getting ready to give instructions to prepare or update a Will, do an inventory of who you have in your life, and what you have (assets and debts), including approximate values.

What Do You Have?

- List all of your assets and all of your debts. Include legal descriptions of all real property (land), location of asset (i.e. name of financial institution or investment company, branch where safety deposit box exists), policy numbers for all life insurance (including death benefit payable), and other identifying information to assist your lawyer with identifying potential opportunity for tax and estate planning, as well as assist your Personal Representative with the task of administering your estate
- Identify whether they are in your sole name or joint names with someone else.
- Include approximate values – although exact values fluctuate depending on circumstances, an approximate value identifies what portion of your estate the asset represents for estate planning purposes, as well as gives your Personal Representative an idea of how much should be there when they start identifying the value of assets and debts as of the date of death.
- Review any designated assets and determine who is/are currently listed as beneficiaries – is this accurate or does it need to be updated?
- If you are involved in a business or corporation, list your ownership interest or share holdings. If there are any agreements relating to the company, such as a Unanimous Shareholder Agreement,

Right of First Refusal Agreement, or Franchise Agreement, either include a copy or reference where a copy can be located and the date of the most recent executed version.

- List the names and contact information for key professionals: financial advisors, insurance agents/brokers, accountants/bookkeepers, lawyer, etc.
- Keep your inventory updated annually to ensure it contains reasonably accurate information.

Who?

- DEPENDENTS – start by identifying those you have a legal obligation to provide for. This includes a spouse / partner, minor children, or adult children who are unable to withdraw from financial dependence on their parent(s) due to a physical or mental infirmity.
- FAMILY MEMBERS – this may be a broader list of individuals than just your dependants. Usually, these family members are related to you by blood, adoption, or marriage.
- FRIENDS – depending on your circumstances and situation, you may have one or more friends that you may wish to include in this inventory of people in your life.

What role?

- PERSONAL REPRESENTATIVE:
 - If you have a spouse / partner, they are often the person chosen first, although not always.
 - It is strongly recommended that you have *at least* two people appointed in some priority (either together or one in succession to the other), just in case anything happens to one of them and they are not able to act in the administration of your estate when the time comes.
 - Always consider the age, health, lifestyle, and residency of the person you are considering – are they younger or older than you; do they have any health issues that may prevent them from acting in this capacity; or do they spend 6 months (or more) of each year in a foreign country? You need to evaluate the person's fitness for the role of Personal Representative, as this job generally takes 2-5 years to complete.
- GUARDIAN:
 - If you have minor children, it is imperative that you consider who you want making decisions regarding your children's well-being if anything happens to you.
 - Most of the time, the other parent is acknowledged as the remaining Guardian of the minor child(ren), but this may not always be the case, particularly with separated / divorced parents
 - It is always advisable to appoint at least one alternate Guardian to care for your minor child(ren). If you are selecting a couple, consider which person in the couple you would want caring for your child(ren) in the event their relationship/marriage ended, and appoint only that person. If they ever have to act in that capacity, they can always grant joint guardianship to their spouse/partner.
 - If your child(ren) is over the age of majority and does not have mental capacity to make decisions for themselves, you cannot appoint a Guardian for them in your Will. That must

be done by Court Order, and the alternate Guardian(s) will take over from you upon your death (assuming you were appointed as the primary Guardian in the existing order).

- **BENEFICIARY(IES):**
 - Again, the first people you must consider providing for are your dependents. Consult with a lawyer to determine what your legal obligations may be to various individuals in your life, and how to deal with competing obligations (i.e. minor children and second spouse/partner).
 - Designated Assets
 - Includes registered investments (RRSPs, RIFs), locked-in accounts, TFSAs, private pensions, and life insurance;
 - Can be a valuable planning tool to provide for some beneficiaries outside estate proper;
 - Pass directly to beneficiary(ies) without first passing through the estate, so they are not subject to creditor claims or held up while moving through the administration of the estate;
 - Be aware of the potential tax implications of these assets and consider who should be responsible for the tax liability; and
 - Some designated assets can be handled within the Will, allowing for additional planning, such as contingent beneficiaries, or funds being held in a trust for the beneficiary(ies).
 - Specific Gifts
 - Do you have any specific items or amounts of money that you want to give to individuals or organizations?
 - Consider whether charitable giving fits in your estate plan, particularly given the tax benefits to charitable bequests in Wills.
 - Should these gifts be included in a memorandum that you can update from time to time, or as part of the Will?
 - Residue
 - The residue is the portion of your estate that remains after all of the administration of the estate is complete, and all debts, expenses and taxes have been paid from the estate
 - It is generally recommended that this be divided between all of your beneficiaries, expressed as a percentage totalling 100%.
 - The residue clause in your Will must distribute everything that remains in your estate in order to avoid a potential intestacy, or partial intestacy.
 - Consider what happens to a gift if the beneficiary predeceases you – does it get divided equally between their children (lineal descendants), or will it be reallocated among the surviving beneficiaries.
 - Consider planning for a ‘family tragedy’ – in a worst-case scenario, list beneficiaries who receive something if everyone dies at the same time or before you in order to avoid a partial intestacy. It’s easier to plan for it and never have it come to fruition than to not plan and have unintended and unwanted results.

- TRUSTS

- Do we need to use a trust in your estate plan in order to ensure that funds are available for one or more beneficiaries who cannot manage their gift themselves.
- Trusts can be used for the following situations, among others:
 - Minor child(ren) / beneficiary(ies);
 - Beneficiary(ies) who cannot manage finances well or who are encountering money issues, with or without capacity issues;
 - Represented adults;
 - Family property division issues, to minimize impact or loss to beneficiary upon relationship breakdown; and
 - To provide for one or more beneficiaries during their lifetime while ensuring the remaining capital in the trust goes to (a) different beneficiary(ies), such as a spousal trust.
- Fully Discretionary Trust:
 - Often referred to as a 'Henson Trust';
 - The income and capital of the trust never vest in the beneficiary, meaning that they never become the property of the beneficiary during their lifetime;
 - The Trustee appointed to manage the trust has complete discretion on when, how much, or even, if, any funds will be paid to a beneficiary;
 - The goal of this type of trust is to ensure that there are funds available to the beneficiary during their lifetime to meet their needs and make their lives more comfortable than they might otherwise be, but not to give the assets in the trust over to the beneficiary for their ultimate control;
 - This type of trust must name (a) contingent beneficiary(ies), meaning the people who will receive whatever might remain in the trust, if anything, upon the death of the primary beneficiary.
- Vesting Trust:
 - Can allow either discretionary payments from trust or maintain investment until vesting condition met;
 - Usually used to provide for (minor) child(ren) until they reach an age where the Testator believes that they will be able to make sound financial decisions for themselves, at which time they gain control over some or all trust assets;
 - Typically, a form of a maintenance and benefit trust, meaning the capital and income of the trust can be used for the sole benefit of the beneficiary during their lifetime in the discretion of the Trustee;
 - These types of trusts can stipulate a fixed payment to a beneficiary on a schedule, and upon each payment becoming due, the beneficiary has the ability to demand payment from the trust;
 - Payments of capital in the trust can be staggered or all at one time, upon attaining whatever condition is placed on the vesting, such as reaching a certain age, or maintaining sobriety for a specified period of time;

- Trust can also stipulate that all funds must be invested and kept in the trust until the vesting condition occurs, although this is generally not the most tax strategy for dealing with an estate;
 - Generally, avoid maintaining the trust more than 21 years, as there is a deemed disposition of all assets in the trust every 21 years (with very few exceptions), which creates a very adverse tax consequence. Therefore, when considering what the vesting age should be, consider adding 21 to the age of the youngest potential beneficiary, as using this as the maximum vesting age.
- Balance the Pros and Cons:
- While it might seem like a great idea to keep funds tied up in a trust indefinitely, this is usually not practical;
 - Consider that someone (or more than one person) have to manage the trust year over year, and potentially deal with demanding beneficiaries;
 - Fully discretionary trusts ('Henson Trusts') are considered an exempt assets pursuant to AISH legislation, even though any income paid out of the trust to the beneficiary may reduce their monthly payment from AISH, and are therefore a way, in addition to or in substitution of, an RDSP or other exempt asset that a beneficiary may own;
 - Trusts, other than Qualifying Disability Trusts, are generally taxed on the income generated in the trust at the highest marginal tax rate, which is currently 48% in Alberta. With a discretionary trust, where the Trustee has the discretion to pay out money from the trust (whether it vests in a beneficiary at some point or not), the tax payable on the income earned can be claimed by the beneficiary at their marginal tax rate for the amount paid to them each tax year;
 - A trust is considered a separate legal entity, and is therefore required to file a tax return every year. New trust reporting rules were implemented by CRA in 2023 which place greater filing responsibilities on Trustees of trusts; and
 - The administration and financial costs of a trust need to be balanced against the benefits of having funds managed by a Trustee who has the maturity, experience and insight to manage those funds better than the beneficiary prior to vesting.