

UNDERSTANDING YOUR WILL

The purpose of a Will is to provide for the orderly distribution of your assets at your death, recognizing that your liabilities must be dealt with before any distribution from your estate can be made to heirs or others. Your assets are all the things you own or in which you have an interest. This can be quite an extensive group of items. The most common assets are your house, personal items such as jewellery, household furnishings and art, bank accounts, investments, life insurance proceeds, any pension benefits to which you are or may become entitled, any registered retirement or other savings plans, and any interests in a business. Your liabilities are all debts owed, including mortgage loans, bank loans, and any income tax that must be paid following your death.

Married couples often assume that they can avoid having Wills by arranging joint ownership of their house, bank accounts and all other assets, and by naming their spouse as the beneficiary of any life insurance. This is an incorrect assumption because without a Will they cannot provide adequately for a common disaster, taking both lives.

If, for example, a husband and wife own property jointly, and they die together in circumstances where it is uncertain which person died first, the law in many jurisdictions presumes that each person predeceased the other, regardless of their ages. In other words, without a Will the husband's interest in the jointly-owned property passes to beneficiaries other than his wife who are determined by law, as his wife is presumed to have died before him. Similarly, the wife's interest in the jointly-owned property passes to beneficiaries determined by law, other than her husband.

Without a Will, the law takes over. While the law varies somewhat from province to province, generally when a person dies without a Will and is survived by both a spouse and children, the spouse must share the estate with the children according to a prescribed formula. If a person dies without a will and leaves a spouse but no children, the spouse is entitled to the entire estate. If there is no surviving spouse but there are children surviving, the children are entitled to the entire estate.

If there is neither spouse nor children surviving, the estate will be transferred to the parents of the deceased or, failing parents, to the brothers and sisters and children of any deceased brothers and sisters. If there are no siblings, nieces or nephews, the law will look to more remote relatives. If none can be found, the estate will fall to the government. This is hardly what most people would want.

Another consequence of not having a Will is the effect this has on the inheritances of children. The liquidated amount of the estate will have to be paid into Court. When each child reaches the legal age of majority, the Court will pay out his or her share, no matter how large an amount that may be. Most parents would not want this to occur. Lost are the opportunities to set up trusts for educational purposes or other special concerns as well as the opportunity to preserve certain assets, such as a family cottage, or any other items of family property which may have special meaning to family members. Also lost is the opportunity to provide bequests to charitable institutions you may wish to benefit.

In even the simplest of Wills, most trust provisions provide for staged distributions of capital to children, for example one-third at age 21, one-third at age 25, and the remainder at age 30. There usually are generic provisions that provide the executor with the discretion to encroach on capital for the “care, maintenance, education, advancement in life or other benefit of the children.” In a Will, the executor also can be given discretion regarding the sale, distribution or retention of any personal assets.

There are many issues related to drafting your Will that must be covered in even the simplest of estates. A lawyer or other professional adviser can help you understand how proper planning now can help avoid problems later!