

### What Is a Will?

A will is a document that contains a declaration by a person (called a testator) describing how his or her property should be dealt with on death. The will may be revised at any point during the testator's lifetime, as long as he or she has the necessary mental capacity to do so.

### Who Should Have a Will?

If you are over the age of majority (18 in Ontario), you should have a will. A will ensures that the persons whom you wish to benefit actually do benefit to the extent and in the manner that you wish. It also enables you to select the person you wish to administer your estate.

### What Happens if You Die Without a Will?

**Who will administer the estate?** The court will appoint someone to administer your estate, giving priority to a spouse (legal or common law), adult children and other next-of-kin, in that order.

**How will the assets be distributed?** In Ontario, if you do not leave a will, the *Succession Law Reform Act* specifies who will receive your property and in what proportion. This law is entirely inflexible and makes no allowances for what your wishes may have been. Furthermore, the scheme of distribution is restricted to spouses, offspring and other blood relatives. There is no provision, for example, for any distribution of assets to friends, in-laws or charities. If a person dies without a valid will, without a surviving spouse and without offspring or other blood relatives, the person's assets become government property.

If the estate is worth more than \$200,000 and there is a surviving spouse and at least one child, the entire estate does not go to the spouse. Rather, it is divided between the spouse and the child in proportions determined by provincial laws. This can result in capital gains taxes being payable on death. It can also result in the spouse having to live on less than what the decedent may have wished. Both situations can be avoided with a proper will.

**When will minors become entitled?** If there is no will, the portion of the estate left to a minor must be paid into court and can be used for the child's benefit only if an application is made to the Children's Lawyer (formerly the Official Guardian). The child will be entitled to his or her share on reaching 18 years of age. In a will, trusts can be established to provide for the ongoing use of funds and to defer the final distribution of funds until the beneficiary reaches the age of majority.

**Are there other problems if you don't have a will?** Common law relationships are not recognized under the Ontario wills legislation, so a common law spouse has no entitlement to the estate (other than the right, as a dependant, to make a claim for support). Further, if the spouse of the decedent was separated but not divorced, he or she is entitled to the spouse's share as determined by provincial law.

**Who will have custody of minor children?** If there is no will, no one will have the immediate authority to take care of minor children. Someone will have to make an application to the court to obtain legal custody.

## Are There Any Assets That a Will Does Not Cover?

Proceeds of life insurance and RRSPs and similar plans that are payable to a named beneficiary are not covered by your will. Similarly, assets held jointly with right of survivorship (generally, joint bank accounts and real estate held in joint tenancy) will pass automatically to the surviving owner and are not governed by the terms of a will. For tax reasons, it is particularly important to designate your spouse or dependent children as beneficiaries of RRSP proceeds. Otherwise, the entire amount of the RRSP will be included in your income in the year of your death.

There are no such negative tax consequences associated with insurance proceeds, but naming a beneficiary ensures that the named person receives the proceeds very quickly after death. On the other hand, naming minors as beneficiaries entitles them to receive the proceeds at the age of 18, which may not be advisable. In this case, you could name your estate as beneficiary of the insurance proceeds and establish trusts under your will for any minor beneficiaries, or you could establish a separate insurance trust in your will. The latter is generally preferable, because naming the estate as beneficiary will result in probate taxes being payable on the amount of the insurance proceeds.

## What Should a Will Cover?

**Estate trustees.** An estate trustee (formerly called an executor) is a personal representative chosen by you and specified in your will to carry out the terms of the will. The role of the estate trustee is onerous, and the choice of one or more estate trustees requires careful consideration of their suitability. If your original estate trustee becomes unable to carry out his or her duties, a well-drawn will typically provides for the appointment of replacement estate trustees to ensure that there is always someone of your choosing available to act.

**Disposition of assets.** A will permits you to determine who should benefit from your estate. You may choose to leave particular articles or property to a named individual or charity (e.g., “My 1965 Ford Mustang to my brother, John Smith, if he survives me”), or you may provide for a gift of a sum of money (e.g., “The sum of \$1,000 to the Toronto Hospital Foundation”).

In most cases, individuals wish to leave most, if not all, of their estate to their surviving spouse in the first instance, and then provide for their children in the event that there is no surviving spouse. This will not necessarily happen if you die without a will. Furthermore, leaving the estate to a spouse (or to a trust for the sole benefit of the spouse) avoids the capital gains tax that would otherwise arise on the death of the first spouse to die.

Of particular significance to parents of minor children is that a will may also provide when or at what age a beneficiary is to receive his or her entitlement under the will. If the will does not make this express provision, a minor beneficiary is entitled to receive property left to him or her on reaching the age of majority. In a will, it is possible to provide that a minor beneficiary’s share be held in trust until reaching a specified age. The terms of such a trust can be tailored to your intentions. For example, a trust may provide for periodic distributions of income to the beneficiary, or leave the timing and amount of the payments to the discretion of the estate trustee. In addition, the trust may provide for the entire trust property to be distributed to the beneficiary when he or she reaches a stated age (e.g., 25 years); alternatively, it may provide for a distribution of the capital of the trust at stated intervals and in stated proportions (e.g., one-half at age 25 and the balance at age 30).

Trusts are extremely flexible arrangements, and their use in wills is not confined to making provision for minor children. Trusts can also enable you to provide for a disabled beneficiary who may not be able to handle his or her own financial affairs.

A will may also provide for a substitute beneficiary in the event that the first named beneficiary dies before you do.

**Custody of Children and Guardianship of Children’s Property.** A will may include a provision appointing a person or persons to take custody of your minor children and become guardians of their

property. In Ontario, such an appointment is effective for a period of 90 days; if the named custodian/guardian wishes to continue acting after this time, he or she must apply to the court to have the appointment confirmed.

### Are There Any Limitations on What You Can Do in Your Will?

There are several statutes and legal rules that may have affect your ability to dispose of your property as you choose.

**Family Law Act.** This provincial statute governs, among other matters, the division of property of spouses in the event of marriage breakdown or death. The Act significantly affects the freedom of Ontario spouses to dispose of property on death. The property disposal provisions of the Act apply only to legally married spouses, whereas the support obligations of the Act extend to common law spouses as well.

Under the *Family Law Act*, the value of all “net family property” accumulated by spouses during the marriage is, generally, shared equally when the marriage ends, whether the end is due to separation, divorce or death. “Property” is very broadly defined under the Act and includes business and partnership interests, investments and pensions. When a spouse dies, the surviving spouse must elect to take either the entitlement under the *Family Law Act* or the gifts specified in the deceased spouse’s will.

If the surviving spouse elects to take his or her entitlement under the Act, any gifts specified in the will are revoked: the will is interpreted as if the surviving spouse had predeceased the testator unless the will expressly provides to the contrary. The surviving spouse’s entitlement under the Act is typically equal to one-half the difference between the deceased spouse’s net family property and the surviving spouse’s net family property. A surviving spouse may elect in favour of the *Family Law Act* only if his or her net family property is less than that of the deceased spouse.

The Act is of concern to you only if you do not intend to leave a significant portion of your estate to your spouse, as is frequently the case if one or both spouses have children from a previous marriage.

The *Family Law Act* also permits a couple to enter into a domestic agreement (often called a “marriage contract”), which can have the effect of excluding a spouse’s entitlement to make a net family property equalization claim and which may also cover issues such as support.

**Succession Law Reform Act.** This provincial statute contains provisions that entitle certain persons to make a claim for support against an estate if they can establish that they were dependent on you at the time of your death and that you have not made adequate provision for their support under your will. Those who may qualify as a “dependants” include a spouse (legal or common law), a parent, children, brothers or sisters.

A will cannot include special provisions that will prevent a support claim from being made against your estate by a party claiming to be a dependant. To reduce the likelihood of such a claim, however, you may determine that it is appropriate to make some provision for the dependant, either in your will or by some other means (e.g., life insurance).

**Shareholders’ Agreements and Other Contracts.** A testator may be a party to a shareholders’ agreement or other contract that may limit his or her capacity to deal with a particular asset. It is important to give the lawyer preparing your will the opportunity to review these agreements.

### How Often Should I Review My Will?

Once a will is complete, it should not be put away and forgotten. Whenever there is a substantial change in your circumstances (e.g., an increase or reduction in assets or the death of an estate trustee or a beneficiary), you should review your will and possibly update it. As well, if you marry, your existing will is revoked. In any event, you should make a point of reviewing your will every year or two to ensure that it continues to meet your needs and wishes.

## Do I Need a Power of Attorney?

Powers of attorney are an important component of any personal and financial plan. In Ontario, there are two types of powers of attorney: (i) continuing powers of attorney for property, and (ii) powers of attorney for personal care.

A continuing power of attorney for property allows an individual (called the donor) to appoint another individual (called the attorney) to make decisions about the donor's financial affairs. This type of power of attorney is "continuing" because it continues to be effective even if the donor loses mental capacity at some point.

A power of attorney for personal care allows the donor to appoint an attorney to make certain decisions about the donor's healthcare, nutrition, shelter, clothing, hygiene or safety if at some point in the future the donor is incapable of making the relevant decisions. **1**