



Wills and Powers of Attorney

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Who Needs a Will?

Everyone should have a Will. As well, a periodic review of an existing Will is important because there are times when you may need to change your Will. The following are some of the times when you should ensure you have a Will in place or you should review an existing Will and make changes, if necessary:

- When you acquire significant property;
- When you get married, as marriage voids a will;
- When you live in a common-law relationship;
- When you have children;
- When you get divorced or separate from your spouse; and
- When you acquire property in different provinces or countries.

Why Do I Need a Will?

Some of the reasons why you should have a Will are described below.

Estate Trustee - in your Will, you can appoint a person who will administer your Will, known as the Estate Trustee (formerly called an Executor).

Without a Will, someone must apply to court to become the administrator of your estate. This takes time, costs money and may result in the appointment of a person you would not want to administer your estate.

Your Estate Trustee is responsible for arranging your funeral, determining what your assets are, determining and paying your debts, protecting your assets, distributing your assets in accordance with your Will or in accordance with the Succession Law Reform Act (Ontario) if you die without a Will, acting as a trustee for any minors who are to inherit under your Will and filing tax returns relative to your estate.

Funeral Directions - in your Will, you can give directions concerning your funeral. These are not binding on your Estate Trustee but will describe your intention and should be followed if possible.

Without instructions in a Will, your Estate Trustee may not know what your wishes were for your funeral. It is important to note that it is important to advise your trustee in advance, so that if your will is not retrieved in a timely fashion, they will not be surprised by instructions contained therein.

Distribution of Assets - in your Will, you determine who is to inherit your property and what each person will get. For children, you can determine at what age or ages they will inherit, set up trusts for your children, determine who the trustees and what the terms of the trusts will be, and determine who will inherit if members of your immediate family die before you or at the same time.

Without a Will, the persons who will inherit your property will be determined by the Succession Law Reform Act (Ontario). If you are married and have children, your spouse will receive a certain portion of your estate and then your spouse will split the remainder with your children, who will inherit their portion when they reach 18 years of age. If your spouse and children predecease you or die at the same time, then other members of your family will receive your assets in a prescribed order (parents, siblings, nieces and nephews). However, if you are living in a common-law relationship and you die without a Will, your common-law spouse is not considered a "spouse" under the Succession Law Reform Act (Ontario) and therefore will not inherit any of your estate.

Guardian of Your Children - in your Will, you can appoint guardians for your children in the event that you and the other parent of your children are both dead. This appointment only lasts 90 days from the date of your death. The guardians appointed in your Will must apply to court to be appointed as the permanent guardians of your children. The court has the discretion to reject the initial guardians if the court feels it would be in the best interests of the children to do so. However, the fact that you have named them in your Will is very persuasive to the court.

Without a Will, someone must apply to court to be appointed as the guardian of your children. If a number of people apply, the court has to decide who would be the best person to be the guardian of your children and the court will not have the benefit of an appointment in your Will as evidence of your wishes. This application process takes time and can lead to uncertainty in your children's living arrangements at an already difficult time. If no one applies, the Ontario Public Guardian and Trustee becomes the guardian of your children.

Tax Planning - in your Will, you can provide for tax planning strategies that may be available to you in order to avoid or defer taxes. Without a Will, your Estate Trustee may not be able to take advantage of these tax planning strategies.

Charitable Giving - in your Will, you can make gifts to charities from your estate. Such charitable giving is not possible if you die without a Will.

Marriage - changes to your marital relationship can have unintended consequences to your estate planning. For example, if you have a Will in place and you subsequently get

married, such marriage will revoke your Will unless the Will was made in contemplation of the marriage.

Disabled Beneficiaries - if any of your intended beneficiaries suffer a disability, there are other considerations in preparing your will. These would include whether a special trust (such as a Henson Trust) should be created, to protect your beneficiary from an unintended termination of public assistance as a result of your gift.

Memorandum - if you wish to leave personal property to individuals, you may wish to simply incorporate a reference to a separate list in your will.

What Is a Power of Attorney?

A Power of Attorney is a document that takes effect while you are living. In general terms, it allows you to appoint someone (called your Attorney) to act on your behalf while you are alive, but mentally incapable of acting on your own behalf. There are two types of Powers of Attorney - a Power of Attorney for Property and a Power of Attorney for Personal Care.

The Power of Attorney for Property allows you to appoint someone to act on your behalf with respect to all of your property and financial matters. The Power of Attorney for Personal Care allows you to appoint someone to act on your behalf with respect to health care decisions and allows you to make your wishes known as to how you wish to be treated if you are mentally incapable.

Do I Need a Power of Attorney?

It is a good idea to have a Power of Attorney for Property and a Power of Attorney for Personal Care. If you do not have a Power of Attorney for Property and you are found to be mentally incapable, someone has to apply to court to act on your behalf for financial matters. This takes time, costs money and it may result in the appointment of someone you would not have wanted to be responsible for your financial matters. The Power of Attorney for Property is a very powerful document because it allows your Attorney to do anything with your property that you can do. Your Attorney is supposed to act in your best interest, but there is potential for abuse. If no one applies to be your Attorney, then the Ontario Public Guardian and Trustee will act on your behalf.

If you do not have a Power of Attorney for Personal Care, then the Substitute Decisions Act (Ontario) determines who will make health care decisions on your behalf if you are found to be mentally incapable. Your Attorney for Personal Care is supposed to act in accordance with your wishes if known, or if not known, then in accordance with what they believe your wishes are. Without written instructions, your Attorney may not know what your wishes are.

Should I Hire a Lawyer to Draft My Will and Power of Attorney, or Can I Do it Myself?

You can draft your own Will and Powers of Attorney, but doing so can lead to unexpected and unwanted consequences.

Wills must be drafted carefully to ensure your specific needs are met, your wishes are clearly expressed and you have provided for all contingencies. Similarly, Powers of Attorney must be drafted carefully to ensure your specific needs are met, your wishes are clearly expressed and to specify when they should take effect. As well, there are technical requirements for signing a Will and Powers of Attorney. "Will kits" are generic in nature, and will often not be suitable to your needs and circumstances.

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Nothing in this article should be relied on as legal advice. Readers are urged to seek professional legal advice on the particular issues which concern them. Members of our firm would be pleased to assist readers with specific legal issues.

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