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PREPARING YOUR WILLS AND POWERS OF ATTORNEY

What is a will?

A will is a written document which provides for the disposition of your property upon your death and which comes into effect only upon your death. It is an important legal document as it can assist in the orderly conduct of your business and financial affairs after your death in accord with your wishes.

What happens if I die without a will?

Contrary to what you might have heard, the government will not take all your property if you die without a will. In the absence of a will, your property will be divided among your immediate family members in specified proportions as set out by the law of Ontario. The division of your estate in accord with Ontario legislation will often be satisfactory to you but often it may not be the division that you would like to see. Without a will, your survivors will have to accept what the legislation provides.

The division and distribution of your estate is likely to be slower and more expensive if there is no will. A proposed executor will have to apply to court to be appointed and can only act as executor once such appointment is made by the court. Without a will, minor children will receive their share of your estate at the age of eighteen (18). In a will, my clients have the option of providing that their children or grandchildren should not receive their share until a later specified age, such as twenty-one (21) or twenty-five (25) as they feel that at age eighteen, their children or grandchildren will not be mature enough to independently manage property.

If you die without a will while your children are still minors, your children's share may be deposited with an official appointed by the court and invested at a normal interest rate. Money for your children's maintenance and education may require a costly and time consuming court application and may require the involvement of a government agency responsible for protecting children's interests before the court.

It is important to be aware of the fact that any property held on a joint tenancy such as the family home or a joint bank account with a right of survivorship will automatically pass to the surviving joint owner by operation of law, regardless of what is said in the will of the joint owner who dies first. Please see below under Joint Assets for a more detailed discussion of this very important and often misunderstood issue.

Wills prepared by me usually make provisions for the appointment of guardians of minor children. While such an appointment is limited in time and is not binding on the courts, your wishes as specified in your will are going to carry great weight and should be given due thought and attention.

A will is not an appropriate document to specify funeral arrangement as the will is often not reviewed until after the deceased is buried. Funeral instructions are not binding on the executor. It is therefore preferable to deal with these matters in other ways, such as by discussing funeral arrangements with family members and the executor. Nevertheless, a clause about funeral arrangements can be inserted into your will if you wish.

In Ontario, a will is revoked by marriage unless the will is stated to be in contemplation of the particular marriage. Unless a contrary intention is expressed, a divorce will revoke the provisions contained in a will in favour of a former spouse.

Wills are important legal documents and should be prepared after careful consideration and legal advice. This package provides some general information about wills, powers of attorney and is followed by an information sheet which I would ask you to fill out to the best of your ability before your first appointment with me. My standard pricing for wills and powers of attorney is also included. In my opinion, the cost of preparing a will is minor when you consider the peace of mind which you will have once you ensure that after your death your assets will be dealt with as you desire and further that the administration of your estate will be smoother and less expensive for your survivors.

This memorandum is not intended to contain advice specific to your situation. Your estate and planning strategies are unique and should be reviewed with me as well as your financial advisors.

Remember to write down any questions you may have for me about the material in this package and bring those questions to our first meeting.

SOME MORE INFORMATION ABOUT WILLS AND ESTATE ADMINISTRATION

Why you should have a will?

The answer to this question may be summarized as follows:

(1) If you do not have a will, you cannot select the executor who will administer your estate, and the person to fill this role will be appointed by the court.

(2) If you do not have a will, you cannot select the beneficiaries of your estate. Provincial legislation dictates who will inherit. The division may often be satisfactory to you but often it will not be. For example, if you have a common law spouse or same-sex partner, he or she will not be considered your spouse for division of your assets.

(3) If you do not have a will and your children are under 18, the children's shares are paid to the court, to be held until the children attain age 18. The children will take their shares at age 18 whether or not they are mature enough to manage them. Without a will, there is no flexibility to set up trusts for children or to consider any special needs of family members.

How will my estate be distributed after my death?

- **Immediate Distribution**

After you have provided for the payment of your debts, the distribution of your personal effects and the payment of cash legacies, you may wish to provide for the immediate distribution of the remainder of your estate to one or more people.

- **Trusts**

Clients are often concerned that an immediate distribution to beneficiaries is not in the best interest of the estate and the beneficiaries. A surviving spouse may not be able to manage the estate without assistance. A parent may feel that, at age 18, a child may not be mature enough to handle a large sum of money. You may deal effectively with these types of concerns by establishing a trust or trusts in your will.

When you create a trust in your will, you direct your executors to hold your estate, or part of it, in trust for the beneficiary or beneficiaries. It is quite common to provide in a will that a child's share is to be held for his or her benefit until the child attains a certain age, and to give the executors the discretion to use the funds being held in trust for the benefit of the child until he or she attains that age. It is also common to provide for a staged distribution of the child's share. For example, a part may be paid at age 21 and the balance at age 25. Until the

child reaches age 25, the executors will have some control over the child's interest in the parent's estate.

Many factors must be taken into account when you are deciding whether or not to establish a trust or trusts under your will. These factors include the size of your estate, the ages of your beneficiaries, their maturity level and any special medical or educational needs which the beneficiary may have.

Restrictions on the freedom to deal with your estate as you wish

The law restricts a person who is making a will from making inadequate provision for his or her dependants. A dependant may include your legal or common law spouse, a parent, a child, or a brother or sister.

There may be other restrictions on your freedom to dispose of your estate. For example, you may have a marriage contract or a separation agreement with your spouse or former spouse, requiring support to be paid following your death, or you may be a party to a buy-sell agreement with a business associate regarding your interest in a business, which will provide for what is to happen in the event of your death. A court order, where there has been a divorce, may also restrict your freedom to dispose of your estate. We will discuss this issue at our first appointment.

Executors of your estate

You must name an executor and trustee, or executors and trustees, of your estate. Although there is no legal limit to the number of executors and trustees, there may be some practical limitations since executors and trustees must work together in the administration of your estate.

The executor is the person or group who will carry out the provisions of your will. Your choice of executors and trustees will depend on the terms of your will. If everything is left outright to your spouse, for ease of administration, you may wish to name your spouse as the sole executor and trustee. If your children are at least 18 years of age, they may also be named as executors and trustees. A trust company carrying on business in Ontario may also be named as an executor and trustee of your estate.

If there are trusts established under your will which delay the distribution of your estate, your choice of executors and trustees must be given careful attention. In such a case, the executors and trustees must invest the assets in the trusts and make the appropriate payments. These are crucial decisions, and your executors and trustees should have the proper judgment and business sense, as well as the ability to relate well to your family members.

Income tax payable upon death

There are income tax consequences that result from your death and they should be taken into account when considering your will. There are no death taxes imposed by any of the provinces of Canada, but in some jurisdictions such as the United States there are inheritance taxes. Even if you are an Ontario

resident, these taxes may be triggered if you own assets in a foreign jurisdiction.

In Ontario, your estate will have to pay a probate fee for any assets that are formally passed on to the beneficiaries through a court procedure known as a probate application. This fee is explained later. In addition, you may have to pay capital gains tax on any assets which have risen in value since you acquired them. Tax laws treat death as an event which triggers a fictional disposition of assets at fair market value. Some exceptions such as the primary residence exemption will shield some assets from this taxation.

Specific tax consequences of death should be discussed with your accountant or financial advisor.

Joint assets

The most common ways people hold the title to assets are:

- sole ownership – one name only;
- joint ownership (joint tenancy or tenancy-in-common) – two or more names with or without a right of survivorship.

If you are the only owner of an asset, you will have complete control of that asset during your lifetime and will be able to give it away by will after your death.

Two or more people may own assets as joint tenants. This kind of ownership is distinguished by the legal right of the survivor to ownership of the property. The assets held jointly are not *generally* part of the estate of the deceased joint owner. You must be aware of the fact that if you and your spouse for example own your family home as joint tenants, this does not mean that you each own two separate 50% shares which you can deal with as you wish. You own the home together and if one of you dies, the other acquires the other's interest immediately by operation of law.

If you own assets with other people, I would like to confirm whether you own them as joint tenants or as tenants-in-common. The latter manner of holding title should define what shares each owner holds. If property is held as tenants-in-common, then each owner can deal with his or her share as they please and the property will not generally pass to the surviving owners automatically.

Probate and joint ownership

It is often assumed that if all your assets are held jointly, you do not need a will. There are many reasons for needing a will. These include:

(1) Not all assets will be held jointly.

(2) You may die at the same time as your joint owner, or you may be the

survivor who then dies without a will.

(3) There are planning strategies available by will that cannot occur outside the will.

(4) You will need an executor to settle your financial affairs, including income tax filings and liabilities.

Advantages of Joint Ownership

There are advantages to *true* joint ownership. The right of survivorship means that jointly held assets pass to the survivor, avoiding probate fees, some solicitors' fees, some creditors, and publicity. The transfer of title is usually very inexpensive and can occur shortly after death, which is very convenient for the survivor.

Disadvantages of Joint Ownership

There are disadvantages to joint ownership which you should consider before any transfer into joint ownership. If you place your property in joint ownership by way of a gift with your spouse or minor children, you will continue to pay all of the income tax on the income earned by the joint property. However, since there are now new owners, you will no longer be able to dispose of the property as you see fit. Part of your home might no longer be a principal residence for tax purposes if the new joint owner already has a principal residence. If the joint owner is sued in court and a judgment issues against him or her, the asset which you own with the joint owner will be exposed to seizure by the creditor. Transferring title to joint ownership can be risky.

Ontario probate fees

Probate fees are payable after death on the value of the estate. On an estate of $1,000,000, the fee in Ontario would be:

$14,500 or roughly 1.5%

Avoiding probate fees may be a valid estate planning objective. It may be appropriate to deal with specific assets which will not become part of your estate. Here are some ideas to avoid probate:

(1) Holding jointly assets that pass by survivorship – real property, bank accounts, Canada Savings Bonds, Guaranteed Investment Certificates.

(2) Hold real estate outside Ontario (but make sure you are familiar with estate laws of that other jurisdiction).

(3) Designate named beneficiaries of life insurance and RRSPs.

(4) Transfer assets without probate (*e.g.*, motor vehicles, personal effects, household goods, jewellery and similar articles which do not have a registered title, shares in private corporations under some circumstances) by a *separate will*, or without probate if there are no other assets which require probate.

Avoiding probate fees means avoiding the probate process. Your executors will not have assets to administer, *but* it may be necessary to have assets in your estate in order to pay taxes, to create trusts for children, spouses and others with special needs and to pay charitable and sentimental legacies. We will discuss joint ownership and avoiding probate at our meeting after I learn about your assets.

CONTINUING POWER OF ATTORNEY FOR PROPERTY

A *Continuing Power of Attorney for Property* allows you to exercise control over your financial life even if you are no longer mentally or physically able to make financial decisions. It is effective the moment you sign it unless you specify in it that you want it to be effective at a later date, or in particular circumstances.

Your attorney should be someone that you know well and trust completely, who is interested only in your best interests, and who is knowledgeable about financial matters. You may appoint as many attorneys as you wish. If you do appoint more than one attorney, they must make their decisions together unless you specifically state otherwise. If you want your attorneys to be able to act separately, the *Continuing Power of Attorney for Property* must specify that they are to act "jointly and severally", which means together or separate.

You may appoint an attorney to act in the event that your first named attorney is unwilling or unable to continue. This can create a practical difficulty that should be discussed with me.

Under the *Substitute Decisions Act, 1992*, attorneys are entitled to compensation in accordance with a set fee scale. You may restrict or increase the amount of compensation. Generally speaking when I draft powers of attorney where family members are appointed, I insert a clause which indicates that no compensation is paid for the work done as part of exercising the power of attorney. We can discuss this at our meeting.

If you have not made a *Continuing Power of Attorney for Property* and you become incapacitated, the *Substitute Decisions Act, 1992* provides a process by which your spouse or partner or other close person may apply to become a guardian of your property.

POWER OF ATTORNEY FOR PERSONAL CARE

The *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 allows you to appoint a person or persons to make personal care decisions for you if you become incapacitated. The *Power of Attorney for Personal Care* can cover all types of personal care, including decisions about health care, nutrition, clothing, housing, hygiene, safety, and consent to medical treatment. Unlike a *Continuing Power of Attorney for Property*, which becomes effective immediately upon signing, a *Power of Attorney for Personal Care* cannot be used until you become mentally incapable of making personal care decisions generally or making specific decisions.

You will be mentally incapable if you are unable to understand information relevant to making a decision concerning your health care, nutrition, shelter, clothing, hygiene or safety, or are unable to appreciate what is likely to happen if a particular decision is or is not made.

You should make sure you understand the authority that you are giving to the attorney, and you must trust your attorney to act responsibly and to follow your instructions. You may choose to name a substitute attorney who will act if the primary attorney is unwilling or unable to act, and you may make joint and several appointments as well.

If you have not made a *Power of Attorney for Personal Care* and you become incapacitated, the *Substitute Decisions Act, 1992* provides a process by which your spouse or partner or other close person may apply to become a guardian of your person.

With respect to consent to medical treatment in the absence of a *Power of Attorney for Personal Care*, the *Health Care Consent Act* provides a hierarchy of designated persons who may consent on the incapable person's behalf. Included in that list are the following individuals in this order: the person's spouse, child or custodial parent, access parent, sibling, any other relative.

PERSONAL DATA SHEET

Please fill this out prior to our first meeting to the best of your ability. If you are unsure as to the answers, please indicate so and we will discuss the issue at our meeting. If you are filling out this sheet for more than one person for example you and your spouse, please include information for both people.

PART I - FAMILY INFORMATION

1. Full Name (s):

2. Marital Status:

3. Date and place of birth:

4. Others to be named in the will – include your children and grandchildren, executors, beneficiaries, proposed guardians for your children:

Full Name	Date of birth	Address

PART II - GENERAL

5. Do you have a will? If so, provide a copy.

6. Does your spouse have a will?

7. Are you presently receiving benefits from an estate or trust? If so, please give particulars.

8. Have you set up a trust to benefit another person? If so, please give particulars.

9. Do you and your spouse have a marriage contract? If so, please provide a copy.

10. Are you an executor or a trustee of any other estate?

11. Do you own or have an interest in a business (i.e. sole proprietorship, partnership or limited company)? If so, please provide copies of business agreements. Please give details as to the type of business, its yearly sales, its assets and legal structure.

12. Have you been married more than once? If so, please provide particulars.

13. If you are separated or divorced, is there a separation agreement or a court order dealing with your separation. If so, please provide a copy.

PART III – ASSETS – PLEASE PROVIDE AS MUCH INFORMATION AS YOU HAVE AVAILABLE ABOUT EACH ASSET.

14. **Automobiles and boats**

Item:	Item:
Value:	Value:
In whose name:	In whose name:

15. Approximate value of **household goods and contents**:

16. **Real estate**

Location:	Location:
Value:	Value:
Original Cost:	Original Cost:
In whose name:	In whose name:

17. **Bank accounts**

Name of bank:	Name of bank:
Address of bank:	Address of bank:
Account number:	Account number:
In whose name:	In whose name:
Average balance:	Average balance:

18. **Safety deposit box**

Location:	Box Number:

19. **Life insurance**

Name of company:	Name of company:
Policy number:	Policy number:
Type of plan: Named beneficiary:	Type of plan: Named beneficiary:
Value to your estate:	Value to your estate:

20. **RRSPs, RIFs, pensions and annuities**:

Name / Institution:	Name:
Account number:	Account number:
Named beneficiary:	Named beneficiary:

21. **Investments** – Please list all stock and/or bonds and their original costs and estimated marked value:

22. Any **other assets** not listed above:

PART IV - WILL INSTRUCTIONS

23. How would you like your personal effects, jewelry, automobiles etc., distributed?

24. How would you like your home and other real property (ex. cottage, investment property) to be dealt with?

25. Do you wish to leave cash legacies (e.g. to relatives, employees, charities). If so, how much and to whom?

26. Does your R.R.S.P or R.I.F annuity name a beneficiary? If so, who is the beneficiary?

27. How would you like the remainder of your estate to be distributed? (i.e. among children, spouse, relatives).

    a) If among children, do you have any age preference at which age they would be able to receive their inheritance? 18, 21, 25?

28. Do you want to provide a common disaster clause which will describe what is to happen to your estate if all the beneficiaries which you named earlier die together at the same time? (Usually, it is a good idea to include this if you have a spouse and young children and if you all travel together on regular basis)

29. Do you want to appoint a person(s) to have legal custody of your minor children if both you and the other parent die? If so, who would you like to appoint?

30. Do you want me to prepare powers of attorney for you? If yes, who would you like to appoint as your attorney for making decisions with respect to your property? What about decisions with respect to your personal care? Do you want to appoint an alternate attorney if the one previously appointed is not available to act?

    a. Property

        i. Primary attorney

        ii. Alternate attorney?

    b. Personal care

        i. Primary attorney

        ii. Alternate attorney?

Thank you for taking the time to complete this package.

If you are unsure about anything above let's discuss it at our meeting.

Write down your questions below: