

## **THE BUSINESS CASE FOR HAVING A GOOD WILL**

### **Introduction**

An article in the *Financial Post* (Heather Burke; February 12, 2005) reported on a survey by a leading US financial planning firm which showed that 16% of Americans with more than \$1 million in assets did not have a Will. Even more surprising, the percentage rose to 37% among those with at least \$10 million in assets!

Procrastination was the given reason in more than half of the persons who did not have a Will. 12% said they could not face the possibility of dying, and 5% thought that they did not have enough assets to make a Will worthwhile.

With there being no obvious reason why a similar survey in Canada would show markedly different patterns, it is appropriate to review the reasons to undertake the small effort and expense of having a good Will and estate plan.

### **Dying Without a Will (in a Nutshell)**

A person who dies without a valid Will is said to die *intestate*. The distribution of the intestate estate is established by the *Succession Law Reform Act*. Generally, a surviving spouse is entitled to the first \$200,000 (after debts and taxes), and the balance is then split among the surviving spouse (if there is one) and the children according to percentages determined by how many children there are. If the children are under 18, their inheritance is paid to and managed by the Office of the Children's Lawyer (a law office in the Ministry of the Attorney General). At age 18, the children are then entitled to their share outright, regardless of the amount.

The *Succession Law Reform Act* establishes a hierarchy of persons who may apply to administer an intestate estate. The first right to appointment belongs to the surviving spouse, and then to all of the children (whether there is one child, or seven, they are equally entitled to apply). Regardless of the size of the estate, the assets can not be administered without a formal appointment obtained in probate proceedings before the Court. If the second oldest of 4 children wants to take on the job, his or her probate application must be consented to by the surviving spouse (who has a higher preference to the appointment) and all of the other siblings (who each have an equal preference to the appointment). Usually, the Court also requires the estate trustee of the intestate estate to post an administration bond, the premium of which is an additional expense to the estate.

### **Ten Reasons to Have a Will**

#### 1) *Save Taxes*

The ability to avoid or postpone paying taxes is a well-established and powerful motivator of personal and business behaviours. The failure to make a Will is a lost tax saving opportunity. Even in the traditional

middle class family which has a house, an RRSP/RRIF, life insurance and some investment assets, Wills and basic estate planning present opportunities to:

- avoid probate taxes, through joint ownership of assets with a spouse, and/or beneficiary designations in pension plans and life insurance policies
- postpone capital gains on investments until the death of the surviving spouse
- capture absolute savings by creating testamentary trusts of life insurance proceeds to split the investment income among the surviving spouse and/or children

## 2) *Control of Who Receives the Estate*

An obvious advantage of a Will is that you can decide, within certain limitations, who is to receive your estate. It is a rare Will which sets out a plan of distribution which is the same as what would occur if there was no Will.

Many people assume that their spouse gets it all if there is no Will, and do not realize that if there are children, the surviving spouse is only entitled to the first \$200,000 and then must share the balance with the children, regardless of the level of the spouse's need and standard of living. The Will therefore typically (but not always) leaves the entire estate to the surviving spouse, either outright or in trust, which is a quite different result than if there are children of the marriage and no Will.

It is important to note that there are some limitations on the power to control the distribution of the estate in a Will. The most important is the obligation to make "adequate provision" for persons who are financially dependant. The experienced estate planner, directly with questions or indirectly in conversation, will elicit enough information to identify if this potential exists, and if it does, advise on how best to implement testamentary intentions are not fully consistent with these financial dependencies.

Other important constraints on the power to choose beneficiaries are contractual undertakings made while alive. For example, domestic agreements and separation agreements commonly create restrictions on one's power to control the distribution of one's estate by Will.

## 3) *The Power to Be Flexible and Consider Contingencies*

A Will is also very flexible, and permits alternative distribution schemes, depending on circumstances which prevail at the time. Without the power to see in the future, it can never be certain that a spouse will actually survive. The Will therefore permits you to make alternate provision if you are not survived by your spouse. It is not uncommon for a Will to set up a kind of "waterfall", with the estate cascading to a spouse, but if the spouse is not surviving, to the children equally, and if a child has also died leaving grandchildren, to the grandchildren of a deceased child, and so on.

## 4) *The Power to Control the Age at which Children Receive Their Share*

A person with full legal capacity is entitled to demand payment of any inheritance to which he or she becomes entitled. Practically, this means that a child can demand the full inheritance at age 18 in Ontario, an age which most people now consider too young to receive a large lump sum. Only with a Will can a structure be set up making it impossible for a child to insist on absolute payment until a specified age is obtained. Frequently, the age is now established in Wills to be 25, although it is also common to prepare wills in which children are entitled to one-half at 25 and the balance at 30. Until the specified ages are reached, the estate trustees who are managing the estate are given the power to manage the money, and

make all or part of the net income, and perhaps all or part of the capital available, for the care, support, education or benefit of the children in the meantime.

#### 5) *The Power to Choose Managers of the Estate*

An estate is administered and managed by persons called the “estate trustees”. Unlike the hierarchy of entitlement to this appointment established by the *Succession Law Reform Act*, a Will may nominate one or more persons as estate trustees, being mindful to choose those people who are in the best position to carry out the plan. While often the surviving spouse is nominated as the estate trustee, the Will should also nominate alternate estate trustees if the spouse is not surviving. This is frequently a crucial decision if there are young children, because it will likely be this person or persons who must assume a crucial financial relationship with the best interests of the children in mind.

The Will often sets up some decision making rules among estate trustees if more than one is appointed, and may also deal with their compensation for acting as such (if there is to be compensation).

#### 6) *Guardians*

For young children, the Will is also the opportunity to express wishes as to who will take custody and care of the children if both parents pass on. Although the appointment of guardians is not binding on the Court, these wishes are highly persuasive if something should happen to both parents because the assumption is that the parents were in the best position to know and appreciate the best interests of their children.

#### 7) *The Ability to Save Expenses*

Although preparation of a Will has a financial cost associated with it, preparation of a Will remains one of the few remaining legal services within easy reach of most Canadians. The modest cost of preparing a Will pales in comparison to the additional expenses and costs incurred if there is no Will, including the higher cost of applying for probate, the cost of paying the premium for an administration bond (or the cost of applying for a court order dispensing with the administration bond), and the cost of lost tax planning opportunities.

#### 8) *Prompt Administration*

When a person dies intestate, no meaningful steps can be undertaken with respect to the administration of the estate until probate proceedings are completed. This takes anywhere from a few weeks to a few months. In the meantime, assets are potentially at risk, or there are losses to the estate because GICs, bonds and other financial instruments cannot be effectively reinvested, or debts and liabilities of the deceased begin accruing penalties, late charges, or additional interest.

In contrast, a Will is immediately operative from the moment of death. While it is still necessary, except in very small estates, for the estate trustee nominated by the Will to obtain a formal appointment with probate proceedings, these proceedings only serve to confirm the estate trustee’s appointment as contained in the Will. In the meantime, the estate trustee continues to have all of the authority conferred by the Will and is therefore in a far better position to ensure that the assets of the estate are gathered in, protected, and appropriately reinvested and that additional costs and expenses associated with late payment of liabilities is avoided.

## 9) *The Ability to Deal with Specific Assets More Effectively*

When a person dies intestate, the general rule is that the assets must be sold and the net proceeds distributed according to the plan of distribution mandated by the *Succession Law Reform Act*. There is no allowance made in the legislation for dealing with unique or special assets, such as the family cottage, the matrimonial home, the family business or family heirlooms which have been handed down through generations.

A Will is particularly well-suited to setting out special instructions for these assets, which are often contentious among the beneficiaries or otherwise difficult to deal with. For example, although a Will may leave everything to the surviving spouse, either outright or in trust, often there is an ongoing business with which the surviving spouse has little or no experience. A Will can set up special provisions and directions as to how a family business should be managed and administered to maximize the surviving spouse's financial benefit and gain from the business.

If there are underlying business assets of significant value, it is also possible to set up an entirely separate "secondary" Will to deal with those business assets separate and distinct from the general estate. With appropriate drafting, probate tax on the value of the business is avoided and an entirely separate plan for management and administration of the business, separate from the main Will, can be set up to maximize the value of the business to the beneficiaries.

## 10) *Integration with Other Estate Planning Tools*

At the same time as a Will is prepared, it is common to prepare a Power of Attorney for Property. The Power of Attorney for Property appoints one or more persons as attorney to deal with financial and property affairs if the person is unable to do so by reason of mental incapacity. In this day and age of rapid medical advances, the prospect of diminished mental capacity during life has been greatly increased, or is even likely. A substantial level of continuity between the provisions of the Power of Attorney for Property and the Will becomes possible.

In addition to the Will, estate planning may include sophisticated *inter vivos* trusts (i.e. trusts made prior to death), as well as joint ownership arrangements. These other arrangements can and should be coordinated with the terms of the Will to create an integrated and comprehensive estate plan.

### **The Power of Advice**

One of the main benefits of working with an experienced estate planner is that you obtain the benefit of years of legal training and accumulated experience which can not be written in any book. The experienced estate planner is a craftsman whose main work product is advice. These skills are honed with years of practical experience in working with families, children, ex-spouses and other 'claimants', and years in wrestling with complex assets like the family cottage and the business, and years of inter-relationships with accountants, financial planners and other personal advisers.

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