

# ESTATE PLANNING: WILLS AND POWERS OF ATTORNEY

(UPDATED: NOVEMBER 2011)

PG 1 OF 2

It is advisable to have an **estate plan** in place.

An estate plan may include:

1. Your Will;
2. Your Assignment of Power of Attorney;
3. Your Living Will (a Medical Power of Attorney);
4. And, in some cases, a Trust may also make sense.

When putting together a plan, you must be mindful of both federal and provincial laws governing estates. You will need to provide your lawyer any instructions you require regarding your will such as:

## Instructions regarding your Will

A will is an essential part of every estate plan because without the will your assets will be distributed in accordance with provincial law. Dying without a will -- also known as dying "intestate" -- can be costly to your heirs and leaves you no say over who gets your assets.

*In Ontario, if you die without a will and have a spouse and two children, your spouse will receive the first \$200,000 of your estate plus one-third of any value of the estate over \$200,000. The remainder will be divided between your children **but**, if you have minor children and you die intestate, the court, and not your spouse, will manage their share of the estate until they turn eighteen.*

Your estate may be subject to probate fees to confirm the validity of your Will and advance planning will allow you to substantially reduce the taxes and probate fees you will have to pay.

## Other issues to consider in drafting your will:

1. Estates may be liable to a substantial death tax because you are deemed to dispose of all your capital property when you die and your estate must pay any applicable capital gains taxes. In addition, any RRSPs or RRIFs lose their tax-sheltered status on your death unless you name your spouse as beneficiary.
2. Do you need to provide guardian(s)/custodian(s) for your minor children? Do you need a special clause to deal with beneficiaries who are minors?
3. Do you need a special clause for a disable beneficiary?

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## Power of Attorney

You should name your Estate Trustee in your plan because if you die without a will, provincial law will direct who will administer your estate and it might not be the person you would have chosen. You will also need to arrange compensation for Executor(s) and trustee(s). Do you want the executors to have broad powers for retention, sale and investment of assets, securities etc? If you elect to have more than one attorney will they act jointly or not? If there are disputes over your estate do you want them handled through mediation or the courts?

## Your Living Will / Medical Power of Attorney

Are you appointing a Power of Attorney for Personal Care? If you become mentally or physically disabled during your lifetime and can no longer look after your own affairs, a Power of Attorney for Personal Care lets you choose a trusted friend or advisor to manage your affairs if you are unable to do so. If you are appointing a Power of Attorney for Personal Care are you specifying the kind of care you require (such as no life support if no hope of recovery etc.) and do you want to leave directions regarding your funeral and/or donating your organs?

## Trusts

Trusts are legal mechanisms that let you put conditions on how and when your assets will be distributed upon your death. They also allow you to reduce your estate and gift taxes and to distribute assets to your heirs without the cost, delay and publicity of Probate Court (which administers wills). Some also offer greater protection of your assets from creditors and lawsuits. Trusts require named trustees, who administer the trust. It is usual to appoint two trustees (they can be the same people as the executors), and it is always necessary to have two trustees to deal with the sale of land which is subject to trust. You can find out more about trusts from your lawyer and from your financial advisor.

**Note: Once you have a will, you must review it regularly to ensure that it is up-to-date and reflects your current wishes. You may need to amend or prepare a new will in the case of:**

- **Divorce or remarriage;**
- **Cohabitation with a common-law or same-sex spouse for more than 3 years;**
- **Relocation to another province or county;**
- **The birth of children or grandchildren;**
- **A beneficiary or your proposed executor predeceases you;**
- **A change in your financial circumstances.**

This tip sheet was prepared for CALC by Sharon Leitch, lawyer, and Judith Dale, from the Hastings County Law Association.

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