

YOUR LAST WILL AND TESTAMENT

What is a Last Will and Testament

A last will and testament, usually referred to as a will, is a legal document in which you give your assets to the people (or organizations/charities) you want to have them after you die. In order to be effective a will must be properly written, executed and witnessed. In your will, you also do other important things, such as appoint an executor, appoint a guardian for your minor children, specify the powers your executor can use, and set up trusts.

What Happens After You Die

When you die, many tasks must be completed in order to gather in your assets, pay your debts and taxes, and fully administer your estate. These tasks include: locating your Will; making funeral arrangements; obtaining proofs of death; locating and preserving all assets; preparing a list of assets and liabilities; preparing a list of beneficiaries; retaining a solicitor to advise on the administration of the estate, to apply for probate, to advertise for creditors, to prepare the documentation necessary to transfer assets, to prepare releases, to advise on the accounting to the beneficiaries, etc.; arranging for the payment of the probate fees; collecting all assets; determining all debts and settling them; arranging for the preparation of income tax returns; distributing the estate and obtaining releases; preparing an accounting and distributing it to the beneficiaries; paying the solicitor for the estate; obtaining his/her compensation. Good records must be kept of all of these transactions, and all documentation, expenses, etc. must be kept track of. It may also be necessary to retain accountants, appraisers, or other professionals in order to properly administer the estate.

What is an Executor

The person who you appoint in your will to take care of all of the tasks discussed above is called your executor and trustee, and in Ontario is also called your estate trustee. This person is usually referred to simply as your executor (a female executor is referred to as an executrix).

As you can see, the tasks to be completed by your executor are voluminous and time-consuming. Consequently, your executor is entitled to be paid to complete them.

Who can be an Executor

Anyone who is over the age of 18 years and is mentally capable can act as your executor. You can name two or more people to act as your executors. Multiple executors must act jointly, although you can specify if their decisions are to be unanimous or can be by majority rule. Many people name a trust company or a lawyer to be their executor or one of their executors, in order to ensure that decisions are made in an unbiased manner, or because they have no one close to them who could take on the responsibility.

When a Will Becomes Effective

Your will takes effect only when you die. Therefore, you can change it as much and as often as you like before you die, as long as you are mentally competent to do so. You are mentally competent to make a will if you understand the nature and extent of your assets, the nature of any moral claims anyone may have upon you, the people who would expect to be beneficiaries under your will, that you are revoking (making legally invalid) your prior will (if you have one), and the reasons you are changing your will (if you are doing so).

What Revokes a Will

You can revoke your will at any time by making another will which states that your previous will is revoked, by signing a properly witnessed statement revoking your will, or by deliberately burning, tearing or otherwise destroying your will.

Your will is also revoked automatically if you get married. No other change in your circumstances will automatically revoke your will, although a final divorce judgment will invalidate those parts of your will which appoint your ex-spouse as your executor or leave any assets to them.

What Happens If You Don't Make a Will

If you die without a will, the following people have the right to be appointed by the court to be your executor (known as an administrator if you die without a will): your married spouse or common-law partner or same-sex partner, your next-of-kin, or your spouse and your next-of-kin jointly.

Currently in Ontario, your common-law partner or same-sex partner will not receive any of your assets if you die without a will. They can apply to court to receive some of your assets as your dependant or on the basis that they contributed to these assets, but these applications are not automatically granted, and are expensive and time-consuming.

If you die without a will, your assets will be distributed in the following manner: if you die with a married spouse and no children, your married spouse will receive all your assets; if you die with a married spouse and children, your married spouse will get the first \$200,000 of your assets, and will share the rest of your assets with your children; and, if you die with no married spouse and with children, your children will share your assets equally (if one child dies before you, their children will receive their share of your assets). If you die with no married spouse and no children, your assets will go to the first person or persons on the following list: your parents equally or your surviving parent, your brothers and sisters equally (if one of your siblings dies before you, their share of your assets will go to their children), your surviving nephews and nieces equally, or your next-of-kin. If you have no close relatives or next-of-kin, your assets will go to the government.

If you die without a will, and some of your assets are to go to a person who is under the age of 18 years when you die, those assets will have to be paid into court, and they will be held by the court until this person reaches the age of 18 years, at which time all of the assets being held for them will be paid to them directly.

Why Have a Will

By making a will, you can ensure that those people whom you want to receive your assets will do so, and that the person you want to distribute your assets and manage your estate has the right and power to do so. You can also appoint a substitute executor, who can act if your primary executor is unable or unwilling to act when the time comes.

You can appoint a guardian for your minor children in your will. This appointment will go a long way to ensuring that the person you want to take care of your children if you die before they reach the age of 18 years has the right and responsibility to do so (although the person appointed will have to apply for permanent guardianship of your minor children within 90 days of your death).

If you want to leave some assets to someone who is still young, and you don't think that they would be ready to handle these assets responsibly all at once upon reaching the age of 18 years, you can leave these assets in trust for them, to be paid out at a later age, or to be paid out in percentages at several later ages, however you feel is appropriate.

If you don't have a will, the consequences discussed above under "What Happens If You Don't Make a Will" are going to happen. If you are not comfortable with any of these consequences, you need to make a will to ensure that they do not happen.

Finally, a properly written will can result in tax savings or probate fee savings, sometimes large savings, at the time of your death and following your death which would not be possible without a will.

Why You Should Review Your Will Regularly

A change in life circumstances can drastically affect the appropriateness and effectiveness of your will. As you get older, the needs of your spouse, your children, and the people to whom you wish to leave your assets change. Also, the person or persons you wish to appoint as your executor or executors may no longer be available, or you may prefer to appoint someone else. You need to review your will to see if it still makes sense in light of current circumstances and current legislation.

This memorandum is not intended to be legal advice, but rather to assist you in understanding wills. If you have specific questions, please feel free to consult us at 416-361-3231 or by email at mail@odonohue.ca.

© November, 2007, O'Donohue & O'Donohue, all rights reserved