

## **BASIC INFORMATION ABOUT WILLS & POWERS OF ATTORNEY**

### **What is a Will?**

A Will is a vehicle used to transfer Wealth after you die.

Other Vehicles to Transfer Wealth:

- “Beneficiary Designations”  
ie. Life Insurance policies & Mutual Funds – allow you to name the primary and secondary recipients.
- “Joint” property  
ie. Real estate and bank accounts  
joint ownership means a “right of survivorship”.  
The surviving joint owner(s) get the deceased’s share.
- Personal property  
ie. “things” or “movables” like furniture, contents and jewellery can be divided as dictated in the Will or by agreement among beneficiaries.

### **What is Residue?**

Residue is that portion of your overall Estate that can only be legally transferred by a Will;

Residue can be anything and typically, there is more residue when the last parent dies, such as:

- Parents’ home;
- Family cottage;
- Sole bank accounts;
- Investments where no beneficiary is designated

### **Components of a Will**

- Name of the Testator – the person making the Will;
- Name of Executor/Trustee – the person(s) assigned to handle the affairs of the deceased;
  - If you name more than one person to act together with another as Executor, the key question is whether they will get along. And, of course, the Executor must be someone whom the Testator trusts without question to carry out their wishes.
  - For cost reasons, it is preferable that the Executor be a resident of Canada.
- Residue can be distributed in the form of:
  - Specific bequests;
  - Parts or percentages;
  - Testamentary or Henson trusts;
  - Exclusionary clauses to exclude anyone not intended to receive a share of the estate.

## Why a second Will?

- A second Will, also known as a non-probate Will, may be necessary for those that hold shares in a closely held private corporation. Such Will permits the transfer of deceased's interest and control in the corporation (and corporate bank account) short of having to go through probate, which:
  - Saves cost of valuation of shares
  - Saves cost of Estate Administration Tax (probate fees)
  - Saves legal cost for added work

## Do I need a TRUST?

**This depends on your purpose and need. There are many types of trusts –ie. family trusts, insurance trusts, cottage trusts, Henson trusts, qualified domestic trusts, spendthrift trusts, charitable remainder trusts, and others.**

### **TOP 10 REASONS why you might consider setting up a trust\***

- 1. Managing assets** - If your beneficiaries don't have the capability or desire to manage the assets you'll be giving them, having trustees manage those assets can solve the problem. Perhaps your kids are minors, or have a disability. You may want to manage the assets while you're alive, but when you're gone, a trust can provide proper management if necessary.
- 2. Protecting assets** - If you want to protect assets from creditors, marriage breakdown or from those who might influence your beneficiaries, a trust can be an effective vehicle. Be aware that there is "fraudulent conveyance" legislation that could prevent you from transferring assets to a trust to avoid claims in some cases – speak to a lawyer about it.
- 3. Controlling distributions** - If you don't trust your beneficiaries to directly own the assets you want them to have (perhaps because they are minors or spendthrifts), you can distribute assets to them over time through a trust.
- 4. Providing privacy** - After your death, your will is likely to be probated. In this case, your will becomes a public document, along with the value of the assets that formed your estate. Further, certain people may be entitled by law to receive a copy of your will. A trust agreement, however, is a private document and can keep information confidential. Some people replace their wills with a trust.
- 5. Avoiding compulsory succession** - If someone feels that they were treated unfairly in your will, a legal battle could ensue. In some cases, it may be possible for your will to be varied (changed) – called "compulsory succession." A properly drafted trust can be watertight so that challenges to your wishes may be avoided.
- 6. Multiplying tax exemptions** - It's possible to use a trust to access the lifetime capital gains exemption (LCGE) or the principal residence exemption (PRE), even where it would otherwise be impractical to do so. For example, if a trust owns shares of a qualifying small business corporation, it may be possible to utilize the \$800,000 LCGE of each beneficiary. Similarly, if a trust owns a residence, it may be possible to shelter a sale from tax using the PRE, as long as at least one beneficiary ordinarily inhabits the home.
- 7. Saving taxes** - It's also possible to save taxes in other ways. For example, it's possible to split income with lower-income beneficiaries by allocating income of the trust to those beneficiaries to be taxed at their lower rates (though there are some exceptions). In addition, testamentary trusts, created in your will upon your death, have in the past allowed beneficiaries to save tax by taking advantage of the low

graduated rates of tax available to those trusts. This week's federal budget eliminated the long-term benefit of testamentary trusts for this purpose, but they can still offer these graduated tax rates for the first three years following your death, after which the trust will be subject to the highest marginal tax rate, causing the tax benefits to disappear.

**8. Avoiding probate** - Assets held in a trust fall outside of your estate and, therefore, do not require probate or the payment of probate fees.

**9. Preserving disability benefits** - If a beneficiary is eligible for certain disability plan payments in your province, it's possible that those benefits can be eroded under a means test if there are assets in his name or set aside for him. A properly worded trust can be used to hold assets for the beneficiary while still meeting the requirements of your province that will entitle him to receive those payments. This is often called a "Henson trust."

**10. Helping charity** - A trust can be set up with the purpose of providing gifts to charity.

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## **Powers of Attorney**

- How is a Power of Attorney different from a Will?
  - A Power of Attorney is only valid while that person is alive. Death terminates a Power of Attorney.
- Why have a Power of Attorney?
  - While alive, there may be times when, either due to illness, injury or infirmity, an individual is unable of caring for themselves or managing their affairs. This is when individuals named as Power of Attorney can legally care for and manage the affairs of their loved one.
- Most common types of Powers of Attorney:
  - Personal Care (for health and medical care decisions and living Will provision)
  - Property (for handling of bank accounts, real estate, investments, and assets)
- You should only choose someone you whom you trust and is willing and able to act as your "attorney".
- Most commonly named as power of attorney are:
  - Family member and friends;
  - Lawyer;
  - Trust company