

INFORMATION ON ESTATE PLANNING AND WILLS

The minimum information needed to instruct a lawyer to prepare a will (a "Will") is the following:

1. Name of Executor and Trustee- _____

2. Name of Alternate Executor and Trustee _____

3. _____

4. Instructions re burial or cremation, such as
-“I wish to be buried at X” _____
-“I wish my remains to be cremated” _____

5. Nature of specific bequests (if any) that take priority, such as
-to my cousin John \$5,000
-to my friend Mary, my ring
-to the Calgary Foundation, \$20,000

6. Nature of residuary distribution, such as
-to my spouse John, and failing that to my children in equal shares
-one half to my spouse, and the rest to my children

7. Guardianship of Children
-this is important in common disaster scenario with respect to young children

Other information that is very useful is:

- a. Nature and location of all assets
- b. RRSP designation information
- c. Life insurance information

In order to ensure that one's affairs are in a basic state of order, we at Pittman Maclsaac & Roy believe that **everyone should have a Will, an enduring power of**

attorney (“Enduring Power of Attorney”) and a personal directive (“Personal Directive”). As persons acquire assets, and wish to plan for the education of their children or the financing of their retirement and the succession of family businesses, more detailed planning is necessary.

The purpose of this article is to provide you with basic information. Once you have the basics in place, or where your situation is more complicated, we recommend that you consider more sophisticated planning techniques and options. Pittman MacIsaac & Roy have a relationship with Paul Jacobson, LLM, an accomplished taxation, trusts and estate planning specialist lawyer. He works with us to help create tax-effective plans for the Canadian based entrepreneur and professional. Some of these plans include Employee Profit Sharing Plans, Deferred Profit Sharing Plans and Principal Residence Trusts.

This article will only consider the building blocks of a basic estate plan. The other services are available, and we will tailor our advice to your needs. Please contact the firm for more information. The concepts we would like you to be aware of areas follows:

- A. Reasons Why a Will is Necessary
- B. Reasons for an Enduring Power of Attorney
- C. Reasons for a Personal Directive
- D. Intestacy Provisions of Alberta- what happens if you do not have a Will
- E. Sample Form for a Will
- F. Real Estate, Life Insurance and RRSP’s- things outside of a Will
- G. Specific Bequests, Residence Trusts and Life Estates
- H. Rest and Residue Portion of your Will
- I. Family Relief Act and Matrimonial Property Act
- J. Testamentary Capacity and Suspicious Circumstances

A. **Reasons Why a Will is Necessary:**

Your will ensures that the persons you choose carry out your wishes, and gather in your assets so as to best benefit the persons you want them to benefit. If you express no choices, then the law deals with your assets in ways that might surprise you. Decisions in wills are limited by laws of taxation and laws that protect spouses and dependent children on the basis that they married persons and parents must be adequately provided for in a will.

There are ways to plan your affairs so that your assets are distributed outside of a will, such as owning a home in Joint Tenancy and making sure that you have filled out RRSP beneficiary designations; these strategies have to be considered in the context of careful planning responsive to your individual case.

Some of the problems that may arise when one does not have a Will may include

the following:

- (a) the Administrator, who is the person appointed by the Court when you do not have a Will, once appointed by the Court, may have little interest in the administration of the Estate, which will result in delays, frustration and even loss.
- (b) the Court appointed Administrator will not have the moral authority of having been chosen by the deceased. This may increase the chances of family squabbles, though the choice of one family member over another as executor of a Will also does tend to create such difficulties as well.
- (c) the Administrator may be required to post a bond at that person's expense.
- (d) there is no opportunity to select a Guardian for one's infant children where necessary.
- (e) there is no opportunity to know the deceased's preference as it relates to burial or cremation.
- (f) the surviving spouse may acquire too much or too little from the estate.
- (g) the children may obtain too much or too little from the estate, or obtain too much when they are too young to be able to properly look after the money.
- (h) the Office of the Public Trustee of Alberta will become more involved where there are infants in supervising the entitlements of those under 18 years of age, and perhaps interfere with the enjoyment of life interests of the estate.
- (i) friends will receive nothing from the Estate.
- (j) assets that the deceased may have wanted retained might be sold.
- (k) in the event of common disasters the Estate may go in a manner not foreseen or not desired.
- (l) a beneficiary who is a relative cannot be excluded where this reflects the wishes of the deceased.

B. Reasons for an Enduring Power of Attorney

Should you become incapacitated during your life, your wishes regarding what should be done, and who should have the right to make decisions for you about where you live, or in relation to finances or treatments are set forth in an Enduring Power of Attorney.

If you do not have an Enduring Power of Attorney, a nursing home or care facility may refuse treatment, or ignore your wishes when stated if you do not have a legal paper that provides you with the authority to make decisions. While we believe that there are very few cases where a power of attorney is needed in an everyday situation, an Enduring Power of Attorney only takes effect only if the person that signed it lacks capacity. Two doctors must state that the person lacks capacity. The disadvantage of appointing an enduring power of attorney is that the actions of the holder will not be

subject to the same level of scrutiny by the courts. This lack of scrutiny by the courts may be an advantage where the person selecting someone as their power of attorney has great trust and confidence in the ability of the person being selected to carry out their duties.

C. **Reasons for a Personal Directive**

A personal directive is a document that allows you to choose what will happen in the case where you are unable to make decisions on matters such as:

- § medical treatments that you want or do not want;
- § where you want to live.

The choices you make will have to be honoured by your family, your friends and service providers such as doctors, nurses and hospitals.

D. **Intestacy Provisions of Alberta**

If you do not have a Will, if the deceased had no children, the surviving spouse is entitled to the entire Estate of the deceased. If the deceased is survived by a spouse and children, if the value of the Estate is not greater than \$40,000.00, the Estate goes to the spouse. If the value of the Estate exceeds \$40,000.00, the spouse is entitled to the first \$40,000.00, and then half of the remainder goes to the surviving spouse and the other half to a single child. If there is a surviving spouse and more than one child, one-third of the Estate goes to the surviving spouse and the balance is divided amongst however many children there are.

E. **Will Forms in Alberta**

Attached is a copy of a Will form that divides into topics the various decisions that are generally part of a Will. This assumes all of the Estate will go to the spouse if the spouse survives, and if not, the Estate would be divided amongst the children.

Other requirements or preferences of the person drawing the Will would, of course, result in different drafting. It is attached to these notes for illustration purposes only.

Some of the basic questions that one must consider are the following:

- § Who would be a good choice as executor or trustee (the words mean the same thing). This is the person who must carry out your wishes and handle your financial affairs. The qualities sought after are that they be reliable and competent in financial matters. Custom is often to choose a family member. The

governing considerations should still be the issues of reliability and competence.

- § Do you wish to provide specific instructions for cremation or burial and other preferences related to these things. These are not necessary, but the executor is left to guess if these things are not dealt with.
- § Do you have specific bequests of money or things to people or charities to be done first
- § Do you wish to the express things in general terms, such as “all my estate to my spouse X”, or “half my estate to my spouse X, and the rest to my children Y and Z”
- § Do you have choices to make such as guardians for your children

F. Real Estate, Life Insurance, RRSPs and things that Pass Outside of a Will

Real estate held in joint tenancy will pass outside of the Will by the rule of survivorship.

The Estate created by your will does not include a life insurance policy. These pass outside of the Will. A life insurance policy does designate a beneficiary, and will be in an amount that is received by that beneficiary quite apart from the proceeds of a Will. If you have specified that an individual obtains a large amount of money from life insurance, you may well not want to give that person equal treatment in the Will in addition to the other manners in which you have provided for that person. This would apply equally to a joint tenancy that relates to the home.

Beneficiary designations under an R.R.S.P. do not have to comply with the formal requirements required for a Will (such as the requirement that there be two witnesses) and pass outside of the Estate created by your will. R.R.S.Ps. are treated differently from Province to Province, and are of growing concern given the large amount that individuals have placed in these assets. Where there is an beneficiary designation, this MAY ALSO change one’s thinking on who will be selected as a beneficiary under your will. If your R.R.S.P. has no such designations, then the terms of your Will govern the entitlement to the net proceeds of your RRSPs. You can mention how these R.R.S.P.s will be dealt with upon your death. Remember that all of your RRSP will be included in your income in the year of your death, so that unless there is life insurance to pay the taxes triggered by your passing, you should consider how much of the actual value of your RRSP net of taxes will remain in the estate for distribution purposes.

G. **Specific Bequests, trusts and life Estates**

Very common in Wills are specific bequests of money or specific items to individuals. If a described item is not owned on the date of death, these bequests fail. Money amounts can be given, but these diminish in value over time.

Another common choice is to provide a residence trust or a life estate instead of an outright gift of real property to a beneficiary. This is often chosen where one family member devotes an extensive amount of time in caring for someone in their last years where such care is necessary. It is a manner of rewarding a person by providing a right for that person to live in the house for as long as choose to, and an eventual sale of the house upon the death or renunciation of the right of possession, followed by a distribution of the sale proceeds among all children equally.

H. **Rest and Residue Portion of Your Will**

This is the portion of most wills where the bulk of the value of the estate is distributed. Generally, as specific items may not be owned on death, or as specific gifts may change in terms of their value as a portion of the estate, it is probably the most logical way to distribute one's assets. Please look at the examples in the sample will attached to these notes.

I. **Family Relief Act and Matrimonial Property Act**

In the event that a person who is a dependant in the way defined in the *Family Relief Act* considers a deceased person did not make adequate provision for the proper maintenance and support of such dependants, these people have a right to apply to the Court to have the Court make what it considers a more just distribution of the Estate then the one provided by the Will. This application has to be made within six months of the Grant of Probate of the Will or later in relation to undistributed assets. The normal applicants are spouses and children of the deceased.

Spouses also have the right to apply under the *Matrimonial Property Act* for a division of assets on matrimonial breakdown. Outstanding orders may have obligations that have to be considered when drawing up a Will. The meaning of spouse may include a same sex couple, or unmarried persons that have children, in accordance with the *Adult Interdependent Relationships Act*.

Factors to be considered are the size of the Estate in the situation of those making the claims. For purpose of considering one's Will, one should address one's mind to making adequate provision for such person or persons and be aware of the legal consequences of possible applications to challenge what has been done if inadequate provision is made.

J. Testamentary Capacity and Suspicious Circumstances

It is possible to bring an application to make the Executor or Administrators of a Will to prove the Will (in solemn form). This is a procedure to have the Court determine the validity of a Will document.

The types of things that the Court will look into at in determining whether the Testator had testamentary capacity is whether those persons benefiting most from the will are considered "natural" beneficiaries which means family as opposed to non-family beneficiaries. Other factors include the health of the person making the will, the level of dependence of the person making the will on others, and the conduct of those benefiting and not benefiting under the will.

The legal reasons why a will can be challenged include, but are not limited to, the following:

(a) lack of testamentary capacity. -In order to have the capacity to make a Will the person who makes the Will (the Testator) must understand what he is doing by making a Will, must appreciate the nature and extent of the property he possesses and must be able to appreciate who, among his family, friends and any charitable organizations he supports, should be considered as possible beneficiaries of his Estate. A Will in which the Testator ignores those who he might logically name as beneficiaries may be unpopular is not invalid if the Testator possessed testamentary capacity, made the Will of his own volition, and if the Will was properly executed.

While the terms of a Will are all still subject to being changed to make adequate provision for spouse's and dependents by court order, these only change the distribution of some of the Estate under a valid Will.

(b) Undue Influence: -A Will may be invalid if a Testator made it under the excessive influence of others, so that the terms of the Will do not reflect the Testator's true intentions. This often applies to sudden changes of beneficiaries to favour those that cared for the deceased while infirm.

(c) Lack of Due Execution: -In order to be valid, as mentioned in the materials, a Will must be completed in accordance with formal requirements posed by law. These include that a Will is invalid if it has not been signed by the Testator, or it has not be witnessed by two persons who are present and remain present while the Will is signed by the Testator. It should be noted that a Will has no legal effect until the death of the person making it, so that there cannot be any question of a challenge to the Will until such time as the Testator has died. There is no procedure to apply to a Court to have the Court determine whether a person had capacity to execute a Will while they are alive.

Pittman MacIsaac & Roy,
Barristers & Solicitors
2600 West Tower,
144 - 4th Avenue S.W.,
Calgary, Alberta, T2P 3N4
Phone 237-6566
Fax 237-6594
Email stm@pmrlaw.ca
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SAMPLE WILL

THIS IS THE LAST WILL AND TESTAMENT of me, *, of the City of Calgary, Alberta.

PART I: INITIAL MATTERS

1. **Revocation**

I revoke all former Wills and Codicils.

2. **Executor and Trustee**

(a) I appoint my *, *, presently of Calgary, Alberta, to be the Executor and Trustee of this Will.

(b) If my said friend * predeceases me or dies after my death but before the trusts hereof shall have terminated, or becomes a non- resident of Canada for tax purposes, or is unable or unwilling to act or continue to act as my Executor and Trustee, I appoint my friend *, presently of Calgary, Alberta, to be the Executor and Trustee of this Will.

(c) I hereinafter refer to my Executor and Trustee, whether original or substituted, as "my Trustee".

3. **Funeral Instructions**

It is my wish that following my death my remains be buried at Calgary, Alberta.

PART II: DISPOSITION OF ESTATE

4. I give and appoint all my property of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment, to my Trustee, upon the following trusts, namely:

(a) **Payment of Debts**

To pay out of the capital of my estate my legally enforceable debts, funeral and testamentary expenses.

(b) **Rest and Residue of Estate**

If my *husband, *wife, *spouse survives me, to pay, to give and

transfer the rest and residue of my Estate then remaining in trust to that person for their own use and benefit absolutely.

(c) **Rest and Residue of Estate Death of Spouse**

If my *husband, *wife, *spouse does not survive me, to divide and distribute the rest and residue of my estate then remaining in trust in equal shares to those of my children (Give names if no more children likely only) who survive me.

- (i) I DIRECT that my Trustees set aside the share of any child of mine or other minor who at the time of my death is under the age of 18 years and that my Trustees keep that share invested, pay the income or capital or as much of either or both as my Trustees consider advisable for the maintenance, education or benefit of that child and to pay and transfer the capital of that share or the amount remaining to that child when he or she reaches the age of 18 years. I further direct that any income not so used in any year shall be added to the capital held in trust and dealt with as part thereof.
- (ii) In the event that a child of mine or other minor mine survives me but dies before receiving the entire capital of his or her trust funds my Trustees will divide the amount thereof then remaining equally among my then surviving children upon the same trusts as their original share.

(d) **Effect of Death of Children**

In the event that if any child or children of mine hereinbefore named as beneficiaries shall have died during my lifetime leaving issue, I direct that the legacies, grants, and bequests to such beneficiary or beneficiaries so deceased shall not lapse but the issue of such deceased beneficiary or beneficiaries shall take by substitution in equal shares per stirpes the share that such deceased child or children of mine would have taken had he, she or they survived me.

(e) **Guardianship**

I appoint _____ to be the guardian of my infant child or children.

PART III: ADMINISTRATION OF ESTATE

5. To carry out the terms of my Will, I give my Trustee the following powers:

(a) **Collection and Dealing with Assets**

(i) to use his or her discretion in the realization of my estate to sell, call in and convert into money, except as elsewhere in this my will provided, all my estate not consisting of money at any time and upon any terms as my Trustee may in his or her uncontrolled discretion decide upon, or to postpone the realization of my estate or any part of my estate that he or she may think best;

(ii) To retain any assets of my estate, in whole or in part, in the form in which they are at my death until they are distributed, sold or otherwise disposed of, even though they are not authorized by law as investments for trustees.

(b) **Distribution in Kind**

To make any division of my estate or set aside or pay any share or interest, either wholly or in part, of the assets of my estate at the time of such division, setting aside or payment, and my Trustee shall determine the value of my estate or any part of it for the purposes of making such division, setting aside or payment, and its determination shall be binding on all persons concerned.

(c) **Investment Powers**

To invest, and from time to time re-invest assets of my estate at the time of such division, setting aside or payment, and my Trustee shall determine the value of my estate or any part of it for the purposes of making such division, setting aside or payment, and its determination shall be binding upon all persons concerned.

(d) **Claims**

To release, forgive, compromise, settle or waive any claim or debt which may be owing to me or by me at my death.

(e) **Corporate Assets**

If at any time my Trustee holds in my estate any investment in or in

connection with any company or corporation, I authorize and empower my Trustee to join in or take any action in connection with such investment to the same extent and as fully as I could if I were alive and the sole owner of such investment.

(f) **Land & Buildings**

- (i) To sell, mortgage, exchange, lease without being limited as to terms, give options on or otherwise dispose of or deal with any real estate held by my Trustee.
- (ii) To repair, improve, or rebuild any such real estate.

(g) **Trust for Minor Beneficiaries**

Except as otherwise provided herein, to set aside the share of any minor beneficiary, keep that share invested, pay the income or capital or as much of either or both as my trustee considers advisable for the maintenance, education or benefit of that beneficiary, and to pay or transfer the capital of that share or the amount remaining to that beneficiary when he or she reaches his or her majority. Any income not so used in any year shall be added to the capital held in trust and dealt with as part thereof.

(h) **Payment to Guardians**

To make any payments for any person under the age of majority to a parent or guardian of such person whose receipt shall be a sufficient discharge to my Trustee.

(i) **Discretionary Powers Under the Income Tax Act**

To make or not to make any election, determination, designations or allocations pursuant to any taxing statute including the Income Tax Act, Canada, which my Trustee deems to be in the best interest of my estate and the beneficiaries thereunder. The exercise by my Trustee of its discretion shall be binding upon all beneficiaries of my estate even though an advantage may be conferred upon any beneficiary at the expense of any other beneficiary and even though an even hand is not maintained among the beneficiaries.

PART IV: MISCELLANEOUS PROVISIONS

6. **Survivors**

ANY PERSON referred to in this Will who does not survive me for a period of thirty (30) days shall be deemed to have predeceased me.

7. **Gifts During Lifetime**

No beneficiary taking any share or interest or otherwise benefiting under this Will shall be liable to bring into account any sum of money or the value of any property or interest which I have already paid or transferred to or settled on such person or which I have already paid or transferred to or settled on such person or which I may hereafter pay or transfer to or settle upon such person.

8. **Bonds**

No trustee shall be required to give any bond or security for the performance of his duties notwithstanding the laws of any country or jurisdiction to the contrary.

9. **Headings**

The headings in this Will are inserted for convenience only and do not form part of this Will.

10. **Interpretation**

I DIRECT that throughout this Will wherever the plural is used the same shall be construed as meaning the singular or vice versa, and the masculine shall be construed as meaning the feminine or a body corporate as the sex or context shall require.

IN WITNESS WHEREOF, I, _____ have to this my Last Will and Testament, containing all these * (*) pages, set my hand this __ day of _____, 200_.

SIGNED by the said TESTATOR)

_____)

in our presence and attested)

by us in his presence and in)

the presence of each other.)

)

_____)

Name)

_____)

Address)

_____)

Occupation)

)

_____)

Name)

_____)

Address)

_____)

Occupation)

_____)
* _____)