

Why Every Parent Needs a Will

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Most healthy parents place “creating a will” last on a long priority list. However, while a Will is vital for everyone, those with children should be particularly mindful of the primary importance of having a Will. The following provides just some of the many reasons why having a Will is so important for parents:

Intestate Succession Act

In Alberta, if you do not have a Will, your estate property will be distributed pursuant to the *Intestate Succession Act*. Other property, such as property held jointly with another person or property that has a designated beneficiary (such as life insurance or RRSPs) will pass directly to the surviving joint owner or the designated beneficiary, and generally not form part of your estate. The *Intestate Succession Act* prescribes that, after payment of debts, your spouse or “adult interdependent partner” will receive the first \$40,000 of your estate and the balance will be divided equally between your spouse/adult interdependent partner and your child (if you only have one child). If you have two or more children, your spouse/adult interdependent partner will receive 1/3 of your remaining estate and the other 2/3 will be divided equally among your children. This arrangement may sound acceptable (unless you wish your spouse to receive the whole of your property) – but it can have unintended consequences.

As a general rule, all property (including money) in excess of \$5,000 to which a minor (under 18 years of age) is entitled must be delivered to the Public Trustee. If the surviving parent wishes to manage your child’s property on his or her behalf, they will have to seek a Court Order appointing them as trustee of your child’s property. Even if they are appointed Trustee, they will likely have to provide a bond or other security and have to formally account to the Court at regular intervals for the way that they are managing your child’s property. This situation can be avoided with a Will, as payment does not have to be made to the Public Trustee if your child’s share is given to them through a Will and a Trustee is specifically appointed to manage the property on the minor’s behalf –

irrespective of the value of the property granted to the minor child in the Will. Further, creating a Will allows you to direct who you specifically wish to manage your children’s trust accounts, including specifying who you wish to act as trustee if both you and your spouse die while your child is a minor.

Of perhaps greater concern is that, without a properly drafted Will, the Public Trustee will release all of your child’s property to them when they reach 18 years of age – irrespective of the value of the property or their ability to handle money. Therefore, your child could receive a cheque for a huge sum of money at 18 years old. A properly-drafted Will may prevent this situation by including provisions which specify the timing and value of payments to your child from the trust account held for their benefit.

It is also significant that income earned in “testamentary” trusts (trusts created within a Will) may be taxed at the more favourable individual progressive marginal income tax rates.

Guardians

If you die without a Will, your choice of whom you wish to care for your children may not be communicated or respected. The biological or adoptive parents of a child are presumptively the legal guardians of the child - however, you may have concerns about your child’s other biological parent or want your spouse (who may be a custodial adult through second marriage but not your child’s biological parent) to be the guardian of your child. If such concerns or wishes are not clearly expressed in a Will, they are unlikely to be honoured. Further, a Will provides you with the opportunity to name the person(s) whom you wish to act as guardian in the event both you and your spouse are deceased. If such wishes are not set out in a Will, the Court may appoint a guardian for your children based on who applies to be guardian of your child – and the person that applies may not be the person whom you would have chosen to care for and protect your children.

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Communicating your wishes

Do you want your daughter to receive all of your jewellery on your death? Is it your wish that the Guardian of your children not work outside the home? Do you want to be cremated? Do you want to designate the person who is to be the Executor and Trustee? Do you want to leave a gift to a favourite charity? Then you need a properly drafted Will. A Will is the only way to ensure that your choices regarding support and protection of your children, distribution of property, funeral instructions and any other testamentary wishes are communicated and legally enforceable. Of course, the terms of your Will should always be consistent with an estate plan which takes into consideration the legal, tax and other consequences of your choices. Our Wills, Trusts and Estates department can assist you in creating an individualized estate plan, and drafting a Will which provides your Executor, Trustee and Guardian with your clear instructions. It is worth noting that in Alberta marriage revokes a Will – but legal separation or divorce does not. Therefore, if you have married or divorced subsequent to executing a Will, you should contact our Wills, Trusts and Estates department without delay to discuss preparing a new Will.

DISCLAIMER

This article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

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