

THE ADVISOR

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WHY EVERY PARENT IN ALBERTA SHOULD HAVE A WILL



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As a young, healthy parent, you may believe that having a Will is the last thing on a long priority list. However, while a Will is important 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:

Wills and Succession Act

In Alberta, if you do not have a Will, your estate property will be distributed pursuant to the intestacy provisions of the *Wills and 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 *Wills and Succession Act* prescribes that, after payment of debts, your spouse or “adult interdependent partner” will only receive the whole of your estate if all of your surviving ‘descendants’ are also the ‘descendants’ of your spouse or adult interdependent partner. ‘Descendants’ is given a broad definition under the *Wills and Succession Act*, and means more than just children. ‘Descendants’ means all lineal descendants of an individual through all generations, and therefore includes grandchildren and great-grandchildren. Therefore, if even one of your children, grandchildren or great-grandchildren are not also the children, grandchildren or great-grandchildren of your surviving spouse or adult interdependent partner - he or she will not receive the entirety of your estate.

Where one or more of your children, grandchildren or great-grandchildren is not also a descendant of your surviving spouse or adult interdependent partner, your spouse or adult interdependent partner only receives the greater of \$150,000 or 50% of the net

value of your estate, and the balance will be divided in equal shares between your surviving children and your deceased children who left ‘descendants’. This arrangement may seem acceptable (unless you wish your spouse or adult interdependent partner 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 which a minor (under 18 years of age) is entitled to receive 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 obtain a Court Order appointing them as trustee of the child’s property. Even if they are appointed Trustee, they will likely have to provide a bond or other security, and to formally account to the Court at regular intervals for the way that they are managing your child’s or grandchild’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 or grandchild’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 in the Will. A Will also allows you to designate who you wish to manage your children’s or grandchildren’s trust accounts, including specifying who you wish to act as trustee if both you and your spouse die while the child or grandchild is a minor.

Of perhaps greater concern is that, without a properly drafted Will, the Public Trustee will release all of your child’s or grandchild’s property to him or her when they reach the age of majority – irrespective of the value of the property or his or her ability to handle money. Therefore, the child could receive a cheque for a huge sum of money when he or she is 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 or grandchild from the trust account held for his or her benefit.

It is also worth noting 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.

Communicating your wishes

Do you want a particular child 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? If so, 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. If you have a blended family that includes step-children or step-grandchildren, or you have children outside of your current relationship, you may wish to contact our Wills, Trusts and Estates department to discuss preparing a Will that properly expresses your wishes. ▲

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