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# Preparing a Will



## Why a Will?

Making a plan to deal with your wishes upon death gives you the comfort of knowing you have done everything possible to make life easier for those you will leave behind. Understanding the legal aspects of these issues allows you to make informed decisions in planning for your independence and for your demise. You can't be bashful in dealing with death. It is one of the certainties of life and should be dealt with while you are able to express your wishes.

If you have no Will, your assets will be dealt with according to the Intestate Succession Act (Manitoba). While this Act may be satisfactory in some cases, it can result in a gift to someone whom you did not intend to benefit or exclude someone you wish to benefit.

In the Will preparation process, you can consider and initiate basic estate planning

which will minimize the cost of, and complexity in, the administration of your estate. These can include simple things as joint ownership of assets during your lifetime and naming specific beneficiaries of pensions and insurance plans. Where your life is more complicated than the average person, it may be appropriate to do some tax planning to save or at least defer the payment of taxes or provide for appropriate funding to cover any potential tax liability. (Many people fail to appreciate the extent of their assets and are surprised to discover the wealth that will be generated as a consequence of their death).

A Will allows you to deal with the division of personal effects and special property which can help avoid disputes among your beneficiaries. Your executor will welcome direction on how to deal with certain personal assets.

If you have no Will then you have no executor and the person appointed to administer your estate may not be the person you intend nor necessarily the best person for the job. The administrator will not have authority to act for your estate until the court order is signed and your estate may be in limbo until that happens. In addition, the cost can increase if bonding and sureties to the bond for the administrator are necessary.

A Will can provide certain powers to the personal representative that may be required depending on your situation. For example, the administration of trusts for minors, young adults or special needs beneficiaries and the power in the executor to encroach on the capital of a trust for the maintenance and well being of minor beneficiaries.

A Will allows you to address the issue of guardianship for your children. The issue of guardianship is always subject to the best interests of the child, but an express wish from a parent is important.

You may have a challenging family situation or asset that needs to be addressed. These can include: second marriages where there are children from a first marriage; family cottages; lending or gifting money to one child; or a child with special needs or addiction issues.

### **DO I NEED A LAWYER?**

You don't need a lawyer to prepare a Will, but it is advisable. Promoters of Will kits would lead you to believe it is a simple process. It is, if you know what you are doing. However, knowing what to do properly takes a lot of time. The forms in the kits are not foolproof and the information they provide is not always complete. You don't even need a kit if you really want to be a do-it-yourselfer. Manitoba law allows a holograph Will, which is a Will entirely in your own handwriting, dated and signed at the end. This is as simple as it gets, however, the same caution applies. Your Will, or changes to your Will, can be done in your handwriting but you have to ensure that the basics are covered and even the basics can be complicated. When considering preparing your own documents without the help of a lawyer, remember: you don't know what you don't know and what you don't know may cost your estate far more money than you would have spent on proper preparation of a Will.

### **HOW MUCH WILL IT COST?**

The cost of preparing a Will depends on the nature of your assets and debts as well as your family situation. A lawyer can steer you through the complexities of modern life. Wills, other than holograph, require that certain formalities be met and

if they aren't, then the Will could be invalid despite the best of intentions.

The Wills Act of Manitoba permits a document to be admitted to probate despite the lack of these formalities, however, this would require a court application, with additional expense. Even if the Court upheld such a document as a Will, the circumstances surrounding the document and the ambiguity of the document may cause disputes.

Remember, Wills can also be challenged on the basis of lack of testamentary capacity and undue influence. Lawyers consider these issues at all stages of the Will preparation process, from taking instructions to the execution of the Will. In essence, the cost of a lawyer is like buying insurance to ensure things are correctly done. It will cost your estate more money if the Will is not properly prepared or certain precautions are not taken and the Will is challenged. This can lead to expensive litigation. It probably will cost your estate more to fix the problems than it will cost you to hire a lawyer to assist you.

In addition to the preparation of the Will and some basic estate planning advice, the lawyer can help you understand the estate administration process.

You should have an appreciation for legislation that affects your freedom of testamentary disposition.

Such legislation can restrict your ability to gift your assets in accordance with your wishes. For example, when decisions are being made on who gets what, you should have an understanding of The Homesteads Act (which gives rights to spouses and common-law partners), The Dependents Relief Act (which provides a mechanism for a person who is financially dependent on you to challenge your Will if adequate provision has not been made for that person) and The Family Property Act (which provides for an accounting between spouses and common-law

partners on death). The fee will depend on the arrangements you make with the lawyer and the complexity of your estate, your wishes and family. It is unlikely the lawyer will be able to determine your needs on the basis of your first phone call.

### **WHEN RETAINING A LAWYER, THE FOLLOWING BASIC STEPS MAY BE FOLLOWED:**

The lawyer may send you a checklist to fill out before the first meeting. The checklist will include information such as your personal information, information about the executors, your children and other beneficiaries and your assets and debts. The more information you can provide, the easier it will be to discuss your affairs at the first meeting. If you can provide the checklist to the lawyer before the meeting, he or she can review it and be ready with appropriate questions.

At the first meeting, you and your lawyer will discuss the checklist and your particular wishes or concerns. If the lawyer did not send a checklist, you will review your information at the meeting. The conversation you have will result in your "estate plan" which reflects how you want your estate dealt with after you are gone.

Based on your instructions, the lawyer will prepare a draft form of your will and send it to you. You will review it to ensure that it accurately reflects your wishes. You also will discuss any questions you may have about the Will.

You will meet with the lawyer to sign your Will and ask any final questions you may have about it. The lawyer also will discuss with you proper storage of the Will and ways to ensure that your executor can find the document at the appropriate time.

The provision of full information, a thorough review of your situation and the preparation of proper documents will lead to peace of mind for you and your loved ones after you are gone.