

Self-Prepared Wills Personal Directives and Enduring Powers of Attorney

WHY NOT?

By Ron Knol, BA (Bu. Ad.), LL.B - March 2008

The primary goal of proper Estate Planning is to provide for the efficient distribution of your life's assets in accordance with your last wishes and in a manner that minimizes costs to your Estate and stress to your surviving family.

“One size fits all” Will Kits and other “do-it-yourself” Estate Planning documents generally contain a standard blueprint that may be too generic in nature to cover the potentially unique (and potentially unknown) aspects of your personal situation. Your life history (marital, financial, business, etc.) may dictate that your Estate Planning requires unique provisions. Since lawyers and other Estate Planning professionals are trained to ask the right questions and find the right answers, you should seek their assistance.

By analyzing the following questions, you will realize that, by preparing your own documents without professional assistance, you may be short-changing your Estate, your wishes, your beneficiaries and your loved ones. And, you may end up becoming a believer in the old adage that “those without (proper) wills should include lawyers amongst their heirs”.

Are your wishes and instructions clearly stated?

- If your instructions are unclear or ambiguous, your Executor (often a loved one) may be forced to seek an interpretation (an expensive interpretation) from the Courts.
- Varying opinions of what you meant to say may inadvertently create an environment where the resulting family feud will forevermore change the nature of family get-togethers. Remember, you won't be there to clear up the confusion.

Have you given your Executor the “power” to accomplish what you want done?

- Unless your Estate documents grant additional powers, the powers of your Executor (or Attorney or Agent) are restricted to those granted by your province's legislation and your “decision-maker” may be prevented from accomplishing your wishes.
- At best, your decision-maker will be forced to seek the court's approval and may have to involve all heirs and claimants in that process.

Have you dotted every ‘i’ and crossed every ‘t’?

The formal process for preparing, signing and witnessing your documents is important and Estate advisors are aware of the most recent changes in Estate law and procedure. For example,

- If one of the witnesses to your Will is also a beneficiary (or the spouse of a beneficiary), the gift to that beneficiary is void.
- If your witnesses did not actually see you sign the will, the entire will is void.
- If you haven't made provisions for those whom, by law, you must make provisions for, your instructions may fail or be successfully challenged.

Have you covered off the “What Ifs?”

- What will happen if your designated decision-maker or your choice of Guardian or one of your beneficiaries passes away before you?
- What if the value of your Estate is significantly more (or less) than anticipated?

Professional advisors will assist you in creating a “Plan B” (and possibly a “Plan C”).

Can your documents survive a “challenge”?

Wills, Enduring Powers of Attorney and Personal Directives are documents that come into effect at times of severe stress and, unfortunately, the documents may be challenged (perhaps by disgruntled relatives who didn't receive what they thought was coming to them).

- Are you sure that your documents cannot be contested on the grounds of undue influence or lack of capacity?
- Who will vouch for your competency before the courts? Your lawyer (and/or your lawyer's records) can confirm your competency at the time of document signing.

Have you placed sufficient “control” on your wishes?

- At what age do you wish for minor beneficiaries to receive their bequests? If you don't address this, the province's default provisions will ensure that the entire gift flows when the beneficiary reaches the age of majority. Your instructions, or lack thereof, may even affect your grandchildren if the gift were to tragically bypass your son or daughter and vest in the next generation. Do you really want them to receive their inheritances immediately with “no strings attached”? (Remember when you were 18 or 19?)
- Do you wish to control how gifts to charity will flow? Should those gifts be immediate or do you wish to set up an endowment or scholarship or trust fund or...?
- If you wish to delay the gift to a beneficiary (or release it in stages), who will control the assets that are to flow to such beneficiaries and how?

This involves the creation of “trusts” that your Executor (or a named Trustee) will have to administer and the more professionally-prompted guidance you can provide, the better.

Do you know what other “forces” will affect your Will and your Estate Plan?

It is very unlikely that all of your assets fall within the scope of your Will's instructions. And, if one of your assets is not covered by your Will, how will its distribution be governed?

- If, for example, you have named your son as a beneficiary on your life insurance but your Will says your Estate should be divided equally amongst your three children, that son will receive the life insurance proceeds first and then one third of your Estate assets.
- If you own a business, that business is likely affected by existing agreements and contracts. These agreements (or the lack thereof) will have an impact on any bequests that flow from that business ownership. You need to be aware of this when you plan your Estate; especially if your business is one that you share with other partners or shareholders.
- Have you considered the way in which your creditors and/or Canada Revenue Agency may deal with your demise? Proper Estate Planning should minimize the taxes (and other claims) payable by the Estate and should enhance the cash flow available to pay such debts. The beneficiaries of your family cabin shouldn't have to sell the cabin to pay a Capital Gains tax.

Proper legal advisors will help you determine which assets are covered by your Will's instructions (and which assets are not) and will help you plan accordingly.

It is ironic that many people don't think twice about rightfully paying annual auto insurance premiums to protect against a loss that may or may not happen that year. Yet, many people will try to avoid the cost of professional assistance in Estate Planning – an expense that is not incurred annually, is usually less than the annual insurance premium and which is designed to protect against a loss that is guaranteed to happen. Keep in mind that, compared to the financial costs of preparing a proper Will, Estate litigation is phenomenally more expensive (with increased financial costs AND significant emotional costs to your surviving loved ones).