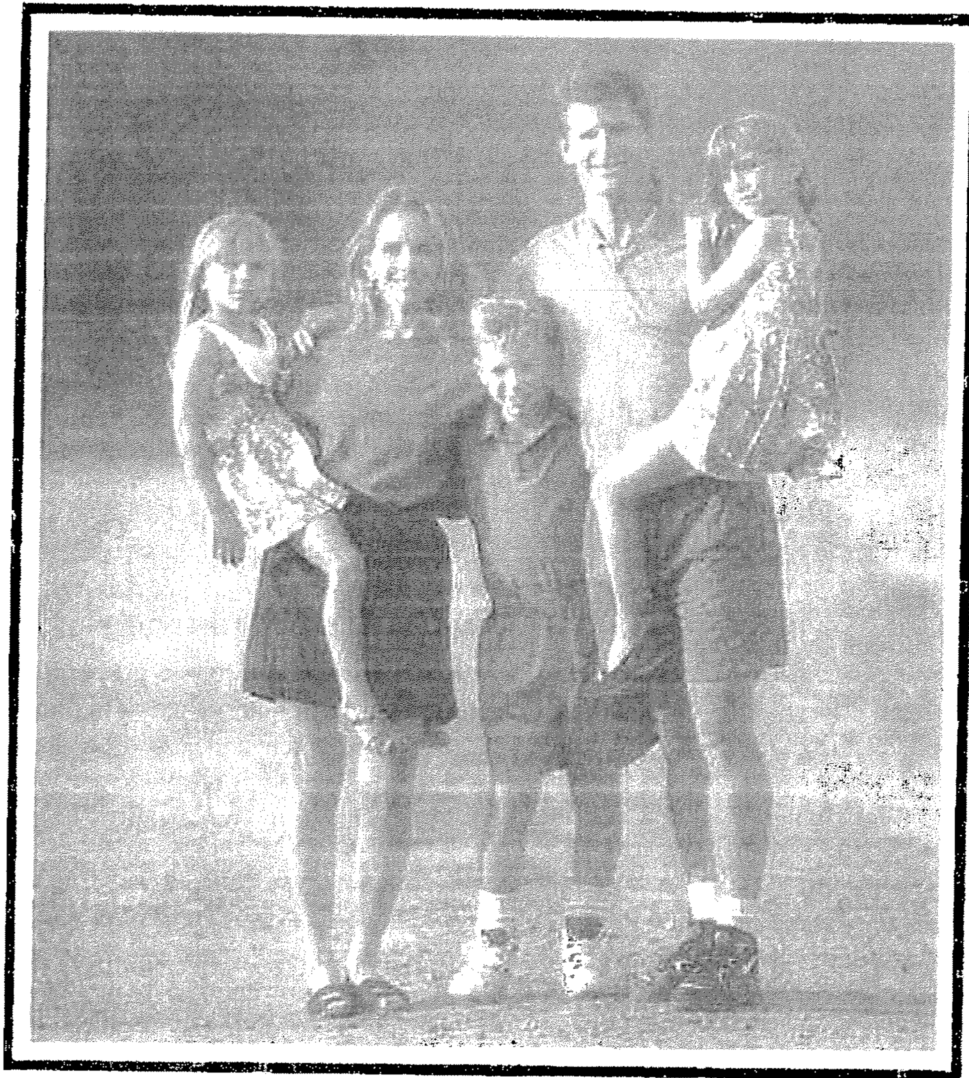


THE WILL KIT

Introduction

Simply stated, a Will is a legal instrument executed by a competent person in the manner prescribed by the various provincial statutes. All real estate, cash, and other property owned by you–such as automobiles and household goods–should be transferred to others either by Will, by operation of law, through joint ownership with the right of survivorship, trusts, gifts, insurance, or other estate-planning methods.

Every married, single, widowed, or divorced person over the age of majority should have a current, valid Will. Most married persons, with or without children, generally wish to leave their entire estate to their surviving spouse.

Some of the benefits you will gain by having a current, legal Will are:

- You may choose those persons you wish to receive your property and assets.
- Your personal effects, memorabilia, and family heirlooms will go to those you have chosen.
- Someone you know and trust will administer your estate, locate your assets and pay your bills.
- Depending on your marital status, you will be able to name the custodian of any minor children.
- The possibility of costly and lengthy estate litigation is reduced.
- Your executors will be aware of your wishes regarding burial or cremation and funeral services.

Keep in mind that Wills do not have an expiration date. This means that a Will you prepare at age 30 will possibly still be valid in every respect when you are 60 or older. Carefully review your Will at reasonable intervals due to factors such as these:

- Your property values change;
- A death or a change of competency of your Estate Trustee or your beneficiaries;
- A change in your marital status;
- You move to a different province or country;
- You acquire property in another province or country;
- A substantial increase or decrease in your financial resources;
- You wish to add other dependents such as a child or an elderly parent;
- You make a change in your life insurance program;
- You inherit or purchase property;
- A change in inheritance or tax laws in your province; and
- A change in your wishes regarding the distribution of your estate.

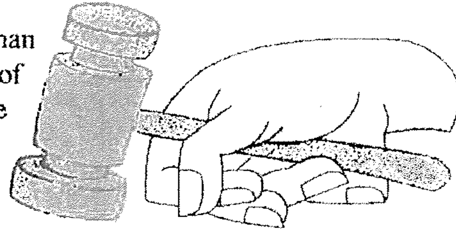
Remember, you can change your Will whenever you want, provided you still have the "mental capacity" to do so. You can either draw an entirely new Will or you can add a codicil to the existing one.

It's important that you give serious consideration to the selection of your Estate Trustee–the person who will be responsible for the administration of your estate and distribution of assets to your beneficiaries. The demands that will be put on that person can be difficult and time consuming.

Legal Requirements of a Will

As a general rule, a simple Will is adequate for most people, married or single, provided there are no complicating circumstances requiring professional advice.

A standard basic Will avoids the costs and inconveniences that result from you dying intestate–or without a Will. It enables you to appoint your own personal representative (Estate Trustee) to administer your estate, to leave your estate to those whom you choose rather than those dictated by the laws of your province, to minimize the cost of administering your estate and to avoid the possible expense of court-required performance bonds.



If there are minor children involved, your standard basic Will deals with the appointment of a custodian, and specifies the creation and terms of a trust fund to be used for their support until they reach an appropriate age.

Statutory Limits of Wills
The laws of each province vary, but the following terms and conditions are most frequently applicable in all provinces. The age requirements are as follows:

Alberta:	**18**
British Columbia:	**19**
New Brunswick:	**19**
Manitoba:	**18**
Newfoundland:	**17**
Northwest Territories:	**19**
Nova Scotia:	**19**
Nunavit:	**19**
Ontario:	**18**
Prince Edward Island:	**18**
Quebec:	**18**
Saskatchewan:	**18**
Yukon Territory:	**19**

Exceptions are made in some provinces for minors who are married or have children.

1. **Relatives and Dependents:**
In some provinces the laws generally provide that the spouse and children of the testator and certain other close relatives have the right to apply to the courts for an increased share of the estate where the Will does not make adequate provisions for them. The courts have the power to alter the disposition of the estate to provide for the applicants.

2. **Marriage and Divorce:** In some provinces, if a person marries or divorces, or enters into or leaves a common law relationship, after making a Will, the Will may be entirely void, or certain parts of it may be void. The many potential variances preclude our giving you the particulars related to each province.

3. **Witnesses:** Subject to certain exceptions in some jurisdictions, if a beneficiary named in a Will or the beneficiary's spouse witnesses the Will, the validity of the Will is not affected, but the beneficiary may lose his/her interest under it.

Safekeeping of Your Will
The signed original copy of your Will should be kept in a safe place where it is available to you in your lifetime, and to your Estate Trustee after your death.

Keeping it in a safety deposit vault could delay its availability to your Estate Trustee.

Revocation of a Will

You can revoke a Will either with a revocation clause or a different disposition of property in a later Will or by marriage, or entering into a common law relationship. A Will may also be revoked by cutting, burning, erasure or any other physical act which essentially destroys the Will.

Charitable Donations

If you wish to leave money or property to religious, educational, or other charitable organizations, be certain that particular charity has been approved as "charitable" by tax authorities and note the exact legal name of the charity. For example, a bequest made to "Fight Cancer" could be claimed by more than one charitable organization.

A THOUGHTFUL MEMO

A simple memo included in your Will could be critical to the settlement of your estate. Important matters such as, "Where you keep your cheque book," "What do you owe on your car" and "What about the real estate investment you planned to make" should be covered in a memo to accompany your Will. Here are the most important items you should include in such a memo.

• **Banks.** Provide the name of your bank and the account number, and location of cheque book and banking records. Also include the number and location of any safe-deposit boxes.

• **Credit cards.** List all of your bank and other credit cards by number and expiration date. Note where you keep the cards and payment records for each.

• **Life insurance.** List the names of the health, life, auto, home and burial insurance companies, policy numbers, the location of insurance documents and how to reach the contact person.

• **Pension.** List the names of pension sources, government and civilian, the location of relevant documents and how to reach the contact person.

• **Military records.** Reveal the location of important discharge papers, service records, citations and decorations.

• **Real Estate.** List your home and other holdings with the mortgage status of each, how to reach the lender, the account numbers and the location of relevant documents.

• **Social Security.** Include your Social Insurance number, ask your family to notify them of your death and to ask about lump-sum death or other possible survivor benefits.

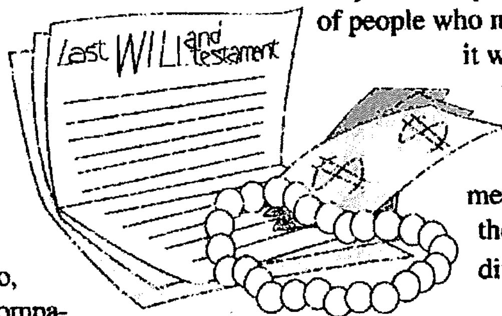
• **Investments.** List all your stocks, bonds and mutual funds with account numbers and names and addresses of your brokers.

• **Motor Vehicle.** Provide the location of the title and if the vehicle is financed the location of loan documents and status of the payments.

• **Tax records.** Provide the name of your tax accountant and if relevant the location of tax records, current and past.

You might want to include additional information such as the funeral or memorial service desired. A list of preferred speakers and pallbearers would also be helpful.

We suggest, for security purposes, that you only make copies for the limited number of people who need this information. And it would be wise to update this memo at least twice a year. Your survivors will truly bless your memory for having made their lives easier during a difficult time.



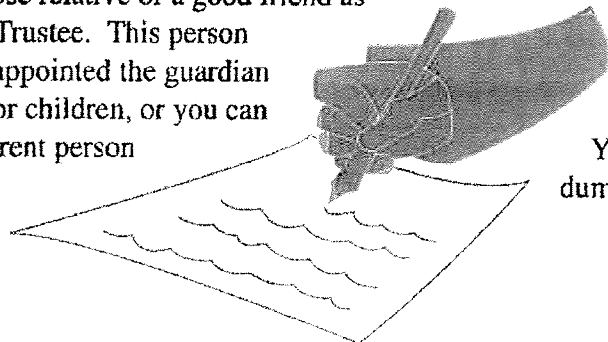
Writing Your Will

To simplify the writing of your Will, follow these numbered instructions. They match the related, numbered paragraphs in the blank Will Form provided in your Kit.

First, write or type your full, legal name on the blank line at the top of your Will Form. Next, fill in your full, legal name and your city/province of residence on the lines provided below that. If you have assets in any name other than your legal name indicate this by adding in brackets, "Also known as ______"

Note: Should you wish to delete any specific instruction noted in your Will Form, simply draw a line through the text you wish to delete *before* the Will is signed. Both you and your witnesses must sign or initial all such deletions.

1. **Appointment of Personal Representative (Estate Trustee):** Your Estate Trustee should be someone you trust to see that your estate is properly and legally handled in a timely manner. An alternate Estate Trustee should also be named. If your estate is small, you may wish to name your spouse, a close relative or a good friend as your Estate Trustee. This person can also be appointed the guardian of your minor children, or you can name a different person to act as a guardian. We recommend you seek professional legal counsel if you have any concerns about also naming the person as guardian. If your estate is sizeable and involves major assets such as real estate, bank accounts, stocks, bonds, and other significant items, you may wish to consider the use of a trust company.



2. **Instructions for Your Estate Trustee:**

a. **Debts:** The law imposes an obligation to pay debts and the general statement about debts in your Will Form stipulates that act.

b. **Household Gifts and Personal Effects:** These are personal effects such as clothing, furniture, jewellery, antiques, art and other household goods. Simply name the beneficiary and list the items you wish to leave to that person.

c. **Cash and Specific Gifts:** This includes cash and other financial gifts such as stocks and bonds. List each specific beneficiary and designate exactly what property you want to give to each.

d. **Real Estate:** Disposing of your real estate in your Will requires very careful detailing of its "legal" description and any other relevant characteristics such as mortgages and rental income. See the example in the Sample Will. You may require an addendum to cover those.

Note: If you have no specific intentions regarding household goods, personal effects, cash, other specific gifts and/or real estate, simply add an "N/A" (i.e., "Not Applicable") in each relevant numbered paragraph. You must complete the "Residuary Estate" paragraph specifically and carefully.

e. **Residuary Estate:** This category includes all assets that are left over after all other gifts have been addressed. Also, any assets added to your estate after you wrote your Will and any items which you gave to beneficiaries who predeceased you.

3. **Administrative and Trust Provisions:** This section addresses other important issues, such as:

a. **Trusts for Minor Beneficiaries:** If any of your children or other beneficiaries are too young to receive their inheritance, you must select an age at which you feel such inheritance can be made. Secondly, since a young beneficiary may survive you but die before reaching the age you have selected, you must identify one or more alternate beneficiaries to receive that inheritance.

All references to "children" in this Will Kit relate exclusively to those who are biologically or legally adopted children of the testator.

EASY AS 123

b. **Custodian of Children:** A very important decision. Name the person(s) you would want to have custody of your children and name an alternate, just in case.

c. **Estate Trustee Powers:** Your Estate Trustee will require administrative "powers" in order to better administer your estate, without which expensive court proceedings to acquire such "power" may be required. Included in your Will Form are common administrative powers that your Estate Trustee may resort to if needed.

d. **Community of Property:** In some provinces beneficiaries under a Will who separate or divorce may have to share with their estranged spouses the interest income earned on the gifts or money they inherited unless the Will which created the gift contains a statement excluding such interest income.

4. **Signing Your Will:** You may sign your name either in its full, legal form as you did at the beginning of the Will Form provided, or in the manner you normally write your signature.

You and both witnesses should also initial the bottom right-hand corner of the first page of the Will.

Next, sign and date only the original form you completed. It is dangerous and inadvisable to have more than one original signed copy of a Will.

Your Will must be signed in the direct presence of at least two persons who are mentally competent and who have attained the age of majority in the province where the Will is made, and are not beneficiaries named in your Will, or the spouses of any beneficiaries. All of the witnesses must be present at the same time as you, and each other, and must sign the Will where indicated, after you sign.

Note: This sample Will, made by a "Jane Doe," illustrates how easy it is to complete your own Will. Study it for guidance purposes only, keeping in mind that the bequests and terms noted are there for illustrative purposes only and are not meant to represent legal advice or to suggest the manner in which you might allocate your own bequests.

SAMPLE ONLY

Last Will of Jane Doe

I, Jane Doe of Ottawa, Ontario, declare this to be my Last Will. I revoke all previous Wills.

1. **Personal Representative/Estate Trustee:** I appoint my husband Tom Doe to be the personal representative (referred to as "my Estate Trustee") of this Will and of my Estate and of any trusts established by this Will. However, if my first-named Estate Trustee cannot, for any reason, act or continue to act as such, I appoint my sister Alice Smith to be my Estate Trustee instead.

2. **Instructions to Estate Trustee:** I give all of my property and assets (collectively referred to as "my property") wherever located and in whatever form to my Estate Trustee, in trust, to deal with as follows:

(a) **Liabilities:** My Estate Trustee shall pay all of my liabilities, including my testamentary and funeral expenses, and my taxes, from my general estate (unless otherwise specifically stated in this Will).

(b) **Household Goods and Personal Effects:** My Estate Trustee shall distribute the following of my household goods and personal effects to the following persons who survive me:
All of my household goods and personal effects to my husband Tom Doe, if he survives me, and, if he predeceases me, then instead among my children who survive me, in equal portions, and failing agreement, those items in dispute shall be sold and the proceeds of sale shall be distributed as part of the residue. However, in spite of the foregoing, my "grandfather clock" shall in any event be transferred to my sister Alice Smith, if she survives me.

(c) **Cash and Specific Gifts:** My Estate Trustee shall pay cash gifts as follows:
The sum of three thousand dollars ($3,000) to the Salvation Army (Ottawa Chapter).

(d) **Real Estate:** My Estate Trustee shall deal with my real estate as follows:
If my brother Sam Smith survives me, all of my interest in my rental property described municipally as 123 Maple Lane, City of Fredonia, Province of Ontario (legal description: Lot 15, Plan 27, City of Fredonia, County of Stormont, Province of Ontario) shall be transferred to him and any outstanding mortgage on that property shall be discharged from funds comprising my general estate. If my brother Sam Smith predeceases me, then his son Paul Smith shall be the beneficiary of this gift instead.

(e) **Residue:** My Estate Trustee shall pay or transfer all of the remainder of my estate ("the residue") as follows:
All to my husband Tom Doe, if he survives me, and if he predeceases me, then instead among my children who survive me, in equal portions (provided that if any child of mine predeceases me leaving a child or children surviving me, then the equal portion which would have gone to such child of mine shall instead be shared equally by such deceased child's children who survive me).

3. **Administrative and Trust Provisions:** The following administrative and trust provisions shall, if relevant, apply to the terms of this Will:

(a) **Trusts for Beneficiaries Under Certain Age:** If any beneficiary of my estate is under the age of 23 at the time of my death, my Estate Trustee shall hold and invest such beneficiary's share or interest, in trust, until the date that such beneficiary attains the said age ("the distribution date") when the share or interest shall be given to such beneficiary. However, at any time or times prior to the distribution date, my Estate Trustee may, exercising unrestricted discretion, encroach on any amount (including all) of the net annual income and/or capital of the trust for the benefit, maintenance, education, and welfare of the beneficiary, capitalizing any unapplied net annual income, and any such payments may be directed to such beneficiary's parent or guardian. If such beneficiary, having survived me, dies before the distribution date, what then remains of his or her share or interest shall be divided and distributed to the following person(s):
Such beneficiary's brothers and sisters then alive, in equal portions, but if none survive such beneficiary, then instead to St. John's Church on Main Street in Ottawa.

(b) **Custodian of Children:** I appoint my sister Alice Smith to be the custodian of any minor child of mine and, to the extent permitted by law, the guardian of such minor child's property. I appoint my brother Sam Smith as the alternate if the first-named person cannot, for any reason, act as such.

(c) **Estate Trustee Powers:** My Estate Trustee shall have all of the available powers, as and when necessary, to properly and efficiently administer my estate, including power to: sell my property (other than as specifically gifted above) for cash if and when necessary; or postpone such sale; invest my property in any type of investment whatsoever until disposed of; manage, maintain, repair, and improve my property; settle claims and debts; carry on any business; make income tax elections; borrow, lend, and lease; and be reimbursed and remunerated for undertaking such office.

(d) **Community of Property:** Subject to provincial law, no gift under this Will, nor any future income, profits, and appreciation realized by such gift, shall constitute "net family property," nor be part of any "community of property" as between any beneficiary and his or her consort.

I have signed this Will (2 pages) at Ottawa, Ontario on the 25th day of June, 20 02.

SIGNED in our presence and attested by us in his/her presence and in the presence of each other.

Jane Doe
(your signature)

Witness Signature Paula Smith	Witness Signature Alex White
Print Name Paula Smith	Print Name Alex White
Street Address 12345 6th St.	Street Address 2071 3rd Avenue
City Ottawa, Ontario	City Ottawa, Ontario
Occupation Civil Servant	Occupation Accountant

Last Will of ____________________

I, ______________________________ of ________________________, ________________________, declare this to be my Last Will. I revoke all previous Wills. (city) (province)

1. **Personal Representative/Estate Trustee:** I appoint ______________________________ to be the personal representative (referred to as "my Estate Trustee") of this Will and of my Estate and of any trusts established by this Will. However, if my first-named Estate Trustee cannot, for any reason, act or continue to act as such, I appoint ______________________________ to be my Estate Trustee instead.

2. **Instructions to Estate Trustee:** I give all of my property and assets (collectively referred to as "my property") wherever located and in whatever form to my Estate Trustee, in trust, to deal with as follows:

(a) **Liabilities:** My Estate Trustee shall pay all of my liabilities, including my testamentary and funeral expenses, and my taxes, from my general estate (unless otherwise specifically stated in this Will).

(b) **Household Goods and Personal Effects:** My Estate Trustee shall distribute the following of my household goods and personal effects to the following persons who survive me:

____

____

____

____

____

____

____

(c) **Cash and Specific Gifts:** My Estate Trustee shall pay cash gifts as follows:

____

____

(d) **Real Estate:** My Estate Trustee shall deal with my real estate as follows:

____

____

____

____

____

(e) **Residue:** My Estate Trustee shall pay or transfer all of the remainder of my estate ("the residue") as follows:

____

____

____

____

____

3. **Administrative and Trust Provisions:** The following administrative and trust provisions shall, if relevant, apply to the terms of this Will:

(a) **Trusts for Beneficiaries Under Certain Age:** If any beneficiary of my estate is under the age of _____ at the time of my death, my Estate Trustee shall hold and invest such beneficiary's share or interest, in trust, until the date that such beneficiary attains the said age ("the distribution date") when the share or interest shall be given to such beneficiary. However, at any time or times prior to the distribution date, my Estate Trustee may, exercising unrestricted discretion, encroach on any amount (including all) of the net annual income and/or capital of the trust for the benefit, maintenance, education, and welfare of the beneficiary, capitalizing any unapplied net annual income, and any such payments may be directed to such beneficiary's parent or guardian. If such beneficiary, having survived me, dies before the distribution date, what then remains of his or her share or interest shall be divided and distributed to the following person(s):

____

____

____

(b) **Custodian of Children:** I appoint ______________________ to be the custodian of any minor child of mine and, to the extent permitted by law, the guardian of such minor child's property. I appoint ______________________ as the alternate if the first-named person cannot, for any reason, act as such.

(c) **Estate Trustee Powers:** My Estate Trustee shall have all of the available powers, as and when necessary, to properly and efficiently administer my estate, including power to: sell my property (other than as specifically gifted above) for cash if and when necessary; or postpone such sale; invest my property in any type of investment whatsoever until disposed of; manage, maintain, repair, and improve my property; settle claims and debts; carry on any business; make income tax elections; borrow, lend, and lease; and be reimbursed and remunerated for undertaking such office.

(d) **Community of Property:** Subject to provincial law, no gift under this Will, nor any future income, profits, and appreciation realized by such gift, shall constitute "net family property," nor be part of any "community of property" as between any beneficiary and his or her consort.

I have signed this Will (2 pages) at ______________________, ______________________ on the ________ day of ______________________, 20___.

SIGNED in our presence and attested by us in his/her presence and in the presence of each other.

____
(your signature)

Witness Signature ______________	Witness Signature ______________
Print Name ______________	Print Name ______________
Street Address ______________	Street Address ______________
City ______________	City ______________
Occupation ______________	Occupation ______________

Checklist for Your Estate Trustee

BEFORE PROBATE

- Obtain all chequebooks and bank records for financial information.
- Give notice of death to all interested parties.
- Notify utilities, charge accounts, credit card firms, and other business accounts of the demise of the decedent.
- Check insurance coverage of decedent and file appropriate claims.
- Give post office a *Change of Address Form* so mail addressed to the decedent comes to your address.
- Copy the death certificate for use in probate of the estate.
- Copy the Will for beneficiaries, tax authorities, and others.
- List the contents of any safe deposit box.
- Make a preliminary estimate of decedent's estate to determine what form of probate will be required.
- Review any litigation, claims, or other controversies relating to decedent's property or other interests.
- Make an inventory of all personal property and arrange for its storage or distribution.
- Assemble data on all property owned by the estate that will not be a part of the probate process.

AFTER PROBATE

- All cash should be accounted for, put to work earning interest, used for estate obligations, or distributed to persons who are to receive it.
- Assemble tax records and file required returns for the estate.
- Collect all debts owed to the estate.
- Advise all interested parties of the facts of the Will and the estate, as available.

Your Personal History

Name ____________________
Address ____________________
City ____________ Prov. ______ Post Code ________
Phone ____________ Tax File No. ____________
Place of Birth ____________ Birth Date ____________
Location of Birth, Marriage or Divorce, Insurance, and Other Legal Documents

____

Spousal Information

Name ____________ Current ______ Former ______
Address ____________________
City ____________ Prov. ______ Post Code ________
Phone ____________ Tax File No. ____________
Place of Birth ____________ Birth Date ____________

Family Members and Friends to Be Notified

Name ____________ Address ____________
City ____________ Prov. ______ Post Code ________
Relationship ____________ Phone (___)____________

Name ____________ Address ____________
City ____________ Prov. ______ Post Code ________
Relationship ____________ Phone (___)____________

Name ____________ Address ____________
City ____________ Prov. ______ Post Code ________
Relationship ____________ Phone (___)____________

Name ____________ Address ____________
City ____________ Prov. ______ Post Code ________
Relationship ____________ Phone (___)____________

Name ____________ Address ____________
City ____________ Prov. ______ Post Code ________
Relationship ____________ Phone (___)____________

Name ____________ Address ____________
City ____________ Prov. ______ Post Code ________
Relationship ____________ Phone (___)____________

Name ____________ Address ____________
City ____________ Prov. ______ Post Code ________
Relationship ____________ Phone (___)____________

Estate Trustee

Name ______________________ Address ______________________

City ______________________ Prov. ________ Post Code ________

Phone ______________________

Estate Trustee Successor

Name ______________________ Address ______________________

City ______________________ Prov. ________ Post Code ________

Phone ______________________

Other Important Contacts

Doctor ______________________ Address ______________________

City ____________ Prov. ________ Post Code ________ Phone ________

Solicitor ______________________ Address ______________________

City ____________ Prov. ________ Post Code ________ Phone ________

Accountant ______________________ Address ______________________

City ______________________ Post Code ________ Phone ________

Religious Affiliation ____________ Contact ______________________

Address ______________________ City ______________________

Prov. ____________ Post Code ________ Phone ________

Funeral Instructions

____

____

____

____

____

Assets & Liabilities

Assets

Cash ______________________ Location ______________

Banks ____

____

Shares and Debentures ________________________________

____

Real Estate ____

____

____

____

Insurance and Beneficiary(ies) ________________________

____

Notes Receivable ________________________________

____

____

Motor Vehicle(s) ________________________________

Retiree Benefits ________________________________

____

Other ____

Liabilities

Real Estate Loans ________________________________

Other Loans ________________________________

____

Leases ____

Sales Contracts ________________________________

____

Charge Cards ________________________________

____

Taxes ____

____

Notes Payable ________________________________

Child Support and Maintenance Payments ________________

____

Note: This list may not fully cover all areas of your personal assets and liabilities. We suggest you prepare the fullest possible list of all such items and write or type these on a separate paper for inclusion with your Will.

THE LIVING WILL KIT

If rich men would remember that shrouds have no pockets, they would, while living, share their wealth with their children, an give of the good of others, and so know the highest pleasure wealth can give.

— **Edwards**

Introduction

As important as a current Last Will in estate planning, is the use of a Health and Personal Care Directive, better known as a Living Will. Congratulations on your decision to seek assurance that your affairs are in proper order!

Today, most provinces in Canada recognize the legal ability of an individual to appoint another individual to be his or her "substitute decision-maker" regarding that individual's personal care and health-related matters. Not all provinces in Canada have, as yet, laws in force authorizing the making of a personal care power of attorney or health care directive. However, authorities in the "have-not" provinces, including physicians and hospital administrators, may nevertheless abide by and respect the directions and sentiments expressed in a document such as the Directive you are about to create.

Some jurisdictions require formal registration of the Directive with a governmental agency or registrar. Some jurisdictions may also require that a certificate be completed proving that legal advice was obtained prior to signing the Directive. The document embodying this authority is called, depending upon which province you reside in, a Power of Attorney for Personal Care, a Directive (or an Advance Health Care Directive), a Representation Agreement, or a Proxy; in common parlance, a **"Living Will."** For simplicity in this publication, we will refer to a **Living Will** as a "Directive." You should not confuse the Directive produced from this Kit with a "power of attorney" for property and asset matters. In some provinces (Ontario for instance), references to the term "power of attorney" may mean a health care directive (such as the Directive in this Kit) or a document used for purposes of banking and other transactional matters. The Directive produced from this Kit is not a banking or transactional document.

A Directive, properly completed and signed, permits the "Attorney" or "Proxy" (the person appointed to be the "substitute decision-maker") to make decisions regarding the personal care and health-related matters of the "Grantor" (the person granting the decision-making authority to the Proxy).

We've heard about people, mostly the elderly, being kept on life-support systems for months beyond any hope of survival from an irreversible injury or illness. And young people, who were victims of auto accidents and falls, not being allowed to die with dignity because they had made no declaration refusing such efforts prior to the accident.

Your **National Living Will Kit** will enable you to prepare for those critically important eventualities. Further, it will address the potential for mental

incapacity which can occur at any age due to brain damage, the effects of aging, Alzheimers Disease, a stroke or other non-life threatening disabilities.

At an advanced age it's almost certain that someone else will have to make many ordinary lifestyle decisions on our behalf: where will we live our final years, what costs should be allowed for our maintenance, what medical treatments or procedures will we allow to be undertaken for us. With a Directive made prior to becoming incapable, your Proxy can make and act on all of these decisions.

Without such a Directive, expensive and protracted legal procedures may have to be pursued in order to have a substitute decision-maker appointed by the Court or other public authority.

It is important to keep in mind that a Proxy cannot act or make decisions under a Directive if and while the Grantor is mentally capable. In other words, until an individual loses the ability to make personal and health care decisions, only he or she is legally capable of managing matters pertaining to his or her own health and personal well-being.

It is also important to remember that the Directive can (and should) be "tailored" to fit your own wishes and circumstances. Forms provided in this Kit contain a section where you may expand upon specific instructions and wishes regarding health and personal care matters. As well, for example, some individuals may want a substitute decision-maker for most matters involving their personal care, but may not want to authorize their Proxy to make decisions regarding the termination of life-support mechanisms. If so, the Grantor can simply delete the relevant section of the Directive, and initial same.

Lastly, it is important that you give serious consideration to the selection of your Proxy–the person who will be responsible for the administration of your wishes expressed in this Kit. The demands that will be put on that person can be difficult and time consuming. This is not a job for someone who does not have your best interests at heart.

Instructions on Completing the Directive

As you can see from examining the Kit's "Sample" Directive, there are very few "fill-in-the-blanks" in the main document. For the most part, names, dates, and signatures are all that is required! Of course, if you wish to set out specific details or instructions as an addendum to the text of the main document, you may do so on the page entitled **Specific Instructions and Wishes to Guide My Proxy**.

Follow these simple instructions, but please ensure that you print neatly, using a ballpoint pen:

1. Since you are the person "granting" substitute decision-making ability in favour of someone else, in paragraph 1 of the Directive you must print your name in the space provided in the first line. Include middle names or initials if you have any. Note that your full current address will be set out below your signature near the end of the Directive. For now, in the second line of paragraph 1, simply identify your city (or town) and province.

2. In the first line of paragraph 2 you must identify the person whom you are appointing to be your substitute decision-maker for personal and health-care matters. Make sure you have adequately identified this person. If this person is your spouse or brother or friend, say so in the space provided in front of the actual name. You should likewise name an alternate decision-maker in the eighth line of paragraph 2 where indicated.

3. The issues surrounding a Living Will are not always clear-cut. Suppose, for example, that a pregnant woman is injured in an automobile accident and is declared to be brain dead. The doctors are given her Living Will. Will they shut off the machines, ending her life and the life of the fetus? Probably not. The woman can be kept alive by artificial means until the baby is born. Once the baby is born, the Living Will would take effect and the machines would be disconnected. This is one of the contingencies allowed for in your Directive. There are "optional" statements in paragraph 6 dealing with the termination of life-support mechanisms. You must decide whether your current wishes are accurately reflected by these. If not, please cross out one or both entirely and place your initials in the margins on both sides of the page near the deleted statements. Both witnesses to the Directive must also place their initials near your own initials adjacent to this statement.

4. At the bottom of the second page of the Directive, following paragraph 9, you must insert the date on which you completed and signed the Directive. Please ensure that the specific date, month, and year are carefully inserted in the relevant spaces. Once the date is completed, please sign on the line under which is stated "(Your normal form of signature)," using your regular formal signature as if you were signing a cheque, for instance. Then you may fill in your full current address, including street address.

city, and province, below your signature on the lines provided.

5. At the top of page 3 of the Directive, you will see where your first-named Proxy and alternate Proxy (if any) must sign and complete his or her address details. Strictly speaking, very few provinces actually require the Proxy (or the alternate Proxy) to sign the Directive, so long as the "Grantor" (that's you in this case) signs. However, some provinces such as British Columbia do require such signatures so we have included space for those. It is advisable to have the Proxies sign the Directive whether provincial law requires it or not.

6. The next persons to sign the Directive are the "witnesses." These two individuals place their signatures near the bottom of page 3 where indicated. It is absolutely critical to know and understand that the persons who sign as witnesses to your signature cannot be Proxies whom you have named, nor the spouses or close relatives of the Proxies. Nor can the witnesses, in many provinces, be your own spouse or children or close relatives (even where your spouse is not one of your named Proxies). In addition to the foregoing, please ensure that both witnesses are:

> a) at least of the age of majority in your province;
> b) present with you in the same room, at the same time, when you sign the Directive yourself, and when the Proxies sign;
> c) present with you and with each other, in the same room, at the same time, when each of them signs the Directive as witness.

7. The importance of proper signing and witnessing of the Directive cannot be emphasized enough: Provincial laws regarding the signing of legal documents are precise! All parties (including you, your Proxies, and your witnesses) must be present at the same time for the signatures. You must sign first, then the Proxies, then the witnesses, in that order!

8. To the extent that you have special wishes or instructions, document these carefully and fully on the page entitled "**Specific Instructions and Wishes to Guide My Proxy.**" You may refer to the "Sample" text for an idea as to what sort of instructions might be appropriate for such an addendum. Such instructions, as set out, are not legally binding on your Proxies, but will in all likelihood be respected in most cases.

Once you have completed the "special instructions," please date and sign the page, towards the bottom, where indicated.

9. Once the Directive is completed, you should review it front to back to make absolutely certain that it is fully dated, signed, and witnessed in accordance with the foregoing instructions. You should maintain the original Directive in a very safe and secure place. Provide a copy of your Directive to family members, to your lawyer, and to your physician. Ask that a copy be placed in your medical file along with instructions about location of the original Directive. If you have a Will, the executor of your estate should have a copy.

Living Will

SAMPLE

A Health and Personal Care Directive ("Directive").

1 This Directive is made by me, Joan Smith (Your Full Name), of the City (City/Town) of Ottawa (Name of City/Town), in the Province of Ontario (Your Province).

2. I appoint the following person, namely my husband Fred R. Smith to be my substitute decision-maker (referred to in this Directive as "my Proxy") in respect of decisions and matters pertaining to my health and personal care, including decisions regarding medical treatment; and I hereby authorize my Proxy to do on my behalf anything that may lawfully be done by a substitute decision-maker regarding my health and personal care in my Province and in any other relevant jurisdiction I may find myself in from time to time. If my first-named Proxy dies or is unable to act by reason of incapacity, or if my first-named Proxy should resign, then I substitute and appoint the following person, namely my sister Betty Jones to be my Proxy in the place of my first-named Proxy. All further references in this Directive to my Proxy shall mean my first-named Proxy, or my alternate Proxy, as the case may be.

* For the sake of certainty, any document that is an original, or a notarially certified copy of an original document, signed by my alternate Proxy to the effect that my first-named Proxy is unable or unwilling to act as my Proxy shall be sufficient proof to all persons dealing with my alternate Proxy of the fact that no person dealing with my alternate Proxy, once provided with such a document, shall be bound or entitled to question my alternate Proxy's authority to act.

3. In making this Directive, I believe:

   * That my Proxy has a genuine concern for my welfare; and

   * That I may need my Proxy to make health and/or personal care decisions for me at some point, when I am no longer legally capable of making such decisions on my own.

4. I authorize my Proxy to give or refuse consent, on my behalf, to medical and health care treatment in respect of which prevailing legislation in my Province (or other relevant jurisdiction) may permit substitute decision-makers, such as my Proxy, to deal with on behalf of others, such as myself.

5. To the extent that I have specific instructions for my Proxy and/or any special wishes with respect to my health and personal care, I have completed and attached to this Directive the additional sheet entitled **"Specific Instructions and Wishes to Guide My Proxy."** Without obliging my Proxy, it is my sincere wish that such instructions and wishes be respected.

6. In the event that I should incur serious life-threatening illness or injury resulting in circumstances where my demise may be or may be perceived to be imminent but for resort to artificial life support means or mechanisms, I declare that the following statement accurately represents my views and beliefs; and my Proxy may thercby be guided in terms of making decisions, on my behalf, with respect to the giving or refusing of consent to specified kinds of treatment under such serious circumstances:

Delete If Not Applicable.

I do not wish to have my life unduly prolonged by any means or course of treatment or other medical procedure which offers no reasonable expectation of successful recovery from life-threatening physical or mental incapacity. Medical treatment or procedures aimed at alleviating pain and suffering may be administered, even if to do so may shorten or extend my life.

In the event that at the time this Directive is being considered, I am pregnant, then I specifically state that I

a. want the treatment withheld even though it may result in an abortion ______________________________

b. do not want such treatment withheld if it will result in an abortion

____

(Cross out inapplicable language and sign on the appropriate line.)

7. I indemnify my Proxy in respect of any liability that may arise as a consequence of my Proxy acting on my behalf pursuant to this Directive. I also indemnify (in respect of any liability involving me, my estate or any third party) any person who, in reliance on this Directive, carries out (or acts consistently with) my wishes expressed herein.

8. For the sake of greater certainty, it is my intention that this Directive is construed as a Power of Attorney for Personal Care, or an Advance Health Care Directive, or a Representation Agreement, or such other name or description as may be given to such health and personal care documents in my province, or any other relevant jurisdiction.

9. Any previous Directive, Power of Attorney for Personal Care, Advance Health Care Directive, Representation Agreement or similar document made by me prior to today is hereby revoked. Any power of attorney or other authority for or in respect of financial and property matters made by me prior to today is not revoked by this Directive.

I have signed this Directive in the presence of both of the witnesses whose names appear below.

I HAVE SIGNED THIS Directive on the ____11th____ day of ______January______, in the year ____2004____.

Joan Smith
(Your Normal Form of Signature)

221 Carling Avenue
(Your Municipal Street Address)

Ottawa
(Your City/Town)

Ontario, K2P 2B1
(Your Province & Postal Code)

I HAVE SIGNED THIS DIRECTIVE on the date above-noted. By signing this Directive, I am demonstrating my willingness to act as a Proxy of this Directive.

____
(I am a Proxy Identified in this Directive)

____
(Municipal Street Address)

____
(City/Town)

____
(Province & Postal Code)

I HAVE SIGNED THIS DIRECTIVE on the date above-noted. By signing this Directive, I am demonstrating my willingness to act as a Proxy of this Directive.

Betty Jones
(I am a Proxy Identified in this Directive)

999 Bridge Street
(Municipal Street Address)

Perth
(City/Town)

Ontario, K7C 1Z9
(Province & Postal Code)

We the undersigned are the witnesses to this Directive. We have signed this Directive in the presence of the persons whose names and signatures appear above, and in the presence of each other, on the date shown above. Neither one of us is named as a Proxy in this Directive, nor is a spouse or partner of a Proxy named in this Directive, nor a child of the person making this Directive, nor a person whom the maker of this Directive has demonstrated a settled intention to treat as a child. Each of us is at least nineteen (19) years old:

1)

Sam Jacob
(Signature of Witness)

Sam Jacob
(Print Name)

1804 Water Street
(Municipal Street Address)

Ottawa, Ontario, K2P 5X3
(City/Town, Province & Postal Code)

2)

Susan Jacob
(Signature of Witness)

Susan Jacob
(Print Name)

1804 Water Street
(Municipal Street Address)

Ottawa, Ontario, K2P 5X3
(City/Town, Province & Postal Code)

Instructions and Wishes to Guide My Proxy

In order to complement my Directive and assist my Proxy, the following are my specific instructions and wishes regarding my health and personal care:

1. If at anytime I have to be placed in a seniors' residence or other health-care facility, it is my hope and wish that my Proxy will select a residence (or facility as the case may be) without regard to cost. In other words, I want to have the best care that my resources can afford.

2. In terms of my wishes expressed in point number 1 above, I do not want to be moved out of the City of Ottawa. In this regard, my Proxy may be aware that my eldest daughter has asked me on numerous occasions to move out to Vancouver so as to be closer to her and her family. As much as I love my daughter, I would prefer to live out the remainder of my life in the City of Ottawa.

3. My Proxy should be aware that I am an organ donor. To this effect, my current driver's license sets out more specific details. However, I would simply like to repeat here that in dealing with my health care and final medical treatment, it is and remains my desire that any usable bodily organs be removed for purposes of transplant. Having said that, it is not my wish that my body or any part of my body be used for medical research.

4. If I should be suffering from what my physician feels is an "irreversible" illness, and to the extent that I suffer cardiac arrest and my breathing and heart have stopped, I do not wish my physician or other health-care workers to attempt to resuscitate me.

Dated at Ottawa, this 11th, day of January, in the year 2004.

Joan Smith

(My Normal Signature)

Living Will

A Health and Personal Care Directive ("Directive").

1. This Directive is made by me, ______________________ *(Your Full Name)*, of the ____________ *(City/Town)* of ____________ *(Name of City/Town)*, in the Province of ____________ *(Your Province)*

2. I appoint the following person, namely ______________________ to be my substitute decision-maker (referred to in this Directive as "my Proxy") in respect of decisions and matters pertaining to my health and personal care, including decisions regarding medical treatment; and I hereby authorize my Proxy to do on my behalf anything that may lawfully be done by a substitute decision-maker regarding my health and personal care in my Province and in any other relevant jurisdiction I may find myself in from time to time. If my first-named Proxy dies or is unable to act by reason of incapacity, or if my first-named Proxy should resign, then I substitute and appoint the following person, namely ______________________ to be my Proxy in the place of my first-named Proxy. All further references in this Directive to my Proxy shall mean my first-named Proxy, or my alternate Proxy, as the case may be.

* For the sake of certainty, any document that is an original, or a notarially certified copy of an original document, signed by my alternate Proxy to the effect that my first-named Proxy is unable or unwilling to act as my Proxy shall be sufficient proof to all persons dealing with my alternate Proxy of the fact that no person dealing with my alternate Proxy, once provided with such a document, shall be bound or entitled to question my alternate Proxy's authority to act.

3. In making this Directive, I believe:

   * That my Proxy has a genuine concern for my welfare; and

   * That I may need my Proxy to make health and/or personal care decisions for me at some point when I am no longer legally capable of making such decisions on my own.

4. I authorize my Proxy to give or refuse consent, on my behalf, to medical and health care treatment in respect of which prevailing legislation in my Province (or other relevant jurisdiction) may permit substitute decision-makers, such as my Proxy, to deal with on behalf of others, such as myself.

5. To the extent that I have specific instructions for my Proxy and/or any special wishes with respect to my health and personal care, I have completed and attached to this Directive the additional sheet entitled **"Specific Instructions and Wishes to Guide My Proxy."** Without obliging my Proxy, it is my sincere wish that such instructions and wishes be respected.

6. In the event that I should incur serious life-threatening illness or injury resulting in circumstances where my demise may be or may be perceived to be imminent but for resort to artificial life support means or mechanisms, I declare that the following statement accurately represents my views and beliefs; and my Proxy may thereby be guided in terms of making decisions, on my behalf, with respect to the giving or refusing of consent to specified kinds of treatment under such serious circumstances:

Delete If Not Applicable. I do not wish to have my life unduly prolonged by any means or course of treatment or other medical procedure which offers no reasonable expectation of successful recovery from life-threatening physical or mental incapacity. Medical treatment or procedures aimed at alleviating pain and suffering may be administered, even if to do so may shorten or extend my life.

In the event that at the time this Directive is being considered, I am pregnant, then I specifically state that I

a. want the treatment withheld even though it may result in an abortion______________________________

b. do not want such treatment withheld if it will result in an abortion

____

(Cross out inapplicable language and sign on the appropriate line.)

7. I indemnify my Proxy in respect of any liability that may arise as a consequence of my Proxy acting on my behalf pursuant to this Directive. I also indemnify (in respect of any liability involving me, my estate or any third party) any person who, in reliance on this Directive, carries out (or acts consistently with) my wishes expressed herein.

8. For the sake of greater certainty, it is my intention that this Directive is construed as a Power of Attorney for Personal Care, or an Advance Health Care Directive, or a Representation Agreement, or such other name or description as may be given to such health and personal care documents in my province, or any other relevant jurisdiction.

9. Any previous Directive, Power of Attorney for Personal Care, Advance Health Care Directive, Representation Agreement or similar document made by me prior to today is hereby revoked. Any power of attorney or other authority for or in respect of financial and property matters made by me prior to today is not revoked by this Directive.

I have signed this Directive in the presence of both of the witnesses whose names appear below.

I HAVE SIGNED THIS Directive on the ____________ day of ____________________, in the year ____________.

____
(Your Normal Form of Signature)

____
(Your Municipal Street Address)

____
(Your City/Town)

____
(Your Province & Postal Code)

I HAVE SIGNED THIS DIRECTIVE on the date above-noted. By signing this Directive, I am demonstrating my willingness to act as a Proxy of this Directive.

____
(I am a Proxy Identified in this Directive)

____
(Municipal Street Address)

____
(City/Town)

____
(Province & Postal Code)

I HAVE SIGNED THIS DIRECTIVE on the date above-noted. By signing this Directive, I am demonstrating my willingness to act as a Proxy of this Directive.

____
(I am a Proxy Identified in this Directive)

____
(Municipal Street Address)

____
(City/Town)

____
(Province & Postal Code)

We the undersigned are the witnesses to this Directive. We have signed this Directive in the presence of the persons whose names and signatures appear above, and in the presence of each other, on the date shown above. Neither one of us is named as a Proxy in this Directive, nor is a spouse or partner of a Proxy named in this Directive, nor a child of the person making this Directive, nor a person whom the maker of this Directive has demonstrated a settled intention to treat as a child. Each of us is at least nineteen (19) years old:

1)

____
(Signature of Witness)

____
(Print Name)

____
(Municipal Street Address)

____
(City/Town, Province & Postal Code)

2)

____
(Signature of Witness)

____
(Print Name)

____
(Municipal Street Address)

____
(City/Town, Province & Postal Code)

Instructions and Wishes to Guide My Proxy

In order to complement my Directive and assist my Proxy, the following are my specific instructions and wishes regarding my health and personal care:

Dated at ____________________, this _______, day of __________________, in the year ________.

____
(My Normal Signature)

THE POWER OF ATTORNEY KIT

"Do not stand by my grave and weep
I am not there. I do not sleep
I am a thousand winds that blow
I am a diamond glint on snow
I am the sunlight on ripened grain
I am the gentle Autumn rain
When you awake in the morning hush
I am the swift uplifting rush
Of quiet birds in circling flight
I am the soft sunshine of night
Do not stand by my grave and cry.
I am not there... I did not die."

Anon.

POWER OF ATTORNEY KIT

Copyright © 2003 by MP Marina Press (Canada) Inc., P.O. Box 344 - Station L, Winnipeg, MB R3H 0Z6

A Power of Attorney is a legal instrument by which one per son confers upon another the authority to make decisions and transact business on the Donor's behalf. This legal instrument has nothing to do with one's Will and deals with one's affairs during one's lifetime, not after one's death.

There are two general categories of Powers of Attorney in most provinces. The first kind deals with decisions and transactions affecting the financial affairs of the Donor. The second kind addresses the Donor's personal affairs. Financial Powers of Attorney may address one or more specific transactions, and may be time-limited, or the authority conferred may be broad and unspecific in nature, with no time limitation imposed. And although many people associate Powers of Attorney with individuals who have lost the mental capacity to make decisions on their own, in fact financial Powers of Attorney (if drafted appropriately) may be employed while the Donor is fully capacitated though perhaps not physically present so as to be able to sign a document or make a particular decision. For instance, a person may be on an extended winter vacation out of the country not wanting to return to Canada to complete the sale of a home. This can be facilitated by the use of a properly drafted financial Power of Attorney.

On the other hand, a personal care Power of Attorney is not generally enforceable unless the Donor has actually lost the mental ability to make personal care decisions.

Either kind of Power of Attorney terminates upon the death of the Donor, and, of course, may be terminated at anytime prior to death if the Donor, while capacitated, decides to revoke the authority. Moreover, a Power of Attorney will become null and void if the appointed decision-maker dies, becomes bankrupt or becomes incapable of continuing on in that position.

By far the most common use of the financial Power of Attorney is in

respect of the situation where the Donor is no longer capable of making decisions on his or her own. Depending upon your province, Powers of Attorney for use in this type of situation are called "enduring" or "durable" or "continuing". That means that they survive the mental incapacity of the Donor. By definition, personal care Powers of Attorney are enduring.

Some provinces require that the power of attorney be witnessed in a particular way by a notary, lawyer or an officer of the law, etc. Local jurisdiction can provide you with this information.

Typically, enduring financial Powers of Attorney will be worded so as to be all-encompassing, with few, if any, restrictions or limitations. In this way, the Donor's substitute decision makers will be able to deal with all aspects of the Donor's affairs.

If a person neglects to make a Power of Attorney prior to becoming mentally incapacitated it is possible that a provincial government agency, such as a public trustee, may take over the management of the person's assets and property, and even his or her personal decisions, all for a fee. In some provinces, these government agencies, although well-meaning, are understaffed and provide slow, impersonal service.

Everyone who owns land, has a bank account, or who owns any other assets of some value should consider making Powers of Attorney to address the possibility of becoming incapacitated. Indeed, even if one does not own assets of any value, making a personal care Power of Attorney may be an extremely wise thing to do.

Having said that, appointing someone to become your substitute decision maker is not a decision to make lightly. You are granting someone else the authority to deal with your property and assets and your personal affairs, and you will have to live with the consequences of their actions or inactions.

The complexities of the various provincial statutes addressing this subject may be of concern to you. Helpful information on it may be found in the National Living Will Kit. If financial or other questions are not addressed to your satisfaction you should seek professional advice.

POWER OF ATTORNEY

For Property and Finance

1. This **Power of Attorney** for the management of property and finances is given by me, ______________________ of ______________________________.
   (print full name) (print full address)

2. The individual(s) whose full name(s) is/are printed below shall be my attorney(s) for purposes of the management of my property and finances:

   ____

   ____

   ____

   (if more than one individual is identified, my attorneys shall act jointly and severally)

3. This Power of Attorney is usable now and may be exercised at any time irrespective of whether I am capable or incapable of managing my property of finances.

4. Any previous Power of Attorney for the management of my property and finances is hereby revoked.

I have signed this Power of Attorney in the presence of both of the witnesses whose names and signatures appear below, on the __________ day of ______________, __________.
(day) (month) (year)

____
(normal form of signature)

We the undersigned are the witnesses to this power of attorney. We have signed this power of attorney in the presence of the person whose name appears above, and in the presence of each other, on the date shown above. Neither one of us is an attorney, a spouse or partner of an attorney, a child of the maker of this power of attorney, a person whom the maker of this power of attorney has demonstrated a settled intention to treat as his or her child, a person whose property is under guardianship, or who is a guardian of the person. Each of us is over the age of majority:

1)______________________________
Witness Signature

____
Witness Address

____

____

2)______________________________
Witness Signature

____
Witness Address

____

____

POWER OF ATTORNEY

For Health and Personal Care

1. This **Power of Attorney** for personal care is given by me,

_______________ of _______________
(print full name) (print full address)

2. The individual(s) whose full name(s) is/are printed out below shall be my attorney(s) for health and personal care:

____

____

____

(if more than one individual is identified, my attorneys shall act jointly and severally)

3. My attorney(s) for health and personal care is/are authorized to do on my behalf anything that I can lawfully do by an attorney for health and personal care, including all elements of health and personal care prescribed by or available in any relevant legislation, including the giving or refusing of consent to medical treatment.

4. I acknowledge that this Power of Attorney for Health and Personal Care is only relevant and usable if and while I am incapable of making personal care decisions on my own.

5. Unless I have crossed out and initialed this paragraph, it is my intention and I do so direct that my life not be unduly prolonged by any course of treatment or any medical procedure which offers no reasonable expectation of recovery from serious physical or mental incapacity, except as may be necessary for the relief of suffering.

I have signed this Power of Attorney in the presence of both of the witnesses whose names and signatures appear below, on the ________ day of ______________, ____________.
(day) (month) (year)

____
(normal form of signature)

We the undersigned are the witnesses to this power of attorney. We have signed this power of attorney in the presence of the person whose name appears above, and in the presence of each other, on the date shown above. Neither one of us is an attorney, a spouse or partner of an attorney, a child of the maker of this power of attorney, a person whom the maker of this power of attorney has demonstrated a settled intention to treat as his or her child, a person whose property is under guardianship, or who is a guardian of the person. Each of us is over the age of majority:

1)_______________
Witness Signature

____
Witness Address

____

____

2)_______________
Witness Signature

____
Witness Address

____

____

ESTATE ADMINISTRATION

The end of a person's natural life constitutes the beginning of a new legal entity–his or her estate. The estate owns and holds the deceased person's assets until same are sold or distributed to the lawful beneficiaries by the estate's personal representative. The process of collecting a deceased person's assets, paying his or her final taxes and other liabilities, and then distributing the balance of the estate to the persons entitled, is called estate administration.

If an individual has made a valid Will, the person in charge of administering the estate (sometimes called an executor or an estate trustee) will be identified in the Will. It will also disclose the important details of the administration of the estate, including the identity of the beneficiaries and the extent of their respective benefits under the Will. However, if an individual dies without having made a valid Will (in other words, dies intestate) his or her estate will be distributed according to a formula prescribed by provincial legislation. Moreover, someone will have to come forward to apply to a Court to become appointed as the personal representative in charge of the intestate person's estate. In many such cases, the intestate heirs determined by prevailing legislation will not be the same individuals the deceased person would have selected had he or she made a valid Will. By the same token, the court-appointed personal representative may not be the most appropriate person to handle the administration of the estate, and may not be the person whom the

What thou givest after thy death, remember that thou givest it to a stranger, and most times to an enemy; for he that shall marry thy wife shall despise thee, thy memory and thine, and shall possess the quiet of thy labors, the fruit which thou has planted, enjoy the love, and spend with joy and ease what thou has spared and gotten with care and travail.

— Sir Walter Raleigh

deceased would have named in the Will, had he or she made a Will.

Estate administration may be simple or complex, depending upon a number of factors. Foremost is the size and nature of the assets comprising the estate. If an estate is to remain open for a long period of time (for instance, where young children are named as beneficiaries of a trust that is to run for many years), the administration will be considerably more involved than the situation where there is an immediate distribution of the net estate to one or more adult beneficiaries.

In estate administration, addressing the payment of the deceased's liabilities is as important as making distributions from the estate to the beneficiaries. Under the general law, personal representatives of an estate are personally liable for payment of the deceased's liabilities, to the extent of the value of the estate.

If, for example, an individual died owing Revenue Canada $15,000.00 for unpaid taxes, and his or her personal representative neglected to check for unpaid taxes, and instead went ahead, that personal representative could be forced to pay Revenue Canada the tax liability! A routine step taken by all prudent personal representatives is to obtain a "clearance certificate" from Revenue Canada prior to distributing the estate.

Persons (or trust companies) who undertake the administration of an estate are entitled to be compensated for the time and trouble they incur. The Courts in most provinces will generally allow compensation in the range of approximately 5% of the gross value of the estate. It is likely that a Court would award an executor less than 5% of a one million dollar estate where there was an outright distribution to a single beneficiary of only one asset and the administration of the estate was otherwise straight forward.

To a very significant extent, the smooth and orderly administration of an estate can be assured by way of a properly-drawn Will. When making a Will, therefore, one should attempt to foresee and deal with the problems which might arise following a person's death in the course of administering his or her Will. Good estate planning facilitates smooth estate administration.

"Do not stand by my grave and weep
I am not there. I do not sleep
I am a thousand winds that blow
I am a diamond glint on snow
I am the sunlight on ripened grain
I am the gentle Autumn rain
When you awake in the morning hush
I am the swift uplifting rush
Of quiet birds in circling flight
I am the soft sunshine of night
Do not stand by my grave and cry.
I am not there... I did not die."

Anon.

UPDATING A WILL

A properly prepared Will should be reviewed periodically to allow for changes in your personal, emotional, and financial situation. To be effective, your Will must keep pace with such changes in your life. These changes may include:

- A change in your personal representative or trustee.
- The deletion or addition of a minor gift or bequest.
- A change in the value of your property.
- A death, birth, marriage, divorce or other change of the competency of your beneficiaries.
- The relocation of your residence to another province or country.
- The acquisition of property in another province or country.
- A major increase or decrease in your resources.
- The addition of another dependent, such as a child, an elderly parent or other relative.
- A major change in your insurance program.

You can accommodate these changes easily by preparing what the legal profession calls a codicil, or "update" in plain English.

The legal requirements for preparing a codicil are the same as those for preparing a Will. If you make two or more codicils, you run the risk of the probate of your estate becoming cumbersome and costly.

Use of multiple codicils could also result in Will contests, confusion among claimants and beneficiaries, and could also create contradictory provisions in your Will.

You should not use a codicil:

- To make substantive changes to your Will or to make any changes to a previous codicil.
- To make a major change or changes to your Will due to a change in your personal circumstances such as a marriage, divorce, or the commencement of a new relationship.
- To exclude someone you normally would or should include, such as a spouse or child, as a beneficiary of your estate. In this situation we suggest you seek legal advice before amending your Will. The laws of the various provinces generally provide that the spouse and children of a testator may have the right to apply to a court to obtain an increased share in a deceased person's estate where the Will does not make adequate provisions. The courts may have the power to alter the disposition of the estate to provide for the applicants.

Signing a Codicil

The legal requirements for signing a codicil are the same as for signing your Will. Your codicil must be witnessed by two independent persons who are not executors, trustees, beneficiaries or their spouses, either in the original Will or in the codicil. Please study and follow these three simple rules:

1. Both witnesses must be present at the same time as each other and the maker of the codicil.
2. The codicil must state whether it is your first, second, third, or another codicil. It must also state the date of the Will and/or previous codicil which it amends.
3. It is important for you to confirm the remaining clauses of your Will or previous codicils–that is, those clauses which are to continue unaltered.

HOW TO AVOID PROBATE

Probate fees are a form of "death tax" levied by the provincial governments on the value of assets falling into an estate upon an individual's death.

If an individual's Will has to be "probated," or approved by the Court (and not every Will does), or if an individual dies without a Will (intestate), his or her estate will first have to pay a probate fee to the relevant provincial government. The amount and rate of the fee varies from province to province. Generally, the more valuable the estate's assets, the greater the probate fee. In Ontario, which currently claims the highest probate fees in Canada, an estate valued at $300,000.00 would be required to pay $4,000.00 in probate fees to the provincial government.

There are many ways to reduce or eliminate probate fees, provided such measures are implemented prior to one's death. However, prior to undertaking any particular probate fee-avoidance technique, it is wise to first determine whether the anticipated saving in fees is worth more than the potential adverse consequences triggered by the fee-avoidance step.

For instance, the most popular way to reduce probate fees is to take an asset and transfer ownership into joint names with another person or persons. We say that the owners of the asset become "joint tenants with right of survivorship" such that when the original owner of the asset dies, the surviving co-owner acquires full ownership of the asset directly without having to pay probate fees on the value of the asset. However, in making ownership "joint," the original owner is seen to have actually disposed of part of his or her interest in the asset. Depending upon the nature of the particular asset, there may be an unanticipated income tax bill for the original owner.

Probate fees, under current law, are only levied on assets falling into a deceased person's estate; if an asset is no longer owned by the deceased at the time of his or her death, the value of the asset is irrelevant for purposes of calculating the probate fee. Accordingly, all probate fee avoidance techniques are premised on the same basic principle: whole or partial divestment of assets by the time of the deceased person's death.

In addition to changing sole ownership to "joint tenants with right of survivorship," other methods of asset divestment aimed at minimizing probate fees include:

- outright gifting;
- transfers to trusts;
- transfers to corporations;
- designating beneficiaries of life insurance products; and,
- designating beneficiaries of registered assets (such as RRSP's).

The highest Court in the land–the Supreme Court of Canada–has recently confirmed that provincial governments have the legal ability to charge probate fees, an issue that had been in doubt for a number of years. Not surprisingly, therefore, it is anticipated that governments in other provinces will soon follow Ontario's trend by increasing probate fees; indeed, British Columbia has already done so.

When one considers the double whammy of income taxes and probate fees, both levied at death, it is not a stretch to predict that more and more Canadians will look for ways to minimize such taxes. Conventional wisdom would dictate, however, that one should look carefully before leaping at what might first appear to be a solution to a very taxing problem.

FAMILY TRUSTS

Many people associate "family trusts" with "tax savings." Although that association was generally accurate not so many years ago, a family trust today may only save taxes in limited circumstances. It seems that every annual Federal Budget takes another kick at family trusts, with the result being the decline in their overall usefulness. However, if properly set up, a family trust can still give rise to substantial benefits in many situations.

In simple terms, a family trust is a "legal relationship" forged amongst three persons or groups of persons. The person who creates (or settles) the trust by contributing money or assets is typically called the "settlor." In most cases, this will be one or both parents or grandparents in the family, or perhaps a close relative or friend. The money or assets put into the trust by the settlor(s) is held and supervised by the "trustees" of the trust. Legally speaking, the trustees exert a limited form of ownership as regards the assets in trust. In many cases, the trustees will also be the same parents who created the trust or, very typically, the parents along with their accountant or lawyer, or perhaps a trusted neighbour or friend. It is the job of the trustees to invest the assets contributed to the trust by the settlor for the sole benefit of the third group in the relationship, the "beneficiaries."

It is useful to conceptualize a family trust as a form of gift. Rather than give the money or assets directly to the children (who may be too young or not yet fiscally responsible), the gift is instead given to the trustees, who are charged with the responsibility of delivering the benefit of the gift to the beneficiaries at a later date, typically incrementally over time.

When the trust is first set up, the settlor will stipulate the circumstances upon which the benefits will flow to the beneficiaries. In many cases, the beneficiaries' absolute entitlement will be postponed to a specific age–say 25 or 30. Prior to that date, the trustees are often given the ability to draw from the trust's assets to pay for the educational pursuits of the beneficiaries, or perhaps to address uninsured medical costs.

Many parents falsely believe that they can transfer money or assets to a family trust and have the income and profits taxed in the hands of the children, as beneficiaries of the trust. Although there is no prohibition against such transfers, the taxation rules in Canada are such that all income (other than income earned on income) paid out to children under the age of 18 is not taxed at the children's low tax rates, but at the rate of the parent who set up the trust in the first place. As such, there may be little incentive in many cases to "split income" amongst family members by way of a family trust.

Some valid non-tax reasons for setting up such trusts include creditor proofing and probate-fee avoidance planning. In all cases involving the establishing of family trusts, however, it is essential to enlist the services of a professional skilled in the drafting and maintaining of such trusts.

CAPITAL GAINS TAXATION

The taxation of capital gains in Canada is relatively recent. Prior to January 1, 1972, there was no such concept as capital gains taxation. That date marked the beginning of a new era in Canadian taxation and, therefore, a new era in estate planning.

A "capital gain" is the increase in "value" (usually described as "fair market value") of a capital asset measured between the date the asset was first acquired by the taxpayer and the date the asset was ultimately disposed of by that taxpayer. For instance, suppose John Q. Taxpayer purchased 100 equity shares of Bell Canada in 1989 at a time when Bell Canada shares were trading at $10.00 per share. Accordingly, 100 Bell Canada shares in 1989 would have cost John Q. Taxpayer a total of $1,000.00. Ten years later, Mr. Taxpayer decides to sell his Bell Canada shares. However, the shares have increased in value in the market place over the ten-year period and are now worth $2,500.00 (or $25.00 per share). On these assumed facts, Mr. Taxpayer has "realized" a capital gain of $1,500.00 (the amount of the increase in value between the date of acquisition and the date of eventual sale).

Measuring the capital gain of a particular transaction is just the first step in determining the actual income tax liability facing the taxpayer. Not all of the capital gain is subject to taxation. In fact, only 50% (or 1/2) of the gain is "brought into income." Using the example above, 50% of Mr. Taxpayer's $1,500.00 capital gain would result in $750.00 brought into income.

However, in order to determine the actual tax liability arising out of the sale of Bell Canada shares, we have to know what "marginal tax bracket" Mr. Taxpayer is in. If we assume that Mr. Taxpayer is in a high tax bracket (a 50% tax bracket), 50% of the amount brought into income ($750.00) will result in an actual tax liability of $375.00.

Based on these assumed facts, Mr. Taxpayer's capital gains tax liability on the sale of his 1,000 Bell Canada shares will be $375.00. In other words, $375.00, or approximately 25%, of the capital gain will be paid to Revenue Canada.

Note that if Mr. Taxpayer had been paid $1,500.00 in salary at an assumed marginal tax rate of 50%, he would have paid $750.00 to Revenue Canada. Generally speaking, it is better regarding taxes to realize a capital gain than to receive the same amount as salary or investment income.

In estate planning, unless capital assets owned by a taxpayer at the time of his or her death are transferred on death to the taxpayer's surviving spouse or a qualifying spousal trust, Revenue Canada takes the position that the taxpayer notionally sold his capital assets at the time of death for fair market value and then re-acquired those assets in the estate at the same value. As such, if Mr. Taxpayer had not sold his Bell Canada shares prior to his death, and did not have a spouse (or did not leave the shares to a spouse), he is deemed to have realized a capital gain at death, again measured by the increase in value between the date of acquisition and the date of his death, resulting in a tax liability reported in his "terminal" tax return.

Every once in a while the Federal Government legislates an incentive to purchase capital assets. A few years ago, many will recall, all Canadians were given a lifetime capital gains "exemption" of $100,000.00 (meaning that the first $100,000.00 of capital gains was tax free), although this benefit was terminated in 1994. We still have, however, a $500,000.00 capital gains exemption in respect of the sale or disposition of shares of certain qualifying private companies. This, however, is a complicated topic, which one would be well advised to speak to a lawyer or accountant about.

How to Avoid Will Contests

Introduction

You've probably heard it said: "Where there's a Will, there's often a family fight." Why does the transfer of assets from one generation to the next cultivate so much animosity among otherwise friendly and loving family members?

In many cases, the reason underlying the malevolence is trivial. We know of families that have fallen apart simply because one of the children got to Mom or Dad's house first and removed a worthless painting before the rest of the family arrived in town for the funeral.

An estate divided evenly among your heirs may not be fair to anyone! Discover how to avoid the most common problems that could tear your family apart.

Most often, the root of the bickering can be traced to easily avoidable issues which could have and should have been recognized and addressed by Mom or Dad as part of proper estate planning.

As with many problems in life, an ounce of prevention is worth a pound of cure.

As should be clear from the following estate-related problems, much of the trouble can be short-circuited with a little ingenuity and forethought. Don't be one of those people who says: "Problems? Who cares? I'll be gone; they'll be someone else's problems then." That is, unless you don't care whether people remember you fondly or not.

If you recognize any of these scenarios as possible candidates for problems in your estate, we strongly urge you to seek out professional legal and/ or financial advice.

Here are some examples of typical estate squabbles, along with advice on how best to avert the family fracases which all too often result.

Problem #1

Child A is wealthy; Child B is not; parents want to be "fair" to both children.

In the typical scenario, Child A is financially set for life, whereas Child B is struggling to make ends meet.

The parents love both children equally, but recognize that if the estate is divided evenly between Child A and Child B, there may be insufficient resources in the hands of Child B with which to send his kids to university or college.

Privately, Mom and Dad would prefer to benefit Child B with the lion's share of their estate (because Child A doesn't need any additional wealth).

But they fear that Child A will feel disinherited, and may alienate himself from his sibling who, after all, had the same opportunities as Child A, but for whatever reason chose a more modest occupational pursuit.

In the mind of Child A, why should he absorb the result of his sibling's self-imposed circumstances?

Solution I:

Many estate planning professionals will suggest that the parents openly communicate their sentiments (and intentions) to the children while there is still time.

Others will suggest that in the very least, appropriate wording be added to the Will, explaining that although both children are loved equally, Child B's financial needs exceed those of Child A. In either case, it should be clearly stated that Child A is no less worthy than Child B; it is simply an issue of the parents wanting their money to "go further" in the hands of Child B.

Of course, there can be no guarantee that simply disclosing the reasoning behind the uneven sharing will sit well with Child A, but if nothing at all is said, Child A will almost certainly react in a negative manner.

Solution II:

Income earned on Child A's inherited share will be taxed at a higher marginal rate than the same inheritance in the hands of Child B, given that in this case Child A is certainly in a higher tax bracket. Accordingly, the parents should try to rationalize with their children that it doesn't make sense to "solve" the dilemma of sibling equalization by having Revenue Canada come out the big winner. Instead, the most tax-efficient result may be to attribute the "lion's share" of the financial estate to Child B, which coincidentally is exactly what the parents want to do in this case.

Solution III:

It may be that Child A would be content to inherit a particular family asset, rather than an equal portion of the parents' financial estate. If the relevant family asset was also cherished by Child B, the uneven payment to Child B in terms of the financial estate may very well satisfy both children.

Solution IV:

Depending on how many grandchildren there are, it may make more sense to "generation skip" by passing over both of Child A and Child B in favour of the grandchildren. For instance, if Child A has two children and child B has four children, a division and distribution of the estate among the six grandchildren equally would result in 4/6ths of the estate accruing to Child B's side of the ledger, consistent with the grandparents'/parents' wishes. Obviously, there is no denying that Child B's family has been preferred in this case; however, it may be more difficult for Child A to take issue with the division and distribution, given that his sibling hasn't benefited directly. And, after all, Child B does have twice as many children as Child A. Trusts may have to be created in the Will in order to facilitate underage grandchildren.

Solution V:

Subject to being insurable, the parents might consider purchasing life insurance paid for with funds notionally attributed to Child B's half of the estate. In most cases, the value of the payout on the death of the last surviving parent will far exceed the cost of the premiums. In this way, the parents will have expended equal amounts on each of their children; however, Child B will have received a larger amount due to the payment of the life insurance proceeds. Communication with the children of such intention should not be overlooked.

Problem #2

The estate will contain an asset of significant financial and sentimental value (i.e., the family house or cottage), and each child is desirous of owning the same asset. In most cases, the value of the real estate will constitute the bulk of the estate. Short of pulling off a feat worthy of King Solomon (by sawing the cottage in several pieces for instance), how is a parent to distribute his or her "wealth" among his or her children equally?

Solution I:

Again, open channels of communication with the

children may circumvent or at least temper problems at a later date. It may be that among the children there is one who is prepared to "buy out" the interests of his or her siblings. In this instance, the family should be able to agree on terms suitable to all involved. If several children wanted to be in the running for the right to purchase the house or cottage from the estate, lots could be drawn to determine the "winner" by chance. It is difficult for the "losers" in such a lottery to say that all the children weren't treated fairly. A similar result could be accomplished by way of appropriate wording in the parents' Wills, if the parents did not want to broach the subject during their lifetimes. In all events, several professional property appraisals should be obtained, if for no other reason than to dispel any notion that the property was not valued correctly or fairly.

SOLUTION II:

If no satisfactory agreement can be reached or anticipated among the family members, this would be a tough but fair decision.

Direct that the real estate not be offered to the children at all but rather sold on the open market after the parents' deaths, with the sale proceeds distributed equally among the children. This would not necessarily prevent any of the children from purchasing the asset on the open market from the estate.

But in most cases would bypass much of the squabbling generated by attempts to reach mutual agreement among the family members.

Problem #3

Closely related to the foregoing is the situation where the parents desire that the family cottage or vacation home (which may have been in the family for generations) not be sold but rather maintained for the benefit of all the interested children and grandchildren for as long as possible after the parents' deaths. In such situations, it is not unusual to find that all interested children and their families typically want access to the cottage at approximately the same time of year. Another problem may be that some of the children may not want the use of the cottage at all, or may live far enough away that use of the cottage in impractical or impossible. How are their interests in the estate to be equalized?

SOLUTION:

The cottage could be transferred to a trust, either during the lifetimes of the parents or thereafter. In either event, the terms of the trust should specifically address issues of cottage access and upkeep. Typically, there would be some sort of rotating lottery mechanism set out in the Will or concocted by the parents which strove to be fair to all interested children by ensuring that each child had the time slot he or she wanted every so many years, and which ensured that overhead expenses were allocated fairly according to use of the cottage.

It is important to remember, for tax purposes, that if a "capital property" (such as a vacation home) is held in a trust, the trust will be "deemed" to have sold the property every 21 years for proceeds equal to fair market value (and to have reacquired the property for the same value immediately thereafter). This circumstance could have devastating financial consequences where, for example, the cottage has increased in value considerably over a 21-year period. After the passage of 21 years, the cottage would be deemed to have been sold for its fair market value, thus giving rise to a significant capital gains tax liability. Might the cottage have to be sold just to raise the money for the tax liability?

Professional advice is required in order to address the "21-year rule."

Problem #4

Dad, a wealthy widower, is about to marry a woman of more modest means. Dad has a number of adult children from a previous marriage who are concerned that the new woman in Dad's life might be seeing dollar signs when she gazes into Dad's blue eyes.

Solution I:

Dad in this case may be extremely sensitive to the "free advice" forthcoming from his kids about what he should do with his estate when he dies. The issue has to be approached delicately, as no two situations are exactly the same. However, the children will want to convey the notion to Dad that provincial laws do not, contrary to popular belief, require him to leave all or "more than half" of his estate to his new spouse, an impression Dad might otherwise have in his mind. He should also be subtly reminded that, to the extent that he is passing on part of his estate to his new wife, he is disinheriting his own children. Moreover, it is likely that the new wife's Will benefits her own children or family members. Accordingly, any wealth passed on by Dad to his new wife may eventually line the pockets of her children or family members.

If the parent has a lawyer already, he should be encouraged to consult with the lawyer regarding the consequences to his estate planning upon remarriage. If he doesn't have a lawyer, he should be encouraged to retain one for advice in this area. Most people don't realize that marriage automatically causes a Will in existence on the date of marriage (and not made in contemplation of that marriage) to be revoked! In such cases, if the parent does not make a new Will, he will die "intestate," and his new wife will receive a large portion of this estate (or all of his estate if he has no children of his own) automatically, whether this was the intention or not. If Dad is in a same-sex relationship or has not remarried but has a conjugal relationship, his Will can still be revoked in some provinces.

Solution II:

Dad should consider a marriage contract with his bride-to-be, the effect of which would be that he and his new wife (who in many cases will want to protect her own children from a previous marriage) would remain "separate" as to their respective assets and property. A typical contract of this sort requires that each party relinquishes any and all claims against the estate of the other upon death. If properly set up and executed, the marriage contract should constitute the protection Dad's children are looking for as regards their eventual inheritances.

Solution III:

Dad could also start giving away his wealth to his children during his lifetime. As an alternative to outright gifting, Dad could place some of his assets in a trust, out of harm's way so to speak. To the extent that Dad has divest himself of assets, his new spouse would have less to claim upon Dad's death. There may, however, be adverse income tax consequences in undertaking a proposal of this sort and professional advice is warranted.

Problem #5

Parents have several adult children, only one of whom is truly capable of being the executor of the parents' Wills; parents do not want to hurt the feelings of the other children.

This is a tough one. The solutions often depend on whether the siblings get along with each other (while the parents are still alive).

Solution I:

The parents could name all of the children as coexecutors and expressly provide in the Will that the one child is to have the "burden of the administration," thus ensuring that the major decisions are left to him or her. Alternatively, the parents could name the one child as sole executor, but stipulate that he or she is to "consult" with his or her siblings on all important issues. This reduces the role of the other children to little more than "honourary consultees," but at least gives them a function and specific mention in the Will. Importantly, however, it also ensures that the appropriate child is at the helm.

Solution II:

In some cases, and for the sake of peace in the family, it maybe best to bypass the children altogether (thus obviating favouritism and infighting among siblings) by appointing a trust company as executor. Although a trust company may

be perceived as being expensive, the sibling rivalry and dissension avoided may be well worth the additional expense.

Problem #6

The last surviving parent, late in life, demonstrates an intention to benefit one of the children to a greater extent than the other children by way of a proposed change to his or her Will.

Perhaps the benefitting child lives closer to the ailing parent and has been more involved in the care and companionship of the parent. In recognition of such circumstances the parent feels it is appropriate to derogate from the previously equal distribution of the estate, by changing the Will so as to provide a "reward" to the relevant child. A laudable gesture on the part of the parent? Certainly.

Will the other children, upon reading the new Will following Mom or Dad's death, understand completely? Don't count on it. In many cases, this scenario is a guaranteed fight card. After all, the other children weren't witness to the time and effort expended by the rewarded child and may be suspicious of their sibling. In fact, it is not unusual to see the other children in this type of situation put forward accusations of "undue influence" allegedly exercised by the rewarded child on the parent resulting in the change to the Will.

It is of course completely illegal to influence a person into providing a personal benefit that would not otherwise be given. But such accusations (which in many cases cannot be proven) nevertheless abound.

For purposes of the suggested solutions to this problem, we assume no such undue influence on the part of the rewarded child, and we also assume the parent was mentally competent to make the new Will in the first place.

Solution I:

The parent should have considered communicating the intention to change the Will to the other children, without even necessarily apprizing the rewarded child of such communication. In this way, the proposal to reward the one child would have at least been known to the other children prior to reading about it in the Will, and would have appeared to have been more independently made by the parent. Admittedly, such communication may have also resulted in one or more of the other children attempting to talk Mom or Dad out of the proposal. Moreover, many parents shy away from expressing these sorts of intentions with the other children, simply because they do not want to face the wrath of perceived disapproval from the other children, who likely see themselves as financing Mom or Dad's "ill-conceived" benevolence. Presumably, the parents would realize ahead of time what sort of reaction the other children would have to the proposal and would act accordingly.

Solution II:

If communicating up front with the other children is not something the parent is prepared to face, he or she should at least leave behind some evidence in support of his or her actions. Without any clues or insight into the rationale behind the changed Will, the parent runs the risk that expensive litigation will be initiated by one or more of the other children, or that serious and lasting family rifts will be created.

Evidence considered worthy in terms of conveying the parent's point would consist of either a well-drafted letter left behind by the parent, or an appropriate statement made right in the Will.

Given the uneven application of the rules of admissibility of evidence in court proceedings, the statement in the Will should be made whether or not the parent writes a letter or communicates his or her intentions to the other children prior to death, since the Will can more easily be produced in court as evidence.

A variation on the foregoing suggested solution would be to have the parent video tape a personal address to the other children, to be shown concurrently with the disclosure of the contents of the amended Will after the parent's death. Although its admissibility may be

dubious in certain court proceedings, the existence of the video will in many cases work wonders in terms of appeasing the other children as to the merits of Mom or Dad's intentions.

It perhaps goes without saying that the benefitting child should not be the director or producer of any such video!

Problem #7

One of several adult children in the family falls upon difficult financial times. The parents have considerable sympathy for the child and decide, out of the goodness of their hearts, to "advance" the financially-troubled child all or part of what would have been his or her eventual inheritance.

The parents' current Wills leave an equal distribution among the children upon the death of the last surviving parent. Unfortunately, it doesn't occur to the parents that they should change their Wills to reflect the accelerated partial inheritance in favour of the disadvantaged child.

After the parents' deaths, the child takes the position that the payment from the parents was a gift and not an instalment in terms of his or her ultimate inheritance, and that he or she is also entitled to an equal share of the estate in accordance with the express terms in the Will.

This in turn infuriates the other children who feel the advancement should reduce the benefitting child's share of the estate. Before you can say "Family Feud", the siblings have all retained high-priced lawyers.

Solution I:

We don't need a rocket scientist here, but it is surprising to see how many parents in this situation would either not address their minds to the consequences of making such a payment to a child, or would procrastinate in terms of amending their Wills, perhaps until it was too late. Clearly, the parents should have appreciated that their Wills would have to be amended immediately upon the payment of the advance to the child so as to remain fair and equal to the other children (assuming that was their intention). By neglecting to do so, they have embroiled their children in expensive litigation that only the lawyers will be happy about. More tragically, the family is torn apart, likely beyond repair.

Solution II:

The parents might consider advancing the money to the child in the form of a loan (as opposed to an outright gift or advancement against eventual inheritance). In this way, the "loan" could be brought into account after the parents' deaths, and would be applied against the debtor child's inheritance from the estate. The loan could be interest-free (at the parents' option), with no payments necessary until the last surviving parent's death, when the entire amount would come due, but would be setoff by the inheritance accruing to the debtor child.

It is important to document any such loan in writing. Moreover, it would be wise to refer to the loan in the parents' Wills, although this is not absolutely necessary if the loan is documented in writing elsewhere.

It would also be important for the parents to attempt to determine whether the amount of the loan (or, for that matter, the amount of the advancement in the previous suggested solution) might exceed the benefitting child's eventual inheritance. If there was such an excess, presumably it would be the parents' intentions that the excess constitute a debt owing by the child to the estate of the last parent to die.

Problem #8

Uncle Fred, who never married and had no children, made a Will many years ago which left all of his estate to his nieces and nephews. At the time, it seemed like the thing to do; after all, the nieces and nephews were young and irresistible then, and seemingly appreciative of Fred's benevolence when Christmas and birthdays came around. As the nieces and nephews grew older, Fred never missed an opportunity to remind them that they were in his Will.

Years later, the nieces and nephews all have their own lives and interests, and don't seem to have much if any time for old uncle Fred now. Fred has been living in a comfortable seniors'

residence for the past several years and initiates a change his Will so as to benefit the residence with his now-substantial bounty, obviously at the expense of the nieces and nephews.

This fact somehow comes to light and several of the nieces and nephews initiate a campaign to reverse the direction of what they consider "their" inheritance. This turn of events causes no end of consternation for Fred, who obviously did not want to live out the last years of his life bothered by such pressure or feelings of guilt directed at him by his greedy nieces and nephews.

Solution I:

Assuming no such undue influence was exerted by the seniors' residence staff, Fred's main problem was likely one of recognition; he should have recognized that changing his Will was likely to generate a strong and negative reaction from the nieces and nephews. Not that such recognition should have necessarily persuaded Fred against changing his Will, but if he at least "saw it coming" he might have been able to better weather the reaction.

Solution II:

Fred should have avoided informing his nieces and nephews of his testamentary intentions to favour them in the first place. This is a tough bit of advice to swallow for many uncles, aunts, parents and grandparents alike, but most estate lawyers will tell you to resist bragging about your planned benevolence; you may live (or die) to regret it, like uncle Fred. Had he kept his intentions secret, his previous Will may never have come to light, since it would have been revoked by the later Will, and it would have been destroyed by his lawyer. As such, the nieces and nephews would never have felt disinherited, since they would have had no expectations of receiving benefits under Fred's Will.

By the same token, once the new Will was made, Fred should have taken all steps to keep the details of the new Will secret until after his death. Most lawyers will retain a client's Will at no charge, and in doing so have a responsibility to respect the confidentiality and privacy of the client. People who leave Wills or copies of Wills lying around are, in effect, placing their testamentary intentions in the public domain ahead of the event, thus exposing themselves to the kind of distress poor uncle Fred experienced.

As an aside, had Fred followed the advice outlined above he would have avoided a great deal of anxiety during his lifetime, but might not have prevented a challenge to his Will after his death, if one or more of the nieces or nephews initiated a claim that uncle Fred was mentally incompetent or unduly influenced by someone at the seniors' residence. In order to better avoid such litigation, Fred might have considered having a physical and mental checkup undertaken at the time of making his new Will. He could have made this fact known to his lawyer, and if a challenge to the later Will was pursued by the nieces and nephews, the favourable medical report would likely cause a rather rapid retreat from such pursuit.

Problem #9

Husband and wife, both in their fifties, have been separated for four years, but have taken no steps to "settle the accounts," such as a proper Separation Agreement. Both have adult children from their respective first marriages, and both are now living in common law relationships with new partners.

Husband dies unexpectedly, leaving a Will he made during his first marriage which leaves everything to his two adult children. Problem is, un-beknownst to the husband, his Will was automatically revoked years ago when he married his second wife, a little-known legal rule which prevails in every province in Canada.

In the result, husband has died "intestate" and because he resided in the province of Ontario, his second wife is entitled to the first $200,000.00 of his estate (or all of his estate if it is valued at less than $200,000.00) plus one-third of the remaining estate in excess of $200,000.00.

His two adult children will therefore share two-thirds (2/3) of such excess, assuming there is any excess, and nothing more. Most other provinces have similar laws which prefer the surviving legal spouse in an intestacy situation.

Solution I:

This sort of tragic situation could have been avoided, or largely avoided, had the husband made a "new" Will after the date of his marriage to wife #2, even though the new Will might have been identical in all respects (except for its date) to the previous Will, leaving everything to the adult children.

Making a new Will after the date of marriage, however, will not necessarily avoid all of the problems envisaged by the foregoing example. For instance, a married spouse has other statutory rights which avail him or her of recourse against the estate of a deceased spouse who did not provide adequately for the surviving spouse in his or her Will.

In other words, in the foregoing example, even if husband had made a new Will after the date of his marriage to his second wife, and which left everything to his two children, that is not to say that the two children would actually receive all of their father's estate. The surviving spouse would have standing to make a claim against her late husband's estate, but her success would depend largely on the extent of her own assets, resources and financial needs. As a general rule, the more in need the surviving spouse is, the greater the extent of her award coming from the estate of the deceased spouse.

Solution II:

Rather than make a whole new Will, husband could have made a one paragraph, one page "codicil" prior to marrying wife, wherein he would have declared that his current Will was now to be considered as amended in the sense that it was now made "in contemplation of marriage" to wife. This simple and inexpensive procedure would have avoided the revocation of husband's Will upon his subsequent marriage to wife.

Note that if the marriage takes place prior to the codicil being made, the codicil made after the date of the marriage must express a specific intention to "revive" the revoked Will, otherwise the Will remains invalid.

Solution III:

An even better solution would be to have the spouses execute a formal domestic agreement (i.e., a Separation Agreement) following separation when it became apparent the split was for good. As part of that agreement, the spouses could have waived all claims against the other's estate, including claims to the estate as an intestate heir.

In this way, the fact that the husband neglected to make a Will would not be as critical; wife would have signed off on her rights, and the children would acquire the whole estate as was the original intention. Having said that, it would of course be optimum for the husband to make a new Will after marriage and enter into a Separation Agreement when the marriage came apart.

Problem #10

Several heirs want the same valuable family heirlooms, art or jewelry.

Solution I:

If family members cannot agree on how to divide up these items, one suggestion would be that each of them would be allowed to make one choice (first choice by lot) and then to rotate turns until every item is distributed. The pitfall of this plan is that since these items could vary greatly in value there would still be disputes about the choices made.

Specify this process in your Will, but don't list the assets by item because this could cause valuation problems in the event of an audit.

Solution II:

If the heirs are unable to fully agree to Solution I you could state in your Will that all such items will be sold within four to six months following the death of the second parent and that the proceeds of the sale will then be equally distributed among the heirs.