
ESTATE PLANNING SEMINAR

Ottawa – September 24, 2007

Does Your Will Reflect Your Intentions

By Jane Burke-Robertson, B.Soc.Sci., LL.B.
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PART I – DO YOU NEED A WILL?

- Do you need a Will?
 - The simple answer is – it depends
 - It depends on
 - Who you want to benefit after you die
 - What type of assets you have
- Benefits of having a Will:
 - The Will speaks for you from the moment of your death: you decide who is to look after your affairs, where your assets go, who inherits, and what they inherit

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- What if you die without a Will?
 - The *Succession Law Reform Act* governs, among other things,
 - Who will benefit from your estate, and
 - How it must be administered
 - The process to administer your estate generally takes longer and is costlier

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- **The *Succession Law Reform Act* contains specific entitlements for situations including where**
 - You die leaving a spouse only
 - You die leaving a spouse and children
 - You die leaving no spouse or children
- **A common law spouse does not have the same rights as a married spouse**
- **Combined family situations may have unintended results**
- **Essentially, the decision about who benefits from your estate is taken out of your hands**

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- **Why have a Will?**
 - **In addition to deciding for yourself who will benefit from your estate, you can**
 - **Ensure that any minor children you may have at the time of your death are taken care of according to your wishes**
 - **Ensure that any children you may have who are legally incompetent at the time of your death are taken care of according to your wishes**

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- Why have a Will cont'd.**
- **Ensure that your wishes concerning a combined family situation are addressed**
 - **Leave bequests and legacies to friends and charities**
 - **and, you have a much better ability to complete some tax planning in order to minimize taxes**
 - **Examples:**
 - **Family business concerns**
 - **Farm property**

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- **Should you have two Wills?**
 - **It is possible to have more than one Will, when you want to deal with specific assets**
 - **It may be advantageous to deal with a family business or farm property separately**
- **Why?**
 - **If you need to obtain a Certificate of Appointment (formerly called Letters Probate) in order to transfer certain of your assets, you must pay an estate administration tax on the total value of your assets (with some exceptions and exclusions)**

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- **The estate administration tax applicable is currently calculated as follows:**
 - **\$5 per \$1,000 for the first \$50,000 of estate value and**
 - **\$15 per \$1,000 for the estate value in excess of \$50,000.**
- **If all of your assets combined (including, for example, all of the livestock, machinery and implements of a farm) total \$500,000.00, you would pay \$7,000.00 in estate administration tax**

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Two Wills cont'd.

- **If you had two Wills – one dealing specifically with the farm assets and a separate Will dealing with the remainder of your assets, you may be able to**
 - **Obtain a Certificate of Appointment only for the Will containing the bulk of your assets; and**
 - **Not obtain a Certificate of Appointment for the Will dealing specifically with the farm assets**

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- **The result:**
 - You could potentially reduce the estate administration tax owing on your estate by the value of the assets contained in the second Will (i.e. the family business or the farm property)

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- **Income Tax Advantages of Charitable Bequests: A bequest will**
 - Produce a charitable donation tax credit in the year of death that can be claimed against 100% of your net income on your final tax return
 - Any unused portion of this credit may be carried back to the previous taxation year to be claimed against 100% of net income for added savings

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- Charitable donation tax credits now may also be claimed for the proceeds from your RRSPs, RRIFs and life insurance policies (including group policies) where the charity is designated as the direct beneficiary
- If you bequeath shares of publicly listed securities that have appreciated in value, your gift will be exempt from capital gains tax on the appreciated value but still generate a full charitable donation tax credit for the gift

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- **Conclusion**
 - Not everyone needs a Will, but
 - If you want to control who benefits from your estate
 - And/or if you have assets that may increase the amount of estate administration tax your estate will have to pay
 - It may be advisable to have a Will

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PART II – CHARITABLE BEQUESTS

- A bequest to a charity in your Will is a gift that allows you to
 - Support a charity in the future without affecting your current finances
 - Designate your bequest to a specific fund, or
 - Direct the charity to designate it where your gift is most needed

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- **Overview of Issues**
 - a) Intention of testator
 - b) Identity of charities to receive gifts
 - c) Quantum of gifts
 - d) Timing to complete gifts
 - e) Form of property to be donated
 - f) Conditions attached to gifts

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a) **Intention of testator**

- **The terms of the Will must show that the testator has a clear intention to make a donation to a registered charity**

b) **Identity of charities to receive gifts**

- **CRA previously required the identity of the charity to receive the gift be expressly set out in the Will**
- **This restrictive view has been relaxed in recent years in several respects**

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b) **Identity of charities to receive gifts (cont'd)**

i) **Discretion of trustees to choose charities**

- **CRA previously did not permit trustees to choose from a list of charities to receive gifts from the estate**
- **In 2001, CRA changed its view**
- **Now acceptable for a Will to stipulate that a specific amount be gifted to charity and provide a list of charities to which donations be made, with the trustees having a discretion to determine the amount to be given to each named charity, as long as:**

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- **The actions taken by the executor are reasonable and in accordance with the terms of the Will**
- **The donation is in fact made to a charity**
- **Also acceptable that where the terms of a Will direct the trustees to donate a specific amount to a charity without identifying any charity in the Will, and the Will allows the trustees to have full discretion to decide which charity would receive the gift**

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b) **Identity of charities to receive gifts (cont'd)**

ii) **Gifts to charities established after the death of the testator**

- **In 2001, CRA accepted a gift by Will to a private foundation to be established by the testator's estate**
- **Query whether this view could be applied to charitable organizations or public foundations established after the death of the testator**

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c) **Quantum of gifts**

i) **Specific amount or specific percentage of the residue of an estate**

- **The Will must expressly set out either (1) the specific amount of the gift or (2) the specific percentage of the residue of the estate**

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1) **Can give discretion to trustees to reduce specific amount listed**

- **Where the Will provides for specified amounts to be given to a number of specified charities, but the executors are given the power to *reduce the amounts*, as necessary, in the event that there are insufficient funds available to make all charitable bequests after the payment of all fees and expenses in the administration of the estate, the actual amount donated by the estate would qualify as gifts made by the Will**

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2) Can give discretion to trustees to decide within a dollar range

- Where a Will provides that a gift is to be made to a charity within a dollar range, the deceased would be entitled to claim a tax credit for the *minimum* amount of the range, with the estate being entitled to a credit for donations made above the minimum amount

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3) Use of formula to calculate the residue and trustees' discretions

- The Will may provide for the donation of a specific percentage of the residue of an estate to a charity
- In some situations, acceptable for the Will to provide for a formula determining the amount of the residue of the estate

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- Examples

1. \$50,000 to charity A
2. \$50,000 to be divided among a charity or charities to be selected by my Trustees
3. \$50,000 to be divided among a charity or charities to be selected by my Trustees but if residue of my estate is less than \$500,000 then the \$50,000 shall be reduced to \$25,000
4. To distribute between \$10-50,000 as my Trustees decide among such one or more charities as my Trustees decide
5. 20% of residue of my estate to charity or charities to be selected by my Trustees

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d) Timing to complete gifts

- **In general, gifts made by a Will should be completed within a reasonable period of time after death and that CRA may be requested to adjust the tax return in the event that the gift is made after the assessment of the deceased's final tax return (subject to the time limitation for reassessments)**

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e) Form of property to be donated

- **CRA generally requires the Will to clearly specify what is to be paid from the estate**
- **Possible for trustees to have discretion to decide the form of property to be donated, unless the Will specifies otherwise**
 - e.g. The Will stipulates that a specific amount to be gifted to a charity, without stipulating as to the form of the gift
 - e.g. The Will permits a gift to be made in cash or *in specie*

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f) Conditions attached to gifts

- **Conditions attached to gifts are acceptable**

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