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Crafting Your Will to Secure Your Family and Charity

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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

1. 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

2. 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

- 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

- For example:
  - If you die survived by a spouse but no children or grandchildren, your surviving spouse is entitled to your entire estate
  - If you are survived by a spouse and children, a “preferential share” of $200,000 will be given to your spouse and the remainder of your estate divided equally amongst your children

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- If you are survived by children only, estate divided equally amongst them, shares of children under 18 paid into court by the estate trustee and payable to them at 18
- If no immediate family, estate distributed to parents, if not then equally distributed amongst siblings
- If no heirs or next of kin, estate will “escheat to the Crown,” which means government will be entitled to it all

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- 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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3. Why have a Will?

- In addition to deciding for yourself who will benefit from your estate, you
  - 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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- ensure that your wishes concerning a combined family situation are addressed
- leave bequests and legacies to common law spouse, friends and charities
- and, you have a much better ability to complete some tax planning in order to minimize taxes, including planning gifts to charity

4. Should you have two Wills?

- It is possible to have more than one Will dealing with specific assets
- It may be advantageous to deal with a family business or farm property separately
- Residents of Ontario having assets in another country often have two wills, one for those located in Ontario, and a second for those in the other country

- 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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- A Certificate of Appointment is a certificate that is issued by the Ontario Court that certifies:
  - The fact and date of death of a deceased person
  - The name and address of the estate trustee authorized to deal with the estate assets
  - That the document attached to the Certificate is a true copy of last will

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- A Certificate of Appointment is not always necessary to effect the transfer of assets:
  - Jointly-owned real property or bank accounts pass to the surviving joint tenant by right of survivorship - usually only a death certificate
  - Insurance policies and RRSPs may designate a beneficiary and probate may not be necessary
  - Shares in a private corporation

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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

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- If all of your assets combined total $500,000.00, you would pay $7,000.00 in estate administration tax:

  ($5 x 50) + ($15 x 450) = $7,000

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- If you had two Wills – one dealing specifically with real estate 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 real estate; and
  - Not obtain a Certificate of Appointment for the Will dealing specifically with the other 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 other assets not requiring a Certificate)

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5. 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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TAX PLANNING ESSENTIALS IN A WILL

- Canada does not have an estate tax
- But… tax is paid upon the death of the testator:
  - On any income earned in the year prior to death
  - On any capital gains arising from the deemed disposition of most property on the date of death

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- The goal of estate planning is to minimize the impact of this tax upon the estate and the beneficiaries
- However, tax planning considerations should not take precedence over the wishes and philanthropic goals of the testator but should merely be a tool to ensure that there are more assets available for distribution

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1. Spouse/Common Law Partner
- Generally, any property that has increased in value that is left to a spouse or common law partner (or qualifying spousal trust) will “roll-over” and avoid triggering any immediate tax
- For example, real estate, shares of a corporation or other investments

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2. Principle Residence/Cottage
- A principle residence may be left to someone other than a spouse without triggering tax if left to an adult child who does not yet have a principal residence
- The disposition of a cottage or second residence will trigger taxable capital gains unless it is left to a spouse/common law partner

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3. RRSPs and RRIFs
- Generally, tax is paid on the fair market value of the plan on the date of death unless it is left to a spouse/common law partner or a dependent child or grandchild
- The tax treatment of RRIFs is similar

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4. Rights and Things

- Certain types of periodic income, referred to as "rights or things" get special tax treatment and can be reported on a separate tax return
- For example, work-in-progress of a professional, declared but unpaid dividends, unused vacation credits and bonuses

5. Use of Testamentary Trusts

- The estate is a separate taxpayer, is taxed as a trust, and can take advantage of the lower tax brackets if income-earning assets are left in the estate for a period of time – an estate income-split
- The Will can also create several different trusts, each a different taxpayer benefitting from the income-splitting advantages

- Typical testamentary trusts include:
  - Spousal or partner trust
  - Family trust
  - Trust settled with life insurance, RRSP or RRIF funds
  - Trust for the benefit of a disabled person

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- The tax planning considerations involved in a Will can be complex depending upon the assets being disposed of and the characteristics of the available beneficiaries

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ESSENTIALS OF GIVING

What is a Gift?

- A valid gift is a voluntary transfer of property without consideration
- Valid gifts made to registered charities are eligible for an official charitable donation tax receipt
- Can be claimed on an individual's income tax return as a non-refundable tax credit

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What is Not a Gift?

- Examples of transactions that do not constitute a "gift":
  - Pledged amounts which are not received by the charity
  - A donation of services
  - The payment of sponsorship fees
  - A loan to the charity

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- Provision of free use of property
- A donation which is court ordered or compelled
- In addition, a charity may choose to decline a gift, for various reasons

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GIFTS MADE IN YOUR LIFETIME

- Outright Gifts

  An outright gift that is not subject to any restrictions:
  - May be applied by the charity towards its general charitable purposes

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An outright gift subject to restrictions (Donor-Restricted Charitable Gifts)
- Will be applied by the charity towards the specific purposes set out in the restriction
- Gift generally constitutes a charitable trust
  - It is a form of "a charity within a charity"

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- Gifts of Publicly-Listed Securities
  - Donations of publicly-listed securities do not result in a capital gain for the donor
  - Common publicly-listed securities
    - Share, debt obligation or right listed on a prescribed stock exchange
    - Share of the capital stock of a mutual fund corporation
    - Unit of a mutual fund trust

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- Gifts of Real Estate
  - Include
    - Single family homes
    - Condominiums
    - Apartment buildings
    - Office buildings
    - Land and farms
  - Not all charities can accept such gifts

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- Gifts-in-Kind
  - Gifts-in-kind are gifts of property other than cash, and include
    - Books,
    - Art work or art collections,
    - Archival documentation, works or material,
    - Equipment or software, or
    - Other property

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- Make sure donation is to the charity and not an individual (i.e. a priest) to make use of charitable donation tax credit
- Ensure that the charity can accept the gift
- CRA can be concerned with valuations - must be able to value property using a FMV valuation, required if greater than $1,000

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- Personal use property - property that is used primarily for the personal use or enjoyment of the individual
- Listed personal property – specifically listed assets, generally acquired for appreciation
- Other capital property – anything which will result in a capital gain or loss when disposed

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- Cultural Property
  - Property must be certified by the Canadian Cultural Property Export Review Board
  - Recipient must be a “designated institution”
  - Board determines FMV
  - Process could take six months
  - Children might not know what they have on their hands

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- The general advantage in donating certified cultural property is that there is no capital gain on its disposition when donated to a designated institution and you get the full value of the charitable donation tax credit
- Ecological gifts are gifts of ecologically sensitive land and have a similar process and tax advantages

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GIFTS BY WILL/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
- A bequest is a provision in a Will directing a gift of property from an estate to be paid to a charity

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- Types of bequests accepted by charities
  - Specific bequest – gift of specific amount of money or specific property (i.e. real estate or securities)
  - Residual bequest – a gift of all or a percentage of the residue of the estate after gifts to other beneficiaries
  - Contingent bequest – a gift of all or a share of the estate in the event of the prior death of other beneficiaries, or in the event of certain conditions having been met

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- When you make a bequest to the charity, you can:
  - Leave it to charity for its general purposes
  - Restrict the bequest for a specific purpose
  - Designate the bequest to an existing fund
  - Specify that the principal be held as an endowment in, for example, a named fund

- Income tax advantages of gifts by will:
  - 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

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

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Some Issues to Consider and Examples

- The terms of the Will must show that the testator has a clear intention to make a donation to the charity
- 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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For example:

1. A Specific Bequest, donating a specific sum of money, publicly-listed securities, a RRSP, a RRIF, a life insurance policy, real estate, or personal property such as a work of art.

   "I direct my trustees to deliver, pay, or transfer the sum of $1,000 or (100 shares of Xco) to the [Name of Charity] to be used for its general charitable purposes."

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2. A Residual Bequest, which is a gift of a named percentage or portion of your estate or of its residue after having paid gifts to other beneficiaries under the estate.

   "I direct my trustees to deliver, pay, or transfer the residue of my estate (or a specific portion of the residue, e.g., 20%) to the [Name of Charity] to be used for its general charitable purposes."

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3. A Contingent Bequest, a gift of all or a share of estate contingent upon certain conditions, such as income being paid through a trust to a loved one for life or for a term of years before the trust can be distributed to the charity.

   "I direct my trustees to deliver, pay or transfer the sum of $1,000 (or 100 shares of Xco) to the "X " Endowment Fund of [Name of Charity] to be used for the charitable purposes of the "X" Endowment Fund pursuant to its general terms and conditions in place from time to time."

- 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*

OTHER PLANNED GIFTS

- Gifts of Life Insurance
  - Gifts of life insurance may be made to the charity by
    - Irrevocably assigning the ownership and beneficiary rights of a life insurance policy
      - That is already paid-up, or
      - On which premiums remain to be paid, or

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- Naming the charity as a beneficiary of a life insurance policy
  - If assigned during lifetime, a charitable donation receipt will be issued for the policy’s value (i.e. its cash surrender value less any loan outstanding on the policy)
  - If the policy is not yet fully paid-up, a charitable donation receipt will be issued for the eligible amount of the premiums paid

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- Where a charity is only named as a beneficiary of a life insurance policy (ownership of the policy is not assigned), the charity may issue a charitable donation receipt when it receives the insurance proceeds upon the death of the insured. No charitable donation receipt is issued upon naming the charity as the beneficiary or for premiums paid for such a policy

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Gifts of RRSPs and RRIFs

- Gifts of registered retirement plans include
  - The direct designation of the charity as a beneficiary to receive the proceeds of a RRSP or RRIF on the death of the donor, or
  - A bequest in a Will directing that the proceeds of a RRSP or RRIF be paid to the charity on the death of the donor

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- The value of the gift is determined on the day of death of the donor
- An official charitable donation receipt will be issued as of the date of death of the donor

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CONCLUSION

- Not everyone needs a Will, but a Will will secure the interests of your family and your philanthropic goals
- Seek legal advice on specific tax planning issues
- Seek help from the development/giving offices of your favorite charities

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THANK YOU

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