



ELEMENTS OF A WILL

AFOA WORKSHOP
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What are the Requirements of a Will?

- The law sets out some rules that must be followed: The Will must be in **writing, typed or handwritten.**
- You must **sign the Will** at the end, in front of two **witnesses**, and you must tell the witnesses that the Will is yours.
- If you are unable to sign the Will because of illness or disability, you can ask someone to sign it for you in front of you, and in front of the two witnesses.

Witness's Important

- The two witnesses must sign the Will in front of you and in front of each other.
- You and the witnesses should initial each page of the Will in front of each other.
- If neither witness can be located, after considerable effort is made to find them, then the signature of the testator must be proven by an affidavit sworn by someone familiar with the testator's handwriting but who is not beneficially interested in the estate.

CHOOSING THE WITNESS

- Must be the full age of majority, presently 18 years of age in Saskatchewan.
- Must be mentally competent
- AVOID using the Testator's spouse as a witness.
- Use Witness's that will likely live longer than Testator.
- Avoid using people who are likely to move away, i.e. people subject to transfer or people who are not well known to the lawyer or the testator's family.

Testator ONLY to instruct a WILL

- Best practice for the instructions to come directly from the **testator and in private** when taking the Will instructions. "well meaning" family, friend, or staff, of the testator from being present.
- **Spouses** most often make a joint appointment to have their Wills drawn BUT should **meet separately**.

Capacity : Minors

- A minor is a person who has not yet attained the age of majority, which in the Province of Saskatchewan in August 2006, is **18 years of age**. A minor cannot make a valid Will, except in the following circumstances:
- (a) A person who is or has been **married or cohabiting** in a spousal relationship can make a valid Will, or at least, the fact that such a person is under 18 years at the time he/she makes his/her Will does not invalidate the Will.
- (b) A member of the **armed forces in actual service** or a sailor in the course of a voyage

Capacity: Persons of Unsound Mind

- **SENILITY**
- **INSANITY**
- **DELUSIONS**
- **DRUGS & ALCOHOL**

SOUND & DISPOSING MIND

- Sound testamentary capacity consists :
- (a) The testator **must understand** that he is giving his property to one or more objects of his regard;
- (b) He must understand and **recollect the extent** of his property;
- (c) He must also understand the nature and extent of the claims upon him both of those whom he is including in his Will and those whom he is excluding from his Will;
- (d) The testator must realize that he is signing a Will."

Capacity

- **Subsequent incapacity does not revoke** an otherwise valid Will.
- On the other hand, **a Will made by a person while mentally incapacitated** will not be validated if he subsequently recovers.
- Unless the issue of incapacity is alleged, then the testator is **presumed to have had the necessary capacity to make the Will.**

- Once the capacity of the testator is brought into question, the burden of proof of testamentary capacity lies with the **executor(s) or other person(s) who propound the Will for probate.**
- A challenge to a Will involves two levels of hearings: firstly, a **chamber** hearing to determine if sufficient evidence exists to warrant a trial of the issue(s), and secondly, the **trial** itself

KNOWLEDGE AND APPROVAL OF CONTENTS

- A testator must have both knowledge and approval of the contents of his/her Will for it to be valid.
- is being unduly influenced to make his/her Will
- 'Persuasion is not unlawful, but pressure of whatever character, if so exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue influence, although no force is either used or threatened.'

Impact of Legislation on Wills

- **The *Intestate Succession Act, 1996***
- **Spouse** means: (a) the legally married spouse of the intestate; or (b) if the intestate did not have a spouse within the meaning of clause, a person who:
 - (i) **cohabited** with the intestate as spouses continuously for a period of not less than **two years**; and
 - (ii) at the time of the intestate's death was continuing to cohabit with the intestate or had ceased to cohabit with the intestate within the 24 months before the intestate's death.

The Dependants' Relief Act, 1996

- Cohabitant becomes a dependant after only two years of continuous cohabitation and same sex cohabitants have the same rights as opposite sex cohabitants.
- If a testator fails to make "reasonable provision" for a dependant or dependants by the terms of his/her Will, an application can be made by, or on behalf of, the dependant to the Court of Queen's Bench.

The Family Property Act

- Part IV of *The Family Property Act* gives a surviving spouse the right to bring or maintain an application for division of the family property **against the estate** of the deceased spouse.
- Inter-spousal Contract or Cohabitation Agreement

The Wills Act, 1996

- **Anti-Lapse Provision**
- **Substantial Compliance**
- **International Wills**
- **Divorce/Ceasing to Cohabit in a Spousal Relationship**

REVOCACTION OF WILLS

- **Sec. 16 *The Wills Act***
- **Revocation by
Subsequent Marriage or
Cohabitation**
- **Revocation Clause**

AMENDING OR CHANGING A WILL

- OFTEN to change an executor or guardian, either of which can be done by way of a **Codicil** to the Will.
- After setting out the changes, the rest of the Will should be confirmed by using a '**republication**' clause.
- The proper way to amend a formal Will on its face is to make the alteration and then have it **initialed** by both witnesses and the testator in the presence of each other

CONTENTS OF WILL

- **Revocation Clause**
- **Appointment of Executors**
- **Insurance Declaration**
- **Funeral, Burial or Cremation Instructions**
- **Debts Clause**
- **Realization Clause**

CONTENTS OF WILL

- **Specific Bequests**
- **Cash Legacies**
- **Demonstrative Legacies**
- **Beneficiaries –
Spouse/Children/Single People**
- **Common Disaster Clauses**

CONTENTS OF WILL

- **Other Assets That May Need Special Treatment**
 - a. Shares in a Private Corporation
 - b. Partnership Interests
 - c. Assets Owned by a Corporation
- **Power Clauses**
- **Guardians**
- **Intention Not to Benefit Spouse(s) of Beneficiary(ies)**

Life Insurance Beneficiaries

Pension Plans

- Usually RRSPs and RRIFs don't form part of the estate, because in the RRSP or RRIF you name a beneficiary.
- When you die, the bank or trust company transfers the RRSP or RRIF, or pays it out to the beneficiary you named when you signed the documents creating the RRSP.