



**Life without me?**

***I just couldn't imagine such a thing!***

**Why We Need Wills,  
Powers of Attorney, and Personal Directives**

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## Disclaimer

This presentation is not intended as professional legal advice. It is provided only as public information and is of a very general nature. Every person's situation and estate is different, therefore, you should consult with your own legal counsel to prepare your Will, Power of Attorney and Personal Directive.

The **views of the author** do not represent the views of the University of Calgary Faculty of Law or the Canadian Institute of Resources Law.

## Moving into the 'learning zone'

Not everyone is comfortable talking about death, losing mental capacity, or about entering a “persistent vegetative state” while still alive.

# Outline

## **Death is not by appointment - yet.**

- Dying 'intestate' vs. dying 'testate.'
- Why get a lawyer to help you prepare your Will?

## **Accidents are not predictable.**

- What is an Enduring Power of Attorney?
- What is a Personal Directive?

# Who can make a Will in Alberta?

- A person over 18 with ‘mental capacity.’
- A person under 18 with mental capacity if:
  - the person has or has had a spouse, or has an adult interdependent partner;
  - the person is a member of the military; or is
  - the person is authorized by an order of the Court.

## *Number 1 reason*

### **why you need to die with a Will:**

- When you prepare a Will, you are a ‘testator.’ **You decide** how you want your estate to be distributed and to whom.
- When you die ‘intestate’, your estate is distributed according to Part 3 of the *Wills and Succession Act*.
- ***Have your say!***

# Property

## Property means:

- Real property – **your house and land**
- Personal property – **your diamond ring and car**
- Rights and interests in real and personal property – **shares and receivables**
- Anything regarded as property in law and in equity- **air miles**
- Any right or interest that can be transferred for value – **your water license**
- Any right – including a future or contingent right- to be paid money or receive property – **your lottery ticket**
- Any cause of action that relates to property or that could result in a money judgment – **your damage award**

# Property that does not become part of your estate

- Joint personal or real property with a ‘right of survivorship.’
- Property for designated beneficiaries in investments, pensions, life insurance, RRSP, RIF etc.
- But, beware the “resulting trust.”



# Resulting trusts

- A resulting trust comes about when title to property is put in the name of a party who gave no value for it.
- The party who gave no value is obliged to return the property to the donor unless he/she can establish it was given as a gift.
- The legal 'presumption of resulting trust' can be rebutted through a court application by providing evidence of intent of the donor to make a gift.

# Complex estates require advice from tax lawyers or accountants

- If you have a complex estate, you should be aware that there will be complex tax issues. Seek expert tax advice early.

**‘Nothing is certain but death and taxes.’**

Daniel Defoe, *The Political History of the Devil*,  
1726:

***"Things as certain as death and taxes, can be more firmly believed."***

Benjamin Franklin, *The Works of Benjamin Franklin*, 1817:

***"In this world nothing can be said to be certain, except death and taxes."***


*<http://www.phrases.org.uk/meanings/death-and-taxes.html>*

# Wills were innovations

- Based on liberalism, the value of the ‘individual’ and “ownership of property”.
- The power to control property after death.
- Provides a sense of personal immortality.
- Life = accumulation of stuff
- Death = distribution of stuff

# A Will takes effect when you die.

- As long as you retain ‘mental capacity,’ you can change your Will at any time.
- The last Will you make revokes all previous wills that you may have made.
- A Will is interpreted by the Courts “as if it had been made immediately before” your death.



# A Will enables you to appoint a ‘personal representative’ (executor, who usually also acts as your trustee).

- Arrange for payment of legal debts, funeral expenses and taxes
- Name your beneficiaries
- Establish trusts
- Give certain powers to your personal representative
- Name the ‘guardian’ of your minor children

# A Will is not the best place to talk about funeral arrangements

- The Will is often not located/read until after the funeral
- Instructions about your funeral are not ‘legally binding’ on your Personal Representative
- Burial versus cremation? A headstone or marker?
- Pre-arrangements with funeral services
- **Memos with instructions**

# Safety deposit boxes

- Let your personal representative know where the box and key are located
- Need a death certificate and copy of the Will to access the safety deposit box



# No estate tax in Alberta – replaced by ‘capital gains tax’ in 1972


- On death, there is a deemed disposition of **capital** and certain depreciable assets.
- Deemed sold immediately prior to death for “fair market value.”
- This makes any untaxed capital gains that accrued during the testator’s life “taxable” in the year that he/she died.

# Some property is capital gains tax exempt

- **Principal residence:** a person can have only one principal residence.
- **Spousal rollovers:** certain conditions apply.
- **Spousal trust rollovers:** spousal trusts
- **Farm rollovers:** farm must qualify – may rollover as a spousal trust or to a child of the testator.
- **Capital Gains Exemption:** \$500,000 for certain property such as a qualified farm property or shares in certain small businesses. Highly regulated system.

# Why get a lawyer to help you prepare your Will?

- The lawyer understands the complexity of the law affecting your Will and must ensure that:
  - You are 18;
  - You have mental capacity;
  - You are making your Will voluntarily, free from undue pressure, coercion or fraud;
  - You understand the contents of your Will.



# A lawyer cannot take instructions for your Will from someone else, including a family member.

- Your Attorney under a Power of Attorney, and your Agent under a Personal Directive cannot give your lawyer instructions for a Will.
- Your instructions must be given **by you** independent of others.

# Alberta's low flat rate probate fees

Based on the **net value** of your estate

Value \$10,000 or less	\$ 35
Value \$10,000 - 25,000	\$135
Value \$25,000 - 125,000	\$275
Value \$125,000 - 250,000	\$400
Value \$250,000 plus	\$525

<https://albertacourts.ca/court-of-queens-bench/frequently-asked-questions>

## Will summary

- Testator designates a “personal representative.”
- The Will takes affect upon death.
- The personal representative has the powers given to him/her through the Will.
- The personal representative is not always the Attorney or Agent.
- Your personal representative probates your Will

# What is a Power of Attorney?

- *Powers of Attorney Act*
- Enduring Power of Attorney
- If a person becomes ‘mentally incapacitated or infirm,’ usually as determined by medical doctors, the designated Attorney can make decisions for the person about the person’s **legal and financial affairs.**



# You are the ‘donor’ of a Power of Attorney

- The person you designate is your **“Attorney.”**
- **Your Attorney is not a lawyer! (necessarily)**
- You must have mental capacity to make a Power of Attorney



# What is a Personal Directive?

- Recall the ‘living will’?
- *Personal Directives Act*
- A person **with mental capacity** can appoint an ‘Agent’ to make decisions about their person, where they should live and what kind of medical treatment they might undergo.

# Persistent vegetative state

Common online definition of “persistent vegetative state”:

*A condition in which a medical patient is completely unresponsive to psychological and physical stimuli and displays no sign of higher brain function, being kept alive only by medical intervention.*

<https://www.google.ca/webhp?sourceid=chromeinstant&ion=1&espv=2&ie=UTF-8#q=persistent+vegetative+state>

# Consult with your legal counsel

- Process starts with an initial interview
- Usually you are required to fill in a Confidential Will Questionnaire
- Costs to prepare each of these documents vary - some firms offer flat rates and packages



# Questions