

## **Ensure your wishes are respected with a properly drafted will, enduring power of attorney and personal directive**

### **What is a will?**

A will is a written document that details how you want your property distributed after your death.

Alberta law sets out the requirements for a valid will. A will is valid only when it is in writing. A will is not valid unless:

- (a) it is properly signed; and
- (b) properly witnessed.

Your will must be signed by you before two or more witnesses who must also sign the document in the presence of you and each other.

You must be mentally competent, and at least 18-years-old. There are some limited circumstances where a person younger than 18 may make a valid will. If you are under 18 or if you are unable to sign your will by yourself, special rules apply. You should discuss your will with a knowledgeable lawyer.

In addition to disposing of your property you may also name your "personal representatives" in your will. A personal representative is also known as an executor, administrator or trustee. Your personal representative is the person or trust company legally appointed to represent your estate after your death. Duties for personal representatives include carrying out the wishes that you have stated in your will, gathering your assets, paying your debts and distributing your property according to your wishes.

### **Why Make a Will?**

A will ensures that your wishes are carried out with a minimum of expense and delay after your death. A properly prepared will can save time and expense for your family and beneficiaries.

You may make a valid will wholly in your own handwriting, signed and dated by you. This is called a holograph will. Your signature must be placed on the holograph will in such a way that it is apparent on the front of the will that you signed this document as your legal will.

There are numerous disadvantages to writing your own will which may include the following:

- your will may not clearly state your intentions;
- your will may not be discovered after your death;
- your will, if discovered, may be destroyed by a disgruntled beneficiary.

A lawyer can help you overcome all of the disadvantages with a properly stored and drafted will.

You can make as many changes to your will as you want. You can either rewrite the entire will or make changes by a document called a "codicil." A codicil is a testamentary document which has the same power as your will. It must be drafted and witnessed with the same care as your will. It is important to note you cannot just cross out things in your present will and write in the changes.

You should update your will from time to time as circumstances change. If you divorce after you have signed a will, that will is not automatically canceled. However, if you have a will and marry or remarry without preparing a new will, the will is automatically canceled.

The following circumstances should prompt you to review your will:

- marriage
- separation
- divorce
- children
- changes in your financial circumstances
- the death of a family member

### **What Happens When There is No Will?**

If you choose not to make a will, your property will be dealt with in accordance with the Intestate Succession Act (Alberta). Your personal representative will be appointed by the court. This person will have limited discretion in how to deal with your estate. The court will not know your intentions. You will not be able to choose a guardian for your minor children. Your beneficiaries will not be named by you. They will be stipulated by the provisions of the Intestate Succession Act.

The provisions of the Intestate Succession Act provide for the distribution of your estate if you die without a will. Many different circumstances are contemplated by the legislation. Just a few examples are:

If you die intestate leaving a spouse but no children, your entire estate goes to your spouse.

Similarly, if the net value of your estate does not exceed \$40,000 your entire estate goes to your spouse.

If you die intestate leaving a spouse and one child, the first \$40,000 goes to your spouse and the balance is divided into two parts. One of these parts is distributed to your spouse and the other part is distributed to your child.

You should consult a lawyer to obtain further information about how the Intestate Succession Act may affect your personal situation if you die without a will. You may obtain a copy of the Intestate Succession Act from either:

Queen's Printer Book Store  
Main Floor McDougall Centre

455 - 6th Street S.W.  
Calgary Alberta T2P 4E8  
or  
Queen's Printer Book Store  
11510 - Kingsway Avenue  
Edmonton, Alberta T5G 2Y5

With some restrictions, you may dispose of your property as you wish. However, if you fail to adequately provide for your spouse or dependent children they may have the right to apply to the court to change the terms of your will. The court may make an order which it determines to be fair and just in the circumstances.

### **Why Not Just a "Simple" Will?**

Lawyers are often asked to prepare a "simple" will. To most people, this means a document of one or two pages. Sometimes this may be accomplished with little difficulty. Occasionally, however, it is difficult for all of your concerns to be addressed in a short document. Every situation is different. Accordingly, your will may be longer or shorter as the circumstances dictate.

"Issue" is a term used to describe your children and their direct descendants such as grandchildren and great grandchildren. In Alberta, the term "issue" includes legally adopted children, but this may not be the case in other provinces or countries. An illegitimate child is treated as the legitimate child of his or her mother.

If you own property in joint tenancy and you die, the other person automatically becomes the property owner. Jointly held property does not form part of your estate. However, if all other joint tenants predecease you then the property does form part of your estate. Accordingly, it is still necessary for you to have a will.

Joint ownership of property may be a beneficial aspect of estate planning. It should be noted, however that while a will may be changed as often as you wish, a joint tenancy creates a legal title in the other joint owners and changes may not be so readily accomplished.

You should seek legal advice to determine whether any of your property should be placed in joint tenancy.

Life insurance is one of the many kinds of property you may own. It is an important part of estate planning. It does not take the place of a will. The prudent person will have a lawyer, a life insurance agent and, in some cases, an accountant work together on a proper estate program. Life insurance may be an important source of funds to provide for the payment of debts or taxes.

In Alberta, there are no estate taxes. Income and capital gains taxes may be payable upon your death. These taxes may often be kept to a minimum through careful tax and estate planning.

Young children will need to have an appropriate trustee and guardian if you and your spouse die. If you are an unmarried parent of a young child this concern is equally important. You may select a guardian under the terms of your will.

Any guardianship appointment must be confirmed by the court at the time the guardian wishes to act. However, in the absence of special circumstances, the court will give effect to the guardianship appointment stated in a will since it is a clear expression of the parent's desire in the matter.

## **Enduring Power of Attorney "EPA"**

An EPA is a document you sign authorizing another person to manage your legal and personal affairs. It is valid even though you lose mental capacity through a stroke or other disability. A court order is not required to make it valid. At your choice, an EPA can take effect immediately or only when you lose mental capacity. The powers associated with it are generally very comprehensive and may include the ability to transfer property out of your name. The named attorney must ensure your property is used only for your benefit or for the benefit of others you have specifically named. It is critical you exercise great care in choosing the person who will be your attorney since you are placing a great deal of power and trust in them.

## **Personal Directive "Living Will"**

Personal directives are written statements directed to your chosen agent (generally a spouse, child or trusted friend) and health care providers which state your wishes pertaining to your medical care if you become seriously ill and unable to make those decisions for yourself. The personal directive is signed at a time when you have sufficient mental capacity to make sound decisions and should be done in the presence of a lawyer. The personal directive can be shown to your health care providers and those persons would be obliged to follow the lawful wishes stated in the directive.

An EPA and a personal directive are documents which express your choices. When you do not choose, the government has put in place a program to deal with your financial and personal care. The result is significantly more expensive than the EPA and personal directive.

When an adult lacks mental capacity to make decisions regarding their financial personal affairs, the Dependent Adults Act authorizes the court to appoint a person, who is usually a relative, to become a trustee (financial) and/or a guardian (personal affairs). Once appointed, the trustee and guardian are required to apply to the court to have it review the financial and personal affairs of the dependent adult at regular intervals to ensure the finances are being properly maintained and the needs of the dependent adult are being met.

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**VERHAEGHE LAW OFFICE**  
BARRISTERS & SOLICITORS  
4902 - 48 STREET  
ATHABASCA, ALBERTA  
T9S 1B8

**Att: Richard Verhaeghe**  
**Timothy Verhaeghe**  
Ph. (780) 675-2534  
Fax: (780) 675-3161  
Email: [Richard@Athabascalaw.com](mailto:Richard@Athabascalaw.com)  
[Timothy@Athabascalaw.com](mailto:Timothy@Athabascalaw.com)

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