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A GUIDE TO THE LAW IN ALBERTA REGARDING

WILLS, PERSONAL DIRECTIVES & POWER OF ATTORNEY

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GENERAL

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IMPORTANT TERMS

Testator: the person who has prepared a will and whose estate is to be distributed under it.

Testatrix: a female testator. This term is seldom used.

Estate: all the property owned by a person, whether inside or outside of Alberta, at the time of that person's death.

Net Value: the value of the testator's estate after payment of the charges, debts, funeral expenses, administration expenses, estate tax and succession duty, if any.

Beneficiary: an individual who receives something under a will.

Executor: a person named by the testator to gather together the assets of the estate, pay all outstanding debts of the estate, and ensure that the estate is distributed in accordance with the terms of the will.

Administrator: fulfills the role of an executor but is appointed by the Court when:

- a. An executor is not named by the testator in his/her will,
- b. The named executor cannot serve his/her duties as an executor, or
- c. No will exists.

Intestate: a person who dies without disposing of his or her property in a will. When one dies completely intestate he/she has not disposed of *any* of his/her property through a will. In this situation the property will be dispensed in accordance with the *Intestate Succession Act*. Incomplete Intestacy is when one dies having disposed only a *portion* of his/her property through a will. In this situation the property will be dispensed in accordance with

the will and what is left over will be dispensed in accordance with the *Intestate Succession Act*.

Adult Interdependent Partners (AIP) and Adult

Interdependent Relationships (AIR): The Alberta government has altered the definition of what has historically been called a "common law" relationship. The new term that is used in Alberta is Adult Interdependent Partner. There are three ways in which you can become an Adult Interdependent Partner with another person, regardless of gender:

- a. Live with that person in a "relationship of interdependence" for at least three years continuously;
- b. Live with that person in a "relationship of interdependence" that is of some permanence and where there is a child by birth or adoption; or
- c. Make an adult interdependent partner agreement with the other person.

A "relationship of interdependence" occurs when two people:

- a. Share in one another's lives;
- b. Are emotionally committed to one another; and
- c. Function as an economic and domestic unit.

Dependants: anyone who relies on the testator/intestate for support. Dependants include:

- a. A child of the testator or intestate under the age of 18;
- b. A child of any age who is unable to earn a livelihood by reason of mental or physical disability;
- c. A spouse; or
- d. An Adult Interdependent Partner.

Minor: In Alberta, a minor is anyone under 18 years of age.

Simultaneous Death: Two or more deaths that occur at the same time, or in circumstances rendering it uncertain as to which person(s) died first. When making a will it is important to

contemplate what will happen if the testator dies at the same time as his/her beneficiary, as a beneficiary must survive the testator to receive the gift. In the event that simultaneous death occurs without provision being made for that event, Courts will presume that the older person died first.

WHAT IS A WILL?

A will is one or more written legal document(s) that determines how a testator's property will be divided when the testator dies. All wills must be in writing and must follow the formal requirements specified in the *Wills Act* to be valid.

A will is important because it can ensure that your property will pass to those you want it to pass to after your death. Any property that is not dealt with in your will, will be distributed in accordance with the *Intestate Succession Act* (See the section *Dying Without a Will* for more information).

There are a few interests that can override a person's will. Provisions in the *Dependants Relief Act* can allow a Court to alter a person's will to provide for the proper care and support of dependants (See the section *Applications for Adequate Provisions* for more information). Also, creditors (people that a testator owes money to) are paid off before any beneficiary receives a gift from a will. So, if an estate has substantial debt, gifts under the will can be impacted.

There are three (3) types of wills:

1. Formal Wills;
2. Holographic Wills; and
3. Soldiers' or Mariners' Wills.

FORMAL WILLS

To be sure that formal wills comply with all the requirements of the *Wills Act*, they are generally written by lawyers. The formalities are:

1. The will must be signed. Either the testator, or someone on behalf of the testator, and in the presence of the testator must sign the will;
2. The testator's signature must be positioned so that it is clear that the signature applies to all of the writing in the will. Therefore, it is usually at or near the end of the document.
 - a. A signature will not give effect to provisions made underneath the signature or that were added to the document at some later time.
3. A formal will must have two witnesses to be valid. Witnesses can either:
 - a. Be present and watch the testator sign his/her will; or
 - b. The testator can sign his/her will alone, and then later tell his/her witnesses that he/she has signed the will. However, the witnesses must be told in the presence of each other that the testator signed the will.
 - c. The witnesses must sign the will in the presence of the testator, though it is not a requirement that they be in each other's presence when signing.

These formalities serve as a safeguard against forgery and impersonation or coercion, to establish that the testator meant to make a will, and to reinforce the seriousness and importance of the making of a will. A will that does not comply with these formalities will be declared invalid.

HOLOGRAPH WILLS

A holograph will is made entirely in the handwriting of the testator and is signed by him/her. No witnesses are required. Because

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they are informal, holograph wills are often incomplete. However, holograph wills will be valid if they show:

- a. A testamentary intention. This means that the will must show that the gifts in it take effect only when the testator dies;
- b. A clear intention to make the gift. So, it is best to use explicit phrasing like: "I bequeath when I die..."

There are some problems associated with holograph wills:

- a. They often fail to distribute the entire estate because it is difficult to think of all possible situations
- b. They can be difficult for the Courts to interpret, because the testator does not have enough legal knowledge to make his/her intentions clear enough for a Court to understand the will.

Holograph wills are often appropriate in emergencies when people do not have time to create a formal will.

SOLDIERS' OR MARINERS' WILLS

Mariners or members of the Canadian Armed Forces may make a will by a written document signed by him/her or by someone on his/her behalf. The formal requirements are:

1. Either the testator, or an agent of the testator, must sign the will.
 - a. If a person signs on the testator's behalf the person must be in the presence of the testator and do so at the direction of the testator.
2. The testator must be on active duty at the time the will is created.
 - a. To prove one is on active duty, Courts may obtain a certificate signed by the officer who has the records of the person at the time the will was made. The document must state that the person was in active service at the time the will was made.

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No witnesses are required to create this type of will.

MUTUAL OR JOINT WILLS

Mutual wills require two or more people to agree to make a certain will. Usually, a mutual will is a mirror-image will. Each party creates a will that is exactly the same as the will of the other party, and each party leaves everything in their estate to the surviving member. Normally, the survivor is free to dispose of the property acquired after the other's death however they see fit.

In order to have a valid mutual will, all parties involved must mean, or intend, to create a mutual will. They must agree to make wills that dispose of their mutual assets in the same way, and agree not to revoke them if there are any changes in detail. However, the promise not to revoke is often viewed by the Courts as not being absolutely binding. If reasonable notice is given to the other party, Courts will usually accept that revocation.

Joint wills are similar to mutual wills. The major difference is that in a joint will each party signs the same will. By signing the document both parties demonstrate their intention to be bound by the will and their intention to not revoke. To revoke a joint will you need to give reasonable notice to the other party. The main difference between a mutual will and a joint will is that a joint will cannot be changed by the surviving testator following the death of one of the joint testators.

The major problem with both mutual and joint wills is that it is very difficult to make sure all parties involved are able to have their wishes put into the will. It is usually easier to draft your own separate will to ensure that your interests are looked out for.

APPLICATION FOR ADEQUATE PROVISIONS

If a testator has not made adequate provisions for proper care and support for his/her dependants, the dependants can make an application under the *Dependants Relief Act*.

Proper maintenance and support is determined by considering all the circumstances of a particular applicant, including:

- a. The size of the estate;
- b. If there are other dependants;
- c. The age and state of health of the applicants;
- d. The station in life of the parties;
- e. The character of the applicant (if a spouse) and the testator;
- f. The likelihood that the need for support will increase in the future;
- g. The likelihood that inflation will increase;
- h. The applicant's other sources of income;
- i. The cost of living; and/or
- j. The quality of life that the applicant would have been accustomed to had the testator honoured his/her moral duty to provide for the applicant

THE MATRIMONIAL HOME

Under the *Dower Act*, a spouse is entitled to certain parts of the testator's estate, regardless of what is stated in the will. The matrimonial home is any home in which either spouse has lived since the marriage. In some cases, the home is entirely owned by one of the spouses. If the matrimonial home is entirely in the testator's name, the spouse is entitled to a life estate in that home for his/her life. This means that once the surviving spouse passes away, the estate will go back to the beneficiary that the testator originally named in the will. This is called a 'life estate'. The surviving spouse must choose only one home if the testator owned more than one.

The life estate that the spouse inherits under the *Dower Act* creates certain rights and obligations for the surviving spouse. The surviving spouse is entitled to live in the home for the rest of his/her life, and is generally only responsible for ordinary recurring expenses (water, heat, taxes, home insurance, lawn care, etc). This means that the person who will take possession of the home following the surviving spouse's death is generally responsible for the other expenses (i.e. a major roof repair).

For example, if John and Jane were married and lived in a house together, that house is the matrimonial home. Even if John left the house to his son Jack, when John passes away, Jane will still be allowed to live in the matrimonial home and would only have to pay ordinary recurring expenses. Jack will have to pay any other expenses. Once Jane passes away, Jack will own the home and be able to do whatever he wants with it. If John and Jane split their time between 2 houses and both were left to Jack, Jane can only choose to live in one of those houses.

ALTERING A WILL

It is possible to alter, or change, a will. A will can be altered by:

- a. Following the same formalities that are required to create a will;
 - i. Alterations to formal wills require two signed witnesses.
 - ii. Alterations to holograph wills require the testator to have hand written the alteration and signed the document.
 - iii. Alterations to a soldier's or mariner's will requires the testator or a person acting in the presence and direction of the testator to sign the alteration.
- b. Physically changing the appearance of the document itself; an alteration is successful if a Court cannot determine what the will said previously.

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- i. For example, a testator could physically cut out a person's name from the will.
- c. Legislation:
 - i. In certain situations a testator is required to leave part of his/her estate to dependants (see the section on *Application for Adequate Provisions*).

If a testator becomes separated, divorced, has children, changes his or her financial situation, or experiences a death in the family, he/she should review their will.

A will that has been altered or revoked may be returned to its original state by drafting a separate document called a *codicil*. The *codicil* must make clear that its purpose is to revive a prior will. It should be noted that a *codicil* does not need to be in the same format as the will. This means that, for example, someone can draft a holograph *codicil* for a formal will.

REVOKING A WILL

A will can be revoked at any time. A testator can revoke a will so long as it is done voluntarily and with the intention to revoke. A testator can demonstrate this intention by:

- a. Making a written declaration of his/her intention to revoke a will (a *codicil*);
 - i. This declaration must follow the same formalities as those required to create a will.
 - ii. When two or more wills are created by a testator and there is conflict between them, the newer document will rule over the older one.
- b. Performing an act of destruction demonstrating his/her intention to revoke the will.
- c. This includes burning, tearing, or shredding the will.
- d. The testator must both fully destroy the will and clearly intend to revoke it.

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(Also note the special provisions for revoking a mutual or joint will discussed above)

A will is revoked automatically:

- a. Upon marriage;
 - i. Unless there is a formal statement that the will is being made in contemplation of that marriage.
- b. Upon entering into an adult interdependent relationship agreement.
 - i. Unless there is a formal declaration that the will is to remain in effect even after entering into an adult interdependent relationship.

Note: People can also enter into an adult interdependent relationship by living with another person for 3 years or by having a child together, but these types of adult interdependent relationships do not automatically revoke a will.

Divorce not does automatically revoke a will.

GENERAL ISSUES

1. The Testator

A testator must have the mental capacity to make a will. This means the testator must understand:

- a. What a will is;
- b. That he/she is making a will;
- c. What property he/she has to dispose of;
- d. The identity of people who have claims to the estate; and
- e. The ability to consider the relationships of these elements.

2. Witnesses

Beneficiaries and their spouses should not be witnesses to the will. Beneficiaries can either be specifically named in a will or become identifiable by the time of execution of a will. For example, a will could say, "I leave everything to my son, John."

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John is a specifically named beneficiary and should not be a witness to the will.

However, if only two (2) witnesses are required and a beneficiary signs the will as a third witness, his or her gift is still valid. Where no witnesses are required, as for holograph and soldier's wills, a beneficiary may sign as a witness.

A will is not invalidated because one of the witnesses was, or has since become, incompetent.

3. Minors

Generally, minors do not need a will. A will created by a minor will only be valid if the minor was or had been married, or if the minor was a member of the Canadian Forces or was a Mariner. Unmarried minors with children can only name their children as beneficiaries in a will.

4. Informing Others About Your Will

Ensure that people know you have written a will, and that you have told people where the will is located. This will help to make sure that your intentions are followed after your death. Your will should be stored in a safe location because if the will is lost or destroyed then it cannot be used to distribute your property, and the *Intestate Succession Act* will be used instead.

It is important to let people know what property you have in your estate. It is a good idea to keep a list of your property (including debts) with your will to make sure that all your property is found and disbursed.

DYING WITHOUT A WILL

A person who dies without a will dies intestate. In Alberta, an intestate's estate is distributed according to the *Intestate Succession Act*. Under this Act, if a person dies:

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- a. With a surviving spouse or Adult Interdependent Partner but no children the entire estate passes to the surviving spouse;
- b. With both a spouse and an Adult Interdependent Partner then the estate will pass to the person that the intestate was last living with;
- c. With a surviving spouse and surviving children:
- d. If the total estate is worth less than \$40,000 the surviving spouse will take the entire estate;
- e. If the total estate is worth more than \$40,000 the surviving spouse will take the first \$40,000 and the rest of the estate will be split in equal shares among the intestate's surviving spouse and surviving children.
- f. Without a surviving spouse or surviving children:
- g. The entire estate will pass to the person's parent(s).
- h. If no parents are still alive, the entire estate will be split evenly amongst the person's surviving siblings.
- i. If there are no living siblings, then the person's nieces and nephews will evenly split the entire estate.
- j. If there are no nieces or nephews, then the estate is left to the nearest ascertainable relative.
- k. If an ascertainable relative cannot be found within 2 years then the estate will pass to the Crown of Alberta.

If the above provisions are an acceptable way for your property to be divided after your death you do not need to write a will. However, the *Intestate Succession Act* does not give you the control that a will gives you, nor does it adapt to changing circumstances like a will can.

PERSONAL DIRECTIVES (LIVING WILLS)

1. What is a Personal Directive?

A personal directive is a written document that gives authority to a person to make non-financial decisions on behalf of another person (i.e. decisions regarding the health and medical treatment

of the maker). These are usually created in contemplation of death or when quality of life is greatly lessened.

Personal directives are like wills, but are designed to take effect when the person making the personal directive becomes incapable of making certain personal decisions.

A personal directive may include information and instructions on personal matters like who will act as the maker's agent and make decisions on his/her behalf, who will determine his/her capacity, who is to be notified that the personal directive has come into effect, and who may access confidential information about the maker. A personal directive can give a person authority to make all decisions, excluding financial decisions, on behalf of another.

2. Formalities

To be valid, a personal directive must be in writing, be dated, and be signed at the end by the maker in the presence of one witness, or signed by someone else on behalf of the maker if the maker cannot sign in the presence of a witness. Witnesses to the signing cannot include the designated agent, the agent's spouse, the maker's spouse, or the person signing on behalf of the maker or that person's spouse.

3. Capacity

Personal directives come into effect when the maker lacks the capacity to make a decision. The testator chooses who will determine capacity in the personal directive. If no person is named, two (2) service providers (at least one of which is a physician or psychologist) can provide a written declaration that the maker has lost capacity. A personal directive no longer has effect when the maker regains capacity or passes away.

4. Agents

Agents must be over 18 years of age and have the capacity to make personal decisions on behalf of the maker. A personal

directive may name any number of agents. If two (2) agents cannot agree, the decision of the first named agent will prevail. If there are more than two (2) agents, the majority will prevail.

According to the *Personal Directives Act*, an agent's decision has the same effect as if the maker had made the decision him/herself. However, agents cannot make decisions about:

- a. Psychosurgery (defined in the *Mental Health Act*);
- b. Medically unnecessary sterilization;
- c. Removal of tissue from the maker's body for transplant or research; or
- d. Participation by the maker in research that offers little or no potential benefit to the maker,

Unless the agent has been given explicit authority in the personal directive to make such decisions.

Agents must follow the instructions of the personal directive and, if possible, consult the maker. If the personal directive contains no relevant instructions, the agent must make the decisions that he/she believes the maker would make in that situation based on the maker's wishes, beliefs, and values. If the maker's beliefs are not known, the agent must make the decisions that are in the best interests of the maker.

An agent is not liable for any action or omission that is performed in good faith. Actions performed in good faith cannot affect the agent's entitlement to a gift under the maker's will or the proceeds of the maker's life insurance policy.

5. Revoking a Personal Directive

A personal directive may be revoked by:

- a. Its expiry date,
- b. Being replaced by a newer personal directive, or
- c. The express intention of the maker.

POWER OF ATTORNEY

Power of attorney is a legal document that gives one person the power to make financial decisions on someone else's behalf. Any competent adult or financial institution can be appointed power of attorney.

A properly drafted power of attorney must:

- a. Be in writing,
- b. Be dated,
- c. Be signed by the donor in the presence of a witness, and
- d. Be signed by witness in the presence of the donor

A donor can revoke or alter his/her power of attorney in writing. However, in order to alter the document the donor must have capacity to make the changes, and the abovementioned formalities must be followed.

Although it is possible to create a power of attorney without the help of a lawyer, it is highly recommended that you retain a lawyer when creating one.

REFERRAL NUMBERS

Legal Services Center. [780] 427-7575
This service is a program of Legal Aid Alberta that provides free legal information, referrals, and advice to Albertans over the phone (based on falling within certain income guidelines).

Lawyer Referral Services (toll free). 1-800-661-1095
www.lawsocietyalberta.com/publicservices/lawyerReferralService.cfm
This service provides the names of three lawyers and the caller is entitled to a ½ hour session with each.

Student Legal Services of Edmonton. [780] 492-2226
Civil/Family Project. [780] 492-8244
www.slsedmonton.com
Please note that Student Legal Services cannot help people create a will.

Oak Net
www.oak-net.org
This website provides information for older adults.

Canadian Legal FAQs
www.law-faqs.org
This website provides information on a number of legal topics.

CanLII
www.canlii.org
This website displays Canadian Legislation and Cases.