

## Do You Need a Will?

The week of April 23<sup>rd</sup>-27<sup>th</sup>, 2007, is “*Will Week – Estate Planning for your Future*”. It is the community based initiative of **The Winnipeg Foundation**, in partnership with **The Manitoba Bar Association** and the office of the **Public Trustee**, where members of The Manitoba Bar generously donate their time and expertise to present estate planning information sessions as a public service. This article is as a result of **Pullan Kammerloch Frohlinger’s** participation in this event.

Intuitively, most people know they need a Will, but actually making one never gets to the top of the “to do” list.

A common response of procrastinators is they have nothing of real value to leave behind. Nonetheless, most people are surprised by the potential value of their estates, especially after life insurance policies are considered. In addition, some assets have sentimental value to certain family members and may not have a high monetary value. Anything of “value” can be disputed if a proper Will is not in place.

Basically, a Will is a written document that controls the disposal of a person’s property after death and takes effect or “speaks” at the moment of death. A properly prepared Will allows for the proper distribution of an estate according to the wishes of the deceased, with the least possible expense and delay.

Why you should have a Will:

- Costs – If a person dies without a Will, the Court will require the appointment of an administrator to settle the estate and file a bond. Who will volunteer? Will the other relatives agree? Will the bond be subject to a costly surety? Settling these questions takes time and adds cost;
- Estate planning – A Will can help maximize benefits to the estate by possibly deferring capital gains and keeping tax obligations at a minimum. A Will can also provide orderly succession of ownership and control specific assets such as houses and cottages and ensure the smooth transition of a family business to the next generation;
- Property distribution – If a person dies without a Will, his/her estate will be distributed according to inflexible provisions of Provincial legislation with no consideration for the likes and dislikes of the deceased and no trust provisions for minors or handicapped loved ones;
- Trusts – They can be established through a Will to benefit minors or a persons under disability or allow income splitting with a surviving spouse or child;
- Guardianship of children – A Will provides a way for a person to clearly state their intention concerning guardianship of minor children;
- Loved ones – A Will makes things easier for surviving friends and family members who are already suffering emotionally, simply because there are less decisions to make.

Although the aforementioned are more than sufficient grounds to justify making a will, there is relatively new Provincial legislation dealing with common-law partners that bears consideration.

*The Common-Law Partners Property and Related Amendments Act* came into effect in Manitoba on June 30, 2004, creating new categories of spouse and common law partners including same sex relationships.

This new legislation also created a fallback system, so that people living in conjugal relationships become common-law partners automatically after they have lived together for a certain period of time, even if they do not register their relationship. The mere passage of time can create a whole host of duties and obligations to persons in such relationships.

The time period to qualify for spousal or common-law rights and benefits depends on which statute one looks at (i.e. Pension rights kick in at a different time than spousal support rights) but 3 years co-habitation triggers the most rights and obligations. If you poll most Manitobans, they would guess incorrectly that most spousal or common-law rights and obligations kick in after a period of less than 3 years.

This new legislation has also created a complex system of who might be a spouse or common-law partner in any given situation and how long the partners have to be together. To make matters even more confusing, the legislation permits a common-law relationship to exist even if the parties are not in a sexually intimate relationship. This is bound to wind up in the courts for interpretation sooner rather than later, but has created more than a bit of uncertainty for many couples and singles with a failed relationship in their personal history.

As an example as to how this new legislation makes things more complicated, consider this:

“Albert” is a married male and separates but never divorces his wife Sally. Albert then goes and registers a same-sex relationship with Fred. That relationship breaks up, but Albert does not terminate or deregister the relationship. Albert then moves in with Cindy and they live together for 3 years before Albert dies. Under today’s law, Albert has three spouses, Sally, Fred and Cindy and all three of them have claims against Albert’s estate as legal spouses at the same time! You can see why Albert needs legal advice to prepare his estate plan and complete his will.

The only way to avoid uncertainty and the delays and costs that go with it are to have a clear Will that deals with the whole host of legal issues that arise on a person’s death. A lawyer will assist in clarifying issues and draft the Will to avoid the possibility of explosive and costly developments from arising after the maker of the Will dies.

“Do you need a Will?”, the answer is a simple but resounding, “Yes”.

*This article was prepared by Herbert H. Rempel, Gary Sarcida and Allan Horn. It was published in the April 2007 edition of “On Broadway”*

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