

Please click on our website address below to visit the Turning Point Law Website:

<http://www.turningpointlaw.ca>

WILLS INFORMATION PACKAGE

TABLE OF CONTENTS

CHAPTER 1: GENERAL INFORMATION ABOUT WILLS	3
What is the difference between a Will, Power of Attorney and Personal Directive?	3
Why should I make a Will?	3
What if I do not make a Will?	4
Can I avoid making a Will?	4
When should I review my Will?	5
CHAPTER 2: THE ESTATE	6
What is included in my Estate?	6
What is not included in my Estate?	6
What happens to my Life Insurance?	7
What will happen to my RRSPs and RRIFs?	7
CHAPTER 3: PERSONAL REPRESENTATIVES	8
What is a Personal Representative?	8
Who should I appoint as my Personal Representative?	8
What qualities should my Personal Representative have?	8
What responsibilities does my Personal Representative have?	8
What if my Personal Representative dies, resigns or is unable (unwilling) to act?	9
CHAPTER 4: GIFTS	10
What is the difference between a Gift, a Bequest and a Legacy?	10
What is required for a Gift to be Valid?	10
What are the different kinds of Gifts?	10
What are Priority Over Gifts?	10
When do the Gifts in my Will become Effective?	10
What if I make a Gift of something I no longer own when I pass away?	11
What if a Beneficiary of a gift dies before I do?	11
What if there are not enough assets in my Estate to cover everything?	11
What are the priorities among claims on my Estate?	11
What is the difference between a <i>Per Capita</i> and a <i>Per Stirpes</i> distribution?	12

CHAPTER 5: DIVISION AND DISTRIBUTION OF ASSETS	14
What types of Wills are there?	14
What are Mirror Wills?.....	14
When should my Estate be divided?.....	14
When should my Estate be distributed to my beneficiaries?.....	15
CHAPTER 6: TAX ISSUES.....	16
What are the tax consequences of dying?	16
What is the benefit of a transfer to a Spouse or a Spousal Trust?.....	16
What is the Qualified Small Business Exemption?	17
What benefits are there for Farm Property?.....	17
What is an Estate freeze?	18
How does a Universal Life Insurance Policy work?	18
CHAPTER 7: GUARDIANSHIP	19
Who will care for my children?	19
How will my children be supported?.....	19
What about Complex Families? (My Kids, Your Kids, Our Kids)	19
CHAPTER 8: TRUSTS	20
What is a trust?	20
When should I set up a trust?	20
CHAPTER 9: MISCELLANEOUS.....	21
How does Living Common Law affect my Will?	21
How does Marriage affect my Will?.....	21
How does an Adult Interdependent Partnership affect my Will?	21
How does Separation and Divorce affect my Will?	21
How do Agreements affect my Will?	22
What is the Dependants Relief Act?	22
How does “Dower” effect my Estate?.....	23
What is an “ultimate disposition” or “family disaster” clause?	24
Does a Will have to be in writing?	24
Does a Will have to be signed?.....	24
What are the signing formalities for a Will?	24
What is a Holograph Will?.....	25
What is an International Will?.....	25
What if I change my mind?.....	25
Does my Will have to be followed?	26
How does the <i>Matrimonial Property Act</i> affect my Will?	26
How does the <i>Trustee Act</i> affect my Will?	26
CHAPTER 10: GLOSSARY.....	27

CHAPTER 1 : GENERAL INFORMATION ABOUT WILLS

What is the difference between a Will, Power of Attorney and Personal Directive?

A **Will** (or “Last Will and Testament”) is a document in which you state how you want your Estate to be distributed after you pass away. In your Will you appoint a Personal Representative (used to be called the executor or executrix) to oversee the administration of your Estate and outline how you want your property distributed. If you have minor children, you can appoint a Guardian and make arrangements for their care.

An **Enduring Power of Attorney** is a document in which you appoint an “Attorney” and give them the power to make decisions relating to your financial matters while you are alive. An Enduring Power of Attorney can come into effect immediately or when you lose the capacity to make your own decisions (e.g., accident, Alzheimer’s, etc). Your Attorney can be any person you choose and does not have to be a lawyer.

A **Personal Directive** is a document that states, in plain language, your views and wishes about the personal care you would like to receive when you are unable to speak for yourself. In this document you give your “Agent” the legal authority to make decisions on your behalf about such matters as health care, where you live, who can visit you, and other personal care issues. A Personal Directive can also include a Living Will.

Why should I make a Will?

By making a Will, you can:

- Dispose of your Estate as you choose (within limits)
- Give items of special significance to specific beneficiaries
- Provide for a common law spouse, step-children and the children of a common law relationship
- Make special provisions for a disabled child
- Choose your Personal Representative
- Select your children's Guardians and set aside money for your children’s care, maintenance and education
- Delay distribution of your Estate until your beneficiaries attain an age you think is appropriate
- Allow for flexibility in the administration of your Estate
- In many cases, reduce the cost of administering your Estate
- In many cases, reduce taxes
- In many cases, simplify the administration of your Estate

What if I do not make a Will?

If you don't make a Will, the Alberta *Intestate Succession Act* determines how your Estate is administered and distributed. This means that you will not have a say in who receives your property. Under this legislation:

- The person entitled to administer your Estate is decided under the Surrogate Court Rules.
- An application to Surrogate Court must be made to appoint a Personal Representative. This application can be both expensive and time consuming, and it can delay the commencement of the administration of your Estate.
- It is likely that your Estate will have to pay an administrator's bond.
- Your Estate will be divided between your spouse and children in predefined shares and you will not be able to provide gifts for friends, relatives or grandchildren.¹
- Only your spouse and children will receive any benefits from your Estate. If you are separated but not divorced or if you are living "common law," your dependents may end up receiving nothing from your Estate unless they make an application to Court.
- The shares of your minor children will be held by the Public Trustee and turned over to them in a single lump sum when they reach 18 (minus the Public Trustee's fee for administering the funds) regardless of how mature they are.
- You lose an opportunity for tax planning.
- If you do not have any known heirs, your property will go to the government.

The three major problems created by dying Intestate are therefore:

1. Cost
2. Delay
3. Lack of Control

In our experience, no one chooses the Alberta *Intestate Succession Act* as their Estate Plan once it has been explained to them.

Can I avoid making a Will?

Some couples put everything in joint ownership and name each other as the beneficiaries of all their life insurance, RRSP'S, etc. instead of making a Will. This may not be good Estate Planning for a number of reasons:

- You lose an opportunity for tax planning
- You have no control over gifts or the administration of your Estate.
- If you and your spouse pass away at the same time, there will be no record of your wishes.
- If you and your spouse pass away at the same time and you do not have any children, then all of the assets of both you and your spouse will go to one of your families as determined by the *Intestate Succession Act*.

¹ The shares depend on the number of children you have.

- If you and your spouse pass away at the same time and you have minor children, your money will be held by the Public Trustee and turned over to your children in a single lump sum when they reach 18 (minus the Public Trustee's fee for administration of the funds) regardless of how mature they are.
- The Alberta *Intestate Succession Act* and the Alberta *Dependents Relief Act* may cause major problems if you have children from a prior relationship.
- There are some things that can't be put in joint ownership.
- Converting everything to joint names will likely take more time and cost more than making a Will.
- If you place property in joint names with your children, your property may be subject to claims by your children's creditors.
- If you place your house in joint names with your children, your use of your property is subject to the agreement of your children.
- If you place your house in joint names with your children, your children may not be able to claim the "principal residence capital gains exemption" on your residence and therefore may have to pay capital gains tax on their interest in your residence when you pass away.

When should I review my Will?

You should review your Will at least once a year to make sure it still represents your wishes. In addition to such regular reviews, you should review your Will at the following "Turning Points":

1. You have another child or you adopt a child
2. Your youngest child becomes an adult
3. You separate, divorce or remarry
4. A beneficiary or Personal Representative dies
5. You come into a large sum of money or other valuable property (such as an inheritance or a lottery win)
6. Tax laws change in a way that may effect you
7. You acquire property outside Alberta
8. You establish or buy into a business (if you go into business with somebody else, you will also need a partnership agreement or a shareholders' agreement)
9. You have recently arrived in Alberta
10. You leave Alberta to reside elsewhere
11. Any other Turning Point in your life

CHAPTER 2: THE ESTATE

What is included in my Estate?

Your Estate includes everything you own that can be dealt with in your Will. Most items fall into one of the following categories:

1. Real Estate (includes real estate you own in your own name and real estate you own “as tenants in common” with someone else, but not real estate you own “as joint tenants”)
2. Mineral rights (including freehold minerals, leases, royalties, etc.)
3. Chattels (including all items of tangible personal property, such as furniture, appliances, coin and stamp collections, crockery, silverware, trophies, art, tools, clothes, vehicles, mobile homes, computers, books, decorations, jewellery, etc.)
4. Cash
5. Accounts in banks, credit unions, trust companies or treasury branches (but not joint accounts with survivorship)
6. Money owed to you (including personal loans and business accounts receivable, promissory notes, mortgages and debentures)
7. Assets of unincorporated businesses (including the receivables, inventory, capital assets, goodwill, etc.)
8. Interests in Partnerships
9. Investments (including stocks, bonds, warrants, options, mutual funds, futures, limited partnership interests, joint venture shares, drilling funds units, trust units, bullion, term deposits, guaranteed investment certificates, treasury bills, etc.)
10. Pension fund refunds
11. RRSPs, RRIFs and RESPs
12. Intellectual property (including patents, copyrights, industrial designs, software, etc.)
13. The right to bring certain kinds of lawsuits
14. Life insurance payable to your Estate
15. Benefits from reward programs (including Air Miles)

What is not included in my Estate?

There are several types of property which do not become part of your Estate and cannot be dealt with in your Will:

1. Joint Property: Upon the death of a person who owns property jointly, the property passes directly to the surviving joint owner(s) and does not become part of the Estate of the deceased joint owner. It cannot be dealt with in the Will of the deceased joint owner, and it eventually passes to the last joint owner.
2. Life Interest: Property in which a person has a life interest goes directly to the person or persons entitled to the remainder interest under the document that created the life interest.

3. Dower: If a married couple does not have both names on the title to their home, the Alberta *Dower Act* gives the spouse whose name is not on the title the right to stay for life in the family "homestead" (the house owned and occupied while the couple was married).
4. Life insurance: Life insurance proceeds go to the designated beneficiary, unless the beneficiary is dead or the owner of the policy uses his or her Will to change the beneficiary.
5. Property held in trust: If you place property in trust, it must be administered according to your instructions. It can be included in a beneficiary's Estate, but the trust instrument usually dictates that other individuals receive the benefit of the property.

What happens to my Life Insurance?

In many cases, life insurance is not affected by a Will. If you designate a beneficiary by filing a "designation of beneficiary" form with the insurance company and the beneficiary is alive when you die, the insurance money is paid directly to the beneficiary. The policy proceeds are therefore exempt from being seized by your creditors to satisfy your debts, and it is not available to pay your taxes.

If the beneficiary you designate in your policy dies before you (or in circumstances that make it impossible to tell who died first) and there is no alternate beneficiary named, then the insurance money goes to the owner of the policy (i.e., the person who took the policy out and paid the premiums). If the owner is dead, the money goes to the owner's Estate and is no longer exempt from being seized by your creditors to satisfy your debts.

If your designation of beneficiary form names your Estate as the beneficiary of the insurance, the insurance money goes into your Estate and can be used to satisfy your debts.

Within certain limits, you can change the beneficiaries of your insurance policy in your Will.

What will happen to my RRSPs and RRIFs?

Your RRSP and RRIF is part of your Estate and can be dealt with in your Will. However, unlike other property, you can also designate a beneficiary of your RRSP and RRIF by filling in a "designation of beneficiary form" with the financial institution that holds the RRSP or RRIF. RRSPs and RRIFs are therefore an exception to the normal rule that a Will is the only document that you can use to pass property upon death.

The traditional view of the Courts in Alberta has been that RRSPs and RRIFs are not protected from the claims of creditors of the Estate unless they are invested in a creditor-proof product purchased from a life insurance company. However, the Ontario Court of Appeal has ruled that RRSP proceeds with a valid designation of beneficiary do not form part of the deceased's Estate and they are therefore immune from creditors.² This case is not binding on Alberta Courts but it is persuasive. Accordingly, while it is likely that RRSPs with a valid designation of beneficiary are protected from creditors, it has not been established in law.

² *Amherst Crane Rentals Limited v. Arlene Clare Perring*, [Ontario Court of Appeal Docket # C38627, June 16, 2004].

CHAPTER 3: PERSONAL REPRESENTATIVES

What is a Personal Representative?

Your Personal Representative is

- The person named in your Will to administer your Estate (formerly referred to as the Executor or Executrix)
- The person named in your Will to administer any trusts created by your Will (formerly referred to as the Trustee)
- The person named by the Court to administer your Estate in the case of an intestacy

If a Will provides that part or all of the Estate is to be held in trust for a period of time, the trusts are usually administered by the Personal Representative acting as your trustee.

You can change your Will and substitute a different Personal Representative at any time.

Who should I appoint as my Personal Representative?

Most Estates can be handled by a lay person with the assistance of a lawyer, so most people appoint their spouse, one or more children, a relative, a friend or their solicitor as their Personal Representative.

Many married couples have Mirror Wills. In a Mirror Wills each spouse appoints the other spouse as the primary Personal Representative. For further information about Mirror Wills, please see chapter 5 of this Information Package.

If an Estate is large or complicated, or if there are family tensions, a trust company, by itself or with one or more individuals, may be an appropriate Personal Representative.

If there is no other choice, the Public Trustee may be appointed.

What qualities should my Personal Representative have?

No matter who you choose, your Personal Representative should be:

- Willing to do the job and able to put sufficient time and effort into it
- Intelligent enough to do the job
- Free from conflict of interest (as much as possible)
- Able to resist undue influence
- Aware of your goals and desires for your children
- Capable of accounting for all transactions carried out in the administration of the Estate
- Most importantly, trustworthy

What responsibilities does my Personal Representative have?

Your Personal Representative has the legal authority to deal with your Estate according to the instructions contained in your Will. Your Personal Representative's first duty will be to see to your funeral arrangements. Wills are often not read until after your funeral has taken place, so your funeral instructions should be given to your Personal Representative verbally or put into a letter to be opened right after you die. The rest of the Personal Representative's duties relate to your property and your children (especially if they are minors).

Your Personal Representative must:

- Locate your Will and be satisfied that it is your last Will
- Determine what and where your assets are, make an inventory and take control of any assets that are at risk of being dissipated
- If your family needs money, arrange for assistance while the Estate is being settled
- Apply to the Surrogate Court for probate of your Will
- Apply for any pension or insurance benefits payable to your Estate
- Liquidate your Estate as necessary to carry out your obligations and wishes
- Advertise for creditors and pay debts
- File final tax returns and pay outstanding taxes
- Divide your Estate according to your wishes as expressed in your Will
- Set aside the shares to be held in trust, invest the capital, collect the income and make payments out of the capital and/or the income in accordance with your Will
- Distribute your Estate according to your Will, either immediately, or when the beneficiaries of the trusts attain the ages set out in your Will
- Obtain releases from beneficiaries
- If required, prepare the accounts of the Estate and present them to the Surrogate Court for approval

If a Personal Representative cannot resolve a problem in the administration of an Estate, they can make an application to the court for advice and directions. However, the court will not substitute its decision for that of the Personal Representative where the Will specifically requires that the Personal Representative make the decision.

Personal Representatives are entitled to a fee for the time and effort involved in administering the Estate and to compensate them for all reasonable expenses.

Personal Representatives must keep records of the administration of the Estate so an accounting can be made to the beneficiaries and to the court. Personal Representatives are fiduciaries and if they fail to carry out their duties properly they can be held personally liable for any losses suffered by the Estate.

What if my Personal Representative dies, resigns or is unable (unwilling) to act?

If your Personal Representative dies, resigns or is unable or unwilling to act or continue as Personal Representative, what happens next depends on the wording of your Will.

- If your Will names an alternative Personal Representative, then person named will be entitled to become your Personal Representative.
- If your Will gives your Personal Representative the power to choose a successor, the person they choose will be entitled to become your Personal Representative.
- If your Will does not provide for either of the above alternatives, and your Personal Representative dies with a Will, the Personal Representative named in your Personal Representative's Will can become your Personal Representative.
- If none of the above applies, or if the alternate is unable or unwilling to apply to become your Personal Representative, the Surrogate Rules allow someone with an interest in your Estate to apply to the court to be authorized to commence or complete the administration of your Estate.

CHAPTER 4: GIFTS

What is the difference between a Gift, a Bequest and a Legacy?

There really is no difference between gifts, bequests and legacies. Each of these terms has been used by lawyers over the years to designate dispositions of property in Wills. The technical distinctions between these terms have diminished in importance over time and we now use the generic term 'gift' to cover all dispositions in a Will.

What is required for a Gift to be Valid?

A valid gift must identify:

1. The thing given
2. The person or group to whom it is given
3. The amounts, shares or proportions of the gift
4. Any conditions on the gift
5. When the gift is to be delivered
6. If the gift is not to be delivered right away, what is to be done with it in the meantime

What are the different kinds of Gifts?

There are three kinds of gifts in Wills:

- **Specific gifts** are gifts of specific items (i.e., I give my five diamond ring to my daughter, Rose).
- **General gifts** are gifts that come from your general estate (i.e., I give \$10,000.00 to my son, John).
- **Residual gifts** are gifts of what is left after everything else has been taken care of (i.e., I give all the rest of my Estate to children in equal shares).

Generally speaking, specific gifts have first priority and are provided first, general gifts have second priority and are provided after all specific gifts have been distributed and the remainder of the Estate is provided as a residual gift. You can, however, establish whatever priorities you want in your Will.

Each of these three types of gifts may be absolute or conditional:

- **Absolute gifts** are gifts that belong to the recipient without any further requirements.
- **Conditional gifts** are gifts that are subject to a condition (i.e., the beneficiary must attain a certain age before the gift is delivered). Conditional gifts are held in trust until the condition is met. If the condition is not fulfilled, the gift fails.

What are Priority Over Gifts?

Priority over gifts are gifts in Mirror Wills that have priority over the gift of the residue of the Estate to the spouse or the children. For example, you may want a piece of jewellery or a favourite fishing rod to go to one of your children, a friend or a relative instead of your spouse.

When do the Gifts in my Will become Effective?

Your Will speaks from the time of your death; before you die, it has no legal effect. The beneficiaries of gifts in your Will have no legal right to those gifts before you die and you can always change your mind by revoking or altering your Will.

What if I make a Gift of something I no longer own when I pass away?

If your Will contains a specific gift of something you no longer own when you die, the gift *adeems* and the person who was intended to receive the gift is out of luck because an *adeemed* specific gift is not made up out of the Estate.

An example is a father who declares in his Will, "I leave my son my 1988 Cadillac automobile" and he no longer owns the automobile when he dies.

What if a Beneficiary of a gift dies before I do?

If a beneficiary of a gift dies before you and your will does not contain specific instructions on what is to happen, the gift lapses unless the beneficiary is your child, grandchild, brother, sister or other issue. In those cases, unless a contrary intention appears in your Will, the gift is divided among the heirs of the deceased beneficiary. You should therefore be careful to deal with the entire residue of your Estate in all combinations of conditions.

What if there are not enough assets in my Estate to cover everything?

Your funeral expenses, debts and taxes must be paid before your gifts are delivered. Unless you specify otherwise in your Will, these expenses, debts and taxes will be paid out of the residue of your Estate. If the residue is depleted and there are still outstanding expenses, debts and taxes, they will be charged against your general gifts *pro rata*. If even that is not enough, they will be charged against funds and property set aside for specific gifts.

What are the priorities among claims on my Estate?

Funeral expenses, the expenses of administering your Estate ("testamentary expenses"), legally enforceable debts and taxes have priority over gifts (they must be paid or provided for before any gifts are delivered).

Generally speaking, specific gifts have priority over general gifts and general gifts have priority over residual gifts. However, you can put conditions on gifts to establish whatever priorities you wish.

Specific and general gifts in Mirror Wills, where the residue of the Estate of first spouse to pass away goes to the surviving spouse, need special attention. A person making such gifts in a Mirror Will should consider whether the specific gifts have priority over the gift to the spouse.

For example, a woman in her second marriage may want certain pieces of jewellery to go directly to a daughter from her first marriage. If the woman's will does not give the jewellery gift priority over her gift to her present husband, the jewellery will go to him to deal with as he sees fit. If she wants her jewellery to go to her new husband if he outlives her, but to her daughter if she outlives him, the gift to the husband must have priority over the gift to the daughter.

Similar considerations apply to specific or general gifts with priority over the residual gift to the children.

What is the difference between a *Per Capita* and a *Per Stirpes* distribution?

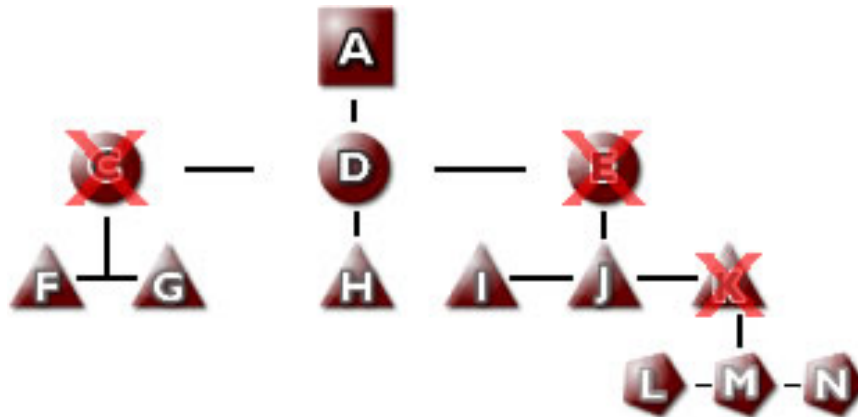
You can distribute your Estate *per capita* or *per stirpes*.

In a ***per capita*** distribution, your gifts will be divided equally among the designated beneficiaries alive at the time of the distribution. If one of your beneficiaries predeceases the time of distribution, that beneficiary's share goes to your other designated beneficiaries *pro rata*.

In a ***per stirpes*** distribution, your gifts will be divided equally among the designated beneficiaries. If one of the beneficiaries predeceases you, the beneficiary's share is divided equally among the beneficiary's children *pro rata*. A distribution *per stirpes* therefore applies through any number of generations.

The following is an example of the difference between a *per capita* distribution and a *per stirpes* distribution.

In this example, A made a Will leaving the residue of his estate to his children in equal shares. Child C, child E and grandchild K then predeceased A.



In a ***per capita*** distribution "to my children then alive in equal shares *per capita*", the Estate is divided as follows:

- 100% goes to D (C's 1/3 share and E's 1/3 share go to D)

In a ***per capita*** distribution "to my issue then alive in equal shares *per capita*", the Estate is divided as follows:

- Each of D, F, G, H, I, J, L, M and N receive 1/9 of the Estate

In a ***per stirpes*** distribution "to my children or, if my children predecease me or die before their share has vested in full, to deliver the residue of their share to their issue in equal shares *per stirpes*", the Estate is divided as follows:

- 1/3 goes to D (H gets nothing).
- C's 1/3 share is divided equally between F and G (i.e., F and G both receive 1/6 of A's Estate).
- E's 1/3 share is divided equally between I, J and K (i.e., I, J and K each receive 1/9 of A's Estate). K has died, however, and K's 1/9 share is divided equally between L, M and N (i.e., L, M and N each receive 1/3 of K's 1/9 share in A's Estate, which works out to L, M and N receiving 1/27 of A's Estate).

In our experience most people prefer a *per stirpes* distribution to a *per capita* distribution.

What is a Life Interest?

A life interest allows you to provide a beneficiary with the use of the income from a gift for the rest of their life. When the beneficiary dies, the gift then goes to another beneficiary named in your Will (the gift does not become part of the beneficiary's Estate). This allows you to give a gift to two beneficiaries, one after the other.

An example of a life interest is: "I give all my land to my wife, for her life and the remainder to my son John." In this example, the wife has possession and use of the land during her lifetime and the son (the "remainderman") receives the land when the wife passes away.

You can create life interests in real estate, funds of money, stocks, bonds, etc. In these cases the person with the life interest usually receives the income from the money but can't touch the capital. When the beneficiary dies, the capital goes to the person named in your Will.

A trust can often accomplish the same results as a life interest but can be much more flexible.

CHAPTER 5: DIVISION AND DISTRIBUTION OF ASSETS

What types of Wills are there?

There are two main types of Wills:

Outright Distribution Will: This type of Will transfers your Estate to the beneficiaries named in your Will directly. The beneficiaries have complete ownership and control over the gifts you have provided for them as soon as your Personal Representative can transfer them. This type of Will is simpler than a Trust Will and is common when minor children are not involved.

Trust Will: This type of Will establishes a trust. See Chapter 8 for a discussion of trusts.

What are Mirror Wills?

Most married couples with children consider all their assets to be part of one Estate that is to be used for the benefit of the whole family and they want all of their assets to go to the parent who survives the longest. If both parents die while their children are still minors, they want the family's resources to be used to help raise and educate their children with the remainder to be divided among their children when they reach adulthood. If the children are already adults they generally want their property divided among them as soon as practical.

This plan can be carried out by Mirror Wills. With Mirror Wills, each parent has a Will that provides that the other inherits everything (except for any specific gifts). When the surviving parent passes away, or if both parents die at the same time, the entire Estate goes to their children in equal shares. The shares of the children may be held in trust until they reach a pre-determined age (i.e., 21 or 25) when they receive their entire share. There is usually a power of encroachment on the trust fund that allows the Trustee to use the trust funds for the benefit of the children (i.e., allows for advances on the trust fund for the beneficiary's maintenance and education).

When should my Estate be divided?

If you have a Trust Will, you will have to decide when your Personal Representative is to divide your Estate. You have two choices:

1. You can direct your Personal Representative to divide your Estate as soon as practical. This usually means that your Estate will be divided after your debts, funeral expenses, testamentary expenses and taxes have been paid or provided for. A separate trust fund will then be created for each beneficiary (usually your children) and separate investment decisions can be made for each trust fund. Encroachments will be charged against the individual beneficiary's trust fund.
2. You can direct your Personal Representative to hold the entire fund in trust for your beneficiaries. This means that a single trust fund will be created for all the beneficiaries and a single set of investment decisions has to be made by the Trustee. Encroachments are usually charged against the fund as a whole, although you can direct in your Will that the encroachments be charged against the beneficiary's share. As each beneficiary reaches the age (or ages) you specify in your Will, their proportionate share of the fund is delivered.

Neither of these choices is necessarily better, but most people choose the first.

When should my Estate be distributed to my beneficiaries?

There are a number of factors people take into account when making their decisions on when to have their Estate delivered to their beneficiaries. You can direct in your Will that gifts be distributed:

1. **Immediately.** In this case all of your property will be distributed as soon as practical but any gifts to minors will be held by the Public Trustee until they reach 18.
2. **When the beneficiaries reach 18.** Some people are concerned, however, that 18-year olds are not mature enough to be able to handle large sums of money.
3. **When the beneficiaries reach 21 and 25.** Another potential arrangement is 1/3 of the beneficiary's share at 21 and the balance at 25. If you have a modest estate and young children, however, your Estate may be substantially reduced by inflation and by encroachments by the time your children reach this age.
4. **When the beneficiaries are 30 or older.** You may do more harm than good if you delay distribution this long because the expectation of a large inheritance when they reach 30 may blunt a beneficiary's incentive and ambition in their twenties.

Determining when your Estate should be distributed is ultimately a very personal decision. In our experience, most people decide to distribute 1/3 of a child's share at 21 and the balance at 25.

CHAPTER 6: TAX ISSUES

What are the tax consequences of dying?

There is no Estate tax in Alberta. The Canada *Income Tax Act*, however, states that there is a “deemed disposition” of all of a taxpayer’s capital property when the taxpayer dies, which triggers a capital gains tax liability for the deceased’s Estate even though the property has not actually been bought or sold. This liability falls on the deceased’s Estate even if the property passes to a joint owner who is not a beneficiary of the Estate.

This means that there is capital gains tax to pay on increases in the value of capital property of the taxpayer, including real property (other than the taxpayer’s principal residence). When capital property is disposed of for more than its adjusted cost base, the sellers are required to declare one half the increase in value as income. For example, if three individuals purchase real property for \$100,000 (the cost base of the property), hold the property in equal shares and then sell the property for \$220,000, each of the individuals would be required to declare \$20,000 of income. This number is based on the following calculation:

Proceeds of Disposition	220,000.00
Less Adjusted Cost Base:	100,000.00
Equals Capital Gain	120,000.00
Taxable Capital Gain (= ½ of Capital Gain	60,000.00
Allocation among owners (1/3 each)	20,000.00

It can get fairly complicated when owners purchase property at different points in time, and therefore have different cost bases, when owners sell their interests in property at different points in time, when owners live on the property as their principal residence during part of the time of ownership, and when the property is farmed for part of the time of ownership.

The above commentary is subject to the rules that an individual's principal residence is exempt from capital gains and transfers between spouses are exempt from capital gains if the appropriate election is made. In other words, both can be non-taxable events.

The following are means to avoid or minimize tax liability upon death:

1. Transfer of property to a spouse or spousal trust
2. Use of the lifetime capital gains deduction;
3. Transfer of certain farm property on death;
4. Estate freezes; and
5. Universal life insurance policies.

What is the benefit of a transfer to a Spouse or a Spousal Trust?

If your property owned at death is transferred directly to your spouse (who is a resident of Canada) or to an appropriate spousal trust, this disposition is deemed to occur at the “tax cost” of your property. In other words, a rollover occurs. While there is no permanent tax savings (the surviving spouse inherits the tax cost base and will eventually be taxed on the gain when they dispose of the property or upon their death), this deferral of tax does maximize the Estate of the surviving spouse.

Putting capital property in joint names does not avoid a deemed disposition. However, if the property is held jointly with a spouse, the tax is deferred.

The advantage of a spousal trust is that the deceased spouse can provide financial support for the lifetime surviving spouse while maintaining control over the ultimate disposition of any remaining principal and income. To qualify as a spousal trust, no part of the income or capital of the trust can be available for anyone other than the surviving spouse (i.e., there can be no provisions for direct support of children in a spousal trust).

As already mentioned, upon death, the fair market value of an RRSP or RRIF is included in the deceased's income, which can result in a significant income tax liability. However, the RRSP or RRIF can be transferred to an RRSP or RRIF in the spouse's name without triggering tax. If the RRSP has been converted to a joint annuity with the deceased's spouse, the surviving spouse is taxed on the periodic payments as ordinary income.

If a deceased has a registered pension plan ("RPP") and a spouse, the spouse is eligible for a reduced pension for the rest of his or her life. If the deceased does not have a spouse and has started receiving the pension, the pension benefits cease, but if the pension has not started yet, the residual value of the pension goes to a designated beneficiary. The designation may be in a Designation of Beneficiary form filed with the pension carrier or it may be in the Will.

What is the Qualified Small Business Exemption?

Taxpayers who own qualified small business corporation shares ("QSBC Shares") can shelter up to \$750,000 of the capital gain arising on the deemed disposition on death of the shares and no tax is paid on that amount. This is a permanent tax savings, not just a deferral.

In order to qualify as QSBC Shares, the following test must be met:

1. the deceased must have owned the shares for at least two years prior to death;
2. throughout the two years immediately preceding death, more than 50% of the fair market value of the assets of the corporation must have been attributable to assets used by it in its active business carried on primarily in Canada; and
3. At the time of death, all or substantially all of the fair market value of the assets of the corporation must be used in active business carried on in Canada.

Although this test forms the basis for the QSBC Shares, there are several additional requirements that must be met but are beyond the scope of this summary. This area of tax law is technical and requires professional help.

What benefits are there for Farm Property?

Farm property may also be eligible for the QSBC Shares exemption if the land was acquired before June 18, 1987 and was used by the individual, their spouse, child or parent, a family farm corporation or partnership in the farming business. If the farm property was acquired after June 17, 1987, then the following criteria must be met to qualify for the exemption:

1. it must have been owned for two years;
2. in at least two years while it was owned, the gross revenue from the farm must exceed this individual's income from all other sources; and
3. The taxpayer (or their spouse, child or parent) must be actively engaged on a regular and continuous basis in the farming operation.

There are also special rules for an inter-generational transfer of farming assets. These farm rollovers and exemptions also have technical rules that need to be carefully analyzed on a case by case basis.

What is an Estate freeze?

Taxpayers that own small business corporation may be able to shelter up to \$750,000 from tax liability by entering into an Estate freeze. The law around these Estate freezes is again technical and requires professional advice.

How does a Universal Life Insurance Policy work?

With Universal Life insurance policies, the invested funds (funds paid to the insurance company in excess of the cost of the life insurance coverage) pass as a death benefit tax free (including any gains and income that have accrued).

CHAPTER 7: GUARDIANSHIP

Who will care for my children?

In Alberta, you can, in your Will, give the powers, responsibilities and entitlements of guardianship that you have when you pass away to whomever you want for your minor children. People normally name an individual person as sole Guardian or two people as joint Guardians.

Mirror Wills usually provide for Guardians after both parents have passed away (see chapter 5 for more information on Mirror Wills).

If you don't appoint a Guardian, someone with an interest in your children (i.e., your Personal Representative, a relative or a friend of the family) can make an application to the court for Guardianship. The court then decides what is in the children's best interests.

If there is no one to take on the Guardianship, Alberta Social Services can step in under the *Alberta Child and Family Services Authorities Act*.

It is necessary to think very carefully about who you name as Guardian for your children in your Will. If you name two people as joint Guardians of your children and one of them dies, the remaining Guardian will likely become your children's sole Guardian. For example, if you name your sister and her spouse as joint Guardians and your sister subsequently dies, the husband of your sister will then become the sole Guardian of your children. This may or may not represent your wishes.

How will my children be supported?

You can make money available for your Personal Representative to use to support your children by setting aside shares of your Estate in trust. Your Personal Representative will administer the trust for the benefit of your children. This ability to use the children's share of your estate for their benefit is called a "power of encroachment." It enables your Personal Representative to use the children's shares for their benefit before they are entitled to receive their share.

If your Estate will be the only source of funds to assist your children after you pass away, you will probably want a relatively broad encroachment power that will allow your Personal Representative to use both income and capital for the children's maintenance, education and advancement in life. If they will have money available from other sources (e.g., inheritance from a grandparent), you may want to limit the encroachment power and preserve your Estate for their future use.

You may also want to specify that the encroachment power is to be used to relieve the extra financial burden on whoever takes care of your children.

Your Personal Representative can set up a regular payment for the children's maintenance. Also, the children's Guardian(s) and the children themselves can make requests for funds.

If your Personal Representative and the children's Guardian is the same person, there is a potential conflict of interest. You will have to trust that any payments made by the Guardian/Personal Representative will be for the care of the children and will be reasonable.

What about Complex Families? (My Kids, Your Kids, Our Kids)

Modern families can be very complex, with intricate overlapping parent-child and new spouse-old spouse relationships. With careful planning and drafting, the death of a person in a complex family can avoid a conflict that damages all concerned and is a serious drain on your Estate.

CHAPTER 8: TRUSTS

What is a trust?

A trust is established when a person (the "settlor") transfers their property to a "trustee" to hold for the benefit of another person (the "beneficiary"). The trustee manages and administers the property according to the settlor's instructions. The actual ownership of the property in the trust is shared by the trustee and the beneficiary.

There are two main types of trust:

1. **Testamentary trust:** This type of trust takes effect upon the death of the settlor and is usually created in a Will. The Personal Representative named in the Will usually acts as the trustee.
2. **Inter vivos trust:** You set up this type of trust when you are still alive. This allows you to provide gifts while you are still alive and may allow you to avoid probate since the property you transfer into the trust during your life passes directly to the beneficiaries when you die.

Transferring property to trusts has tax consequences, so it is important to get professional advice when setting them up, transferring property into them and when administering them.

When should I set up a trust?

The following circumstances are examples of situations where you should consider setting up a trust in your Will:

1. To keep control over gifts to minors. A gift provided directly to a minor must be turned over to the Public Trustee. The Public Trustee then converts the gift to cash, invests it, and delivers it (minus their administration charge) to the minor when they turn 18. If you leave a minor a gift in trust, the trustee you choose holds the gift and administers it the way you direct. This usually results in increased flexibility and makes it simpler for the Guardians of your children.
2. To keep control over gifts generally. A trust allows you to insure that the gift goes to the beneficiary named in your Will. Situations where a trust may be appropriate are
 - o If you are uncomfortable with giving control over a gift to your former spouse or common law partner.
 - o If you are worried about your current spouse re-marrying and your gift to your children inadvertently ending up in someone else's Estate.
3. To delay distribution of shares of your Estate until the beneficiaries are mature enough to handle the gift.
4. To provide an income for a beneficiary who is not capable of handling money, such as a handicapped child or a child with an addiction (regardless of age).
5. For tax planning reasons such as income splitting.
6. To protect the beneficiaries from creditors and/or matrimonial property claims.

CHAPTER 9: MISCELLANEOUS

How does Living Common Law affect my Will?

Entering a common law relationship (that is, forming a new family without going through the formalities of a marriage ceremony) does not, by itself, affect your Will. A Will signed before you entered the relationship remains valid, so a common law spouse not specifically mentioned in your Will does not receive anything from your Estate. By the same token, you may be excluded from the Estate of a common law spouse who has a pre-existing Will. In either of these situations, the Estate may end up in the hands of a prior spouse or common law partner.

If you enter into a common law relationship, you (and your spouse) should review your Wills and if there is any chance of confusion, get new Wills that ensure that your Estates will be available to support your spouse and children.

How does Marriage affect my Will?

A Will is revoked by the legal marriage of the person who made the Will unless the Will contains a declaration that it was made in contemplation of marriage. In other words, if you had a Will when you got married and it doesn't refer to your marriage, then the Will is no longer valid. The *Intestate Succession Act* would dictate how your Estate would be distributed.

If you have been married since your Will was drafted and executed, you (and your spouse) should get new Wills as soon as possible.

How does an Adult Interdependent Partnership affect my Will?

People living together in interdependent relationships, including both conjugal ("common law") and non-conjugal arrangements, can become Adult Interdependent Partners in three ways. First, you automatically become an Adult Interdependent Partner if you live together in an interdependent relationship for a continuous period of 3 years. Second, you are deemed to be an Adult Interdependent Partner if you live in an interdependent relationship of some permanence and there is a child of the relationship by birth or adoption. Third, you can sign an Adult Interdependent Partnership Agreement.

If you and your spouse become Adult Interdependent Partners by either of the first two methods, any pre-existing Will remains in effect (the same as with a common law relationship).

If you sign an Adult Interdependent Partnership Agreement, your previous Will is revoked unless the Will contains a declaration that it was made in contemplation of the Agreement (the same as with a marriage).

If you are in an Adult Interdependent Partnership, both you and your partner should review your Wills and if there is any chance of confusion, get new Wills to ensure that your Estates will be available for each other and your family.

How does Separation and Divorce affect my Will?

In Alberta, separation and divorce do not revoke your Will. If you don't change your Will when you separate or divorce, the Will terms remain in force and your ex-spouse or partner will receive whatever is given to them in your Will. If you have mirror Wills your ex-spouse or partner may receive all or substantially all of your entire Estate.

Divorce may have a different effect on your Will in different jurisdictions (for example, in Ontario any benefits that are provided to a former spouse are revoked when the parties divorce unless a contrary intention appears in the Will). It is essential that you review your old Will as soon as you decide to separate. It is likely that your old Will does not express your wishes and you will have to sign a new Will to protect yourself and your assets. If you subsequently reconcile, you can always revoke this Will and sign a new one. If you have divorced and you do not have a new Will you should get one.

How do Agreements affect my Will?

Pre-nuptial agreements, domestic agreements, separation agreements and divorce settlements (minutes of settlement) usually deal with estate matters and may limit your ability to deal with your Estate. For example, in your separation agreement, you may have agreed to leave a certain amount of money to your children in your Will. If you don't follow the agreement, you could expose your Estate to a lawsuit.

The parties to separation agreements and divorce settlements usually waive their claims against each others' Estates. If you don't get a new Will after you sign an agreement, you may leave an Estate that is exceedingly difficult to administer.

What is the Dependents Relief Act?

The Dependents Relief Act ("the DRA") is an Alberta law that restricts Albertans' testamentary freedom.

The general rule is that Albertans can leave their property to whomever they wish in their Wills after payment of their funeral expenses, legal debts and other liabilities and the expenses involved in administering the estate. The DRA cuts into testamentary freedom by permitting certain defined dependants to ask the Court of Queen's Bench to in effect change a deceased person's will to provide for the dependants.

When determining a DRA application, the first thing the court has to determine is whether the applicant is a dependant. Under the DRA, dependants include the deceased person's spouse or adult interdependent partner, minor children and children over 18 who are unable to earn a livelihood because of a mental or physical disability. With spouses and minor children, the decision is usually straightforward, but can be quite complex in the case of a disabled adult dependant. If the court decides that the applicant is not a dependant, the application is dismissed. If the court decides that the applicant is a dependant, the next step is to ask if the deceased person made adequate provision for his or her support and maintenance. If the answer is Yes, the application is dismissed and the estate is distributed according to the Will. If it's No, the court decides how much the dependant should get and how it should be paid. This will obviously affect how much the other beneficiaries will receive.

When making these decisions, the court can take into account anything it considers appropriate, including the deceased person's reasons for dividing the Estate as they did, the character or conduct of the dependent making the claim, and any other benefits the dependent may have received. The normal rules of evidence don't apply. The court has a wide discretion to decide how much the dependants should be paid and how and when they will receive it.

As you can see, DRA applications are very fact-driven. Given the number of variables involved, it is difficult for an estate lawyer to advise the Personal Representatives on the likely outcome of a DRA application.

The Surrogate Rules (the rules that prescribe the steps that must be taken to obtain a grant of probate or administration) protect the interests of dependants by requiring a person who applies for probate or administration to send a notice of the right to make a DRA application to all dependents by registered mail. If the dependent is a minor child, the Public Trustee receives the notice and can make a DRA application on their behalf. It gets complicated if the dependant is a mentally disabled adult.

Dependants have 6 months from the date probate is issued to go to court. During this period, the Personal Representative cannot distribute the estate unless all the dependants agree. After 6 months, the dependant must get a court order to start a DRA application. The practical consequence of these rules is that the estate usually cannot be distributed for at least 6 months after probate.

How does “Dower” effect my Estate?

The *Dower Act*, R.S.A. 2000, c. D-15, (“Dower Act”) goes back to pioneer times. The Dower Act is Alberta legislation which is applicable when a couple is married and it gives spouses certain rights with respect to what is quaintly referred to as their "homestead".

A homestead is defined as a parcel of land a person owns, on which there is a dwelling that the person occupies as his or her residence, and that consists of not more than 4 adjoining lots in one block in a city, town or village, or not more than one quarter section of land outside a city, town or village.

The Act gives a person who is legally married (which does not include common law or adult interdependent partners)

- the right, when both spouses are still alive, to prevent the disposition of that person's homestead, even if the property is solely in the name of the spouse who wants to dispose of it, and
- a life interest in the homestead and certain personal property when one of the spouses dies

The life interest gives the surviving spouse the right to use and enjoy the homestead for the rest of his or her life, with the same rights as a full owner of the property except the right to pass it on to their heirs. The surviving spouse is entitled to exclude anyone else from the homestead and to receive the income derived from rent, crops or other productive uses of the property. When the surviving spouse dies, the homestead becomes part of the deceased spouse's estate.

Accordingly, if a married individual who has the house in their sole name dies, the widow may have a life estate in the homestead.

A surviving spouse also has a life interest in some of the deceased spouse's personal property.

Dower does not affect a spouse's rights under the Matrimonial Property Act. However, it may affect what a surviving spouse may recover under the Dependent's Relief Act.

Dower litigation is relatively rare because the Act does not apply to most married couples in Alberta who hold title to their homes as joint tenants. In these cases, when one spouse dies, the homestead passes directly to the surviving spouse by the right of survivorship. As well, the Dower Act does not apply to a residence that one of the spouses owns as joint tenants or tenants in common with person other than the spouse, even if the residence is a homestead. Finally, it does not apply where the couple has a matrimonial property agreement or separation agreement that releases dower.

However, dower rights arise and must be addressed where the homestead is registered solely in the name of the deceased spouse or the spouses hold the homestead as tenants in common (not as joint tenants). An example of a situation where dower can become crucial is where a person leaves children by a first marriage, a second spouse, and no will.

Dower is an inadequate, archaic and inflexible protection for surviving spouses in the modern world. It based on the expectation that a person will continue to live in the homestead for the rest of their lives. There is no provision for selling the homestead and substituting another residence, or selling it, investing the proceeds and living off the interest. There is also no provision for valuing the dower interest so it can be bought out. These problems make dower disputes particularly difficult to settle.

Dower has been abolished in most other provinces.

What is an “ultimate disposition” or “family disaster” clause?

In any family, there is a possibility that all of the direct lineal descendants will die before the Estate is completely administered. Unless the Will deals with this possibility, a partial intestacy may result and the balance of the Estate will then go to the family of the spouse who survived the longest. Most people want to avoid this result.

Many families give this ultimate residue to charities or friends; others divide it among the husband and wife's relatives; still others combine these options by making specific gifts to charities and friends and dividing the residue among relatives.

When making your decisions in this area, you have to think forward over the course of the administration of your Estate because the event that triggers the ultimate disposition clause may not occur until many years after you die. You have to decide, for example, whether you want gifts to relatives to go only to those who survive until then, or whether you want the gifts of relatives who fail to survive to go to their children or other issue.

Does a Will have to be in writing?

A Will must be in writing. People often tell family members that certain items with sentimental value are to go to specific people, but these statements have no legal effect.

Does a Will have to be signed?

A Will must be signed and witnessed to be effective (unless it is a Holograph Will, discussed below). You should not delay coming in to sign your Will in the expectation that your instructions to your lawyer will be followed if you die before the Will is signed. Until you sign, your instructions have no effect.

What are the signing formalities for a Will?

The person signing the Will, the “Testator”, must initials any changes to the Will. We also ask that the Testator initial each page so there can be no question of a page being replaced after the Will has been signed. The Testator then signs at the end, or foot, of the Will, along with two witnesses. Anything under the signature, or that is inserted after the Will is signed, is not legally binding. All the initialing and signing must be done with the testator and the witnesses all present.

If a witness is a beneficiary or the spouse of a beneficiary, the Will is valid but a gift to the witness or the spouse of the witness is void unless there are at least two other witnesses who are not the beneficiary, or a spouse or adult interdependent partner of a beneficiary. A gift to a Personal Representative is valid as long as the Personal Representative is not a witness.

The signature may be the Testator's normal signature, full name, mark (an "X") or initials. The Testator may direct another person to sign for him/her in his/her presence. (We ask clients to use their normal signatures; in this way, there will be plenty of specimens available for comparison if it is ever necessary to prove the validity of the signature.)

A validly signed Alberta Will is valid in all Canadian provinces and most US states. If you have property outside Canada and the US, you should have an International Will (discussed below).

What is a Holograph Will?

Normally, a Will must be witnessed by two witnesses. However, the Alberta *Wills Act* permits a Holograph Will to be considered valid even if it is not properly witnessed. A Holograph Will must be completely in the hand-writing of the person making it and must be signed. Fill-in-the-blanks forms are therefore not valid Holograph Wills.

What is an International Will?

An International Will is valid in any country that has ratified the *Convention providing a Uniform Law on the Form of an International Will*.

In order to be valid

- An International Will must be in writing, and it may be in any language. It does not have to be written by the testator.
- The testator must declare, in the presence of two witnesses and a lawyer, that the document is his Will and that he knows the contents of the Will.
- The testator must sign the Will or, if he has previously signed it, acknowledge his signature in the presence of the witnesses and the lawyer.
- The witnesses and the lawyer must sign the Will in the presence of the testator.

What if I change my mind?

If you change your mind, you can change your Will by making a new Will or a codicil to your current Will.

You can revoke your Will if you:

- Make another Will (the later Will should expressly revoke the earlier one)
- Sign a document witnessed like a Will declaring your intention to revoke your Will
- Destroy your Will with the intention of revoking it
- Marry (unless there is a declaration in the Will that it is made in contemplation of marriage)

Does my Will have to be followed?

You have considerable freedom to distribute your Estate as you wish. You are subject to some legislated limitations, however, including the Alberta *Dependants Relief Act*, Alberta *Matrimonial Property Act* and the Alberta *Trustee Act*.

Marriage contracts, partnership agreements and shareholders' agreements sometimes contain clauses where parties agree to put certain provisions in their Wills. Such agreements will generally be enforced against your Estate and may frustrate your intentions as expressed in your Will.

Finally, an explicit agreement that a Will is irrevocable may also be enforced against your Estate

How does the *Matrimonial Property Act* affect my Will?

The Alberta *Matrimonial Property Act* deals with the division of property after a marriage breakdown. It allows a separated spouse or former spouse to enforce their rights against the Estate of a deceased if they take court action within 6 months of the date the Letters Probate are issued. While this action does not necessarily overturn the Will, it may frustrate the intentions of the deceased by compelling a transfer of property to the (former) spouse.

How does the *Trustee Act* affect my Will?

In certain cases, a court can vary the terms of a trust in a Will under the Alberta *Trustee Act*. Before varying a trust, the court must be satisfied that every competent beneficiary consents to the variation, that the variation benefits all beneficiaries who are incapable of consenting on their own behalf (i.e. children and incompetent adults), and that the variation is justifiable.

The Alberta *Trustee Act* also restricts the investment powers of your Trustee. This is referred to as the "prudent investor rule" and it places several restrictions on the ability of your Trustee or Personal Representative to invest your Estate. Essentially, it requires the Trustee/Personal Representative to invest the trust assets conservatively.

Turning Point Law is a father – son Wills, Estates and Trusts law firm. Paul McLaughlin (father) and Andrew McLaughlin (son) are committed to helping our clients find peace of mind through plain language drafting of Wills, Enduring Powers of Attorney, Personal Directives and Trusts. We also assist our clients with Applications for Grants of Probate and Grants of Administration, and with the Administration of Estates.

Our office is located in Sherwood Park, Alberta, and we serve clients in Strathcona County, Fort Saskatchewan, Edmonton, St Albert, Leduc, Camrose, Tofield and Spruce Grove. We also serve clients in Red Deer and Calgary.

Please do not hesitate to contact our office with any questions you may have.

CHAPTER 10: GLOSSARY

Adeems A specific gift "adeems" when it is no longer available when the Testator dies.

Example: A father declares in his Will, "I leave my son my 1988 Cadillac automobile" and he no longer owns the automobile when he dies.

Administrator is an individual appointed by the Surrogate Court to administer the Estate when

- There is no Will
- No personal representative is named in a Will, or
- All of the personal representatives named in a Will are unwilling or unable to act.

Administering an Estate includes gathering an Estate in, paying the debts, funeral expenses and taxes, and distributing the Estate.

Agent is a person you appoint in a Personal Directive to make personal decisions on your behalf if you become incapacitated.

Attorney is a person you appoint in an Enduring Power of Attorney to handle your financial matters if you become incapacitated. It is not required that this person be a lawyer.

Beneficiary is a person (a person can be an individual, company, organization or charity) who receives a gift from a Will or trust, or who is designated to receive the proceeds of an insurance policy, an RRSP or RRIF, or a pension plan. A beneficiary is also a person who is entitled to benefits from a trust.

Codicil is a change or addition to your Will.

Discretionary Trust is a trust where the trustee can control the allocation of income and capital to the beneficiaries.

Donor is the person signing an Enduring Power of Attorney, thereby giving someone else the authority to handle their financial affairs if they become incapacitated (also called a principal or grantor).

Encroachment is a trustee's power to use a beneficiary's share of a trust for the benefit of the beneficiary. It is often used to access a child's share of their parent's Estate for their benefit before they are entitled to receive their share.

Enduring Power of Attorney is a signed document in which you appoint a person (your "Attorney") to make decisions on your behalf relating to your financial matters while you are alive but unable to make decisions on your own.

Estate is all the property an individual owns. It is often used to refer to the property owned by the testator at the time of their death, but it also refers to property owned during the lifetime of an individual.

Estate Planning is arranging for the well-organized transfer of property at the time of the death.

Executor and **Executrix** are the old terms for the individual or institution appointed by a Will to administer the Estate. The preferred term is now Personal Representative.

Fiduciary Duty is the legal duty (responsibility) to act in the best interests of another individual (individual includes persons, companies, organizations and charities).

Gifts There are three kinds of gifts in Wills:

- **Specific gifts** are gifts of specific items (i.e., I give my diamond ring to my daughter, Rose).
- **General gifts** are gifts that come from your general Estate (i.e., I give \$10,000.00 to my son, John).
- **Residual gifts** are gifts of what is left after everything else has been taken care of (e.g., I give all the rest of my Estate to children, in equal shares).

Guardian is the person appointed by a Will to take custody of children if their parents pass away.

Holographic Will is a Will that is completely in the handwriting of the testator and signed at the foot of the Will.

Inter Vivos Trust is a trust is created during the lifetime of the settlor.

International Will is a Will that is valid in any country that has ratified the "Convention Providing a Uniform Law on the Form of an International Will". It requires the signature of two witnesses and a lawyer to be valid.

Intestate is when a person dies without a Will. A partial intestacy occurs when a valid Will does not distribute the entire Estate.

Issue refers to all persons who are descended from a single person (also referred to as lineal descendants). It is broader than the term "children," which is limited to one generation.

Joint Tenancy is when two or more people share ownership of a single asset.

Lapse is when a gift fails to occur. For example, a specific gift in a Will would lapse if the beneficiary passed away prior to the testator passing away, and the gift would go back into the Estate.

Life Interest allows you to provide a beneficiary with the use a gift for the rest of their life. When the beneficiary dies the gift does not become part of their Estate, but instead goes to another beneficiary named in your Will. This allows you to give a gift to two beneficiaries one after the other.

Mirror Wills are an estate planning tool for families. With Mirror Wills each parent's Will provides that if one parent passes away, the other parent inherits everything owned by the deceased parent (except for any specific gifts provided for in the Will). When the surviving parent passes away, or if both parents die at the same time, the entire Estate goes to their children in equal shares in trust.

Per Capita in a per capita distribution, the residue of your Estate is usually divided equally among your children. If one of your children predeceases you, then their share goes to your other children pro rata.

Per Stirpes in a per stirpes distribution, the residue of your Estate is usually divided equally among your children. If one of your children predeceases you, then their share goes to that child's children (your grandchildren) pro rata.

Personal Directive is a signed document in which you outline your views and wishes about personal care issues and you appoint a person (your "Agent") to make decisions on your behalf relating to your personal matters while you are alive but unable to make decisions on your own (Personal matters include decisions relating to health care and where you live). A Personal Directive is similar to a Living Will.

Personal Representative is the person appointed by a Will or the Court to administer an Estate.

Probate is a procedure in Surrogate Court that certifies the validity of a Will and confirms the Personal Representatives named within the Will. It is also known as Letters Probate.

Remainderman is the person who receives an interest in property after all other interests have terminated.

Settlor is an individual who establishes a trust.

Testamentary Trust is a trust that is created in a Will and it only takes effect after death.

Testate is when a person dies with a valid Will.

Testator/Testatrix is the person who made the Will.

Trust A trust is established when a person (the "settlor") transfers legal title to their property to a trustee to administer for the benefit of another person (the "beneficiary"). A trust may also be established in a Will.

Trustee is the person or a trust company responsible for administering assets on behalf of the beneficiary.

Will is the signed document in which you declare how you want your property distributed after you die.