

Make a Will Month:

Plan Early and Plan Ahead: Estate Planning for Young Families



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Talking about Wills and estate planning is often associated with visions of elderly people planning their affairs towards the end of their lives. But the truth is, once a child is born, putting a proper Will in place is extremely important. The Will does not have to be complicated, but it should contain certain provisions to allow for the child to be adequately cared for both physically and financially. While thinking about these scenarios can be emotionally taxing, having an estate plan ensures that your dependants will be properly taken care of in the unlikely event of an untimely death.

Trusts

A Will would typically contain a trust through which the child would inherit their entitlement. Without such a trust, a child would inherit the assets outright at age 18 – an age that most people would agree is inappropriate to receive large sums of money. The child would have full autonomy over the assets without any protection and likely very little guidance.

A trust in a Will would only be established upon the death of the testator (the person making the Will), as opposed to at the time of signing the Will.

Trustee(s)

A person or a panel of people would be designated and act in the role of trustee(s). The trustee(s) would be responsible for ultimate decision-making regarding the assets owned by the trust, while often engaging accountants, financial advisors, and/or lawyers to help manage the assets.

If the trust is established for a minor child, the trustee(s) would have open and continuous communication with the child's guardian to ensure that trust assets are available to support the child without the financial burden falling on the guardian. We typically advise against naming the same person to act in the roles of guardian of the child and trustee of the trust, if possible, in order to avoid any conflicts of interest and to allow for proper oversight of the trust distributions.

Timing of Asset Distribution

The trust would contain provisions specifying how income and capital of the trust assets are to be distributed to the child as beneficiary. The trust could, for example, stipulate that a portion of the capital is payable to the child when the child attains certain ages (for example, one-third of the capital is payable at age 25, one-half of the balance is payable at age 30, and the balance is payable at age 35).

In addition to having mandatory distributions of capital, the trust could also contain wording giving the trustee(s) discretion to use as much of the trust income and/or capital as they think is necessary for the benefit of the child. This would help to ensure that the child receives adequate support for necessary expenses such as education, daily living, and health care, while also preserving the capital of the trust assets.

Wording can also be included for distributions to be made to the child upon achieving certain life milestones, such as graduating from university, buying a house, or getting married. If desired, the trust could contain wording restricting the trustee(s) from making distributions in the event that the child needs protecting (for example, if the child has creditor or substance abuse issues). If the child is disabled and receives government benefits such as ODSP, the trust could be worded in such a way so that the child continues to qualify for such governmental assistance.

Guardianship

The Will would also contain a guardianship appointment. In the rare event that the child is orphaned before age 18 (meaning both parents are deceased), having an appointment in the Will helps to ensure a seamless transition during such a turbulent time. The appointment would normally name a person or a couple to be certified as the guardian of the child until age 18, and would also contain a list of ordered alternates that would be appointed in the event that someone named is unable or unwilling to act. Sometimes clients ask whether they can appoint multiple people from different families to act in this role. We strongly advise against a shared custody arrangement because of its disruptive nature.

In Ontario, an appointment in a Will is not permanently binding. It is a temporary appointment that is valid for the first 90 days following death. Within that time, the named person would have to apply to the court to become certified as the permanent guardian of the minor child. Courts give great weight to appointments in Wills and a judge would have to be presented with strong evidence before veering away from the parents' wishes. Ideally, both parents would have the same panel of people appointed in each of their Wills. If no appointment is made, immediate action has to be taken by the court to appoint someone. This can become contentious and can involve multiple families fighting over who will care for the child without the benefit of knowing the parents' true intentions. Once a Will is in place with proper appointments, it is important to review these appointments regularly to make sure they are still consistent with the testator's intentions.

Residence

A Will can enable the testator to provide detailed instructions on how the family home should be dealt with upon death. For example, in the scenario where both parents are deceased and a guardian will be appointed, consideration must be given to where the children and guardian will live. If the desire is to allow the named guardian to move into the home where the children have been living, the Will could include wording to ensure that the home is retained for a specified period of time, and that the guardian is able to reside rent-free with the children until that period ends (which can be longer than the date that the youngest child attains the age of 18). Until such time, the expenses for the upkeep of the home could be paid out of the estate assets. When this period expires, provisions can be included for the transfer or sale of the property, either within the family or to a third-party. Not only does this type of planning ensure that the children will have a stable and comfortable place to reside, but it also helps to minimize the chances of fighting among the children at a later date.

Conclusion

Preparing a Will does not have to be stressful, complicated, or costly. The process is an opportunity to reflect on your assets and your intentions and create a plan to protect the people you love most. It is also an opportunity to discuss your wishes during your lifetime with those you will entrust with managing your estate and caring for your children in your absence. Proper planning today will facilitate a smooth transition in the future and will create a secure and comfortable environment for your children.

If you wish to discuss any of the above in greater detail or would like any additional information on estate planning, contact Rachel Goldman Robinson at rgoldman@mindengross.com or any lawyer in our Wills and Estates Group.

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