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Wills and Estates in Ontario

DISCLAIMER: Please note that the information provided in this eBook is NOT legal advice and is provided for educational purposes only. If you need legal advice with respect to Wills and Estates matters (e.g. drafting your Will and Power of Attorneys, etc.), you should seek professional assistance (e.g. make a post on Dynamic Lawyers). We have Toronto, Ottawa, Hamilton, Brampton, Mississauga and other Ontario Wills and Estates lawyers registered to help you. If you need legal advice with respect to drafting or resolving a dispute concerning a Wills and Estates matter, you can contact Michael Carabash directly at michael@carabashlaw.com.

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Introduction

You've heard it many times. You need a Will! But what is a Will and why do you need one? What legal surprises (and headaches) await your loved ones if you don't have one? Is a lawyer required to draft or witness a Will? What is a "Living Will? Is that a Will too? What are Power of Attorneys and how do they work? These and other questions are common, but not always answered. Sometimes, a lack or absence of communication can result in costly mistakes and even litigation. That's why we come up with the idea of writing this eBook. Through it, we hope to shed some valuable insight into these and other questions that may come to mind when you're getting serious about dealing with Wills and Estates matters in Ontario. Remember: if you're looking for an Ontario lawyer to help you with your Wills and estates needs, make a post on Dynamic Lawyers. We have Toronto, Ottawa, Hamilton, Brampton and other Ontario lawyers registered who can assist you in drafting, reviewing, revising, or resolving disputes concerning Wills and Estates matters.

What is a Will?

A **Will** (also referred to as a Last Will and Testament) is a legal document that provides instructions as to how your remaining assets and liabilities are to be dealt with. It also provides for instructions as to who will be responsible for administering your final wishes (known as the **Estate Trustee**) and identifying who your beneficiaries will be. Finally, a Will can leave instructions as to who **Guardians** will be in the case of minor or incapable dependents left behind. According to section 1(1) of the ***Succession Law Reform Act***, R.S.O. 1990, c. S.26, a Will also includes a "**Codicil**", which is a document that cancels certain parts of your Will or adds new parts to it and which must be read together with your Will as one document. A person who makes and signs a valid Will is referred to as a Testator (for a man) or Testatrix (for a woman).

When you die in Ontario (and elsewhere), your assets are pooled together into something called an **Estate**. An **Estate Trustee** is appointed in the Will (and a substitute is usually appointed in case the primary estate trustee is unwilling or unable to perform his or her duties) and must administer the Will by paying out liabilities (e.g. taxes owed, funeral expenses, creditors, etc.), managing remaining assets (e.g. selling them, gifting them, investing them, etc.), and distributing the residue of the estate (i.e. the remaining funds after everything else is taken care of) to the beneficiaries designated under the Will. An Estate Trustee is also commonly referred to as an "**Administrator**", "**Executor**", "**Personal Representative**" or "**Liquidator**".

How much does a Will cost?

Depending on where you live, most lawyers charge from $150 to $300 for a simple Will. When you attend a lawyer's office to have your Will prepared, they will generally recommend you also have a **Power of Attorney for Property** and a **Power of Attorney for Personal Care** prepared too (both of which are discussed below). A lawyer will generally charge from $50 to $100 for each Power of Attorney.

What are the legal requirements for a Will to be valid?

There are only a few things that are needed in order for a Will to be valid, binding, and of full legal force and effect. But if you don't do these basic things properly, the Will can be contested through litigation, which will cost thousands of dollars (or more), destroy relationships, waste years away, etc. (you get the point).

First, in Ontario, for a Will to be valid, it must be in writing. So says the ***Succession Law Reform Act***.

Second, a Will must be made a legally competent person (i.e. you must be 18 years old or older and mentally competent to make a Will). This is often a litigious issue: some will claim that the person making the Will was not sufficiently competent to make the will as they did not understand the purpose and effects of making the Will. FYI, a person under 18 years old can make a Will if he or she is married or if he or she is in the Canadian armed forces.

Third, the **Testator** (i.e. the person making the will) must sign the Will before two witnesses, who must also acknowledge that this was done (in the presence of the testator) – typically through an affidavit attached to the Will. The testator's signature must be at the end of the document, but can follow a blank section on the page after the concluding words of the Will. Neither of the witnesses can be beneficiaries (and this has been used to challenge Wills before).

While there may be other requirements for a Will to be valid, those requirements are often examined and dealt with by a lawyer who is trained and experienced in making the will as litigation-proof as possible.

Worth mentioning is that **Holographic Wills** are acceptable and do not require the presence or attestation or signature of a witness to be valid: s. 6 of the ***Succession Law Reform Act***. Holographic Wills must be wholly written by the testator's in his or her handwriting and signed and dated. People are cautioned against writing their own Wills in this manner and raising the possibility of future challenges.

Is a lawyer required to have a Will?

While a lawyer is not legally required for you to have a Will drafted, reviewed, or executed, it is nevertheless in your best interests to do so. Only a few things are needed in order for a Will to be legally binding and enforceable. But if you don't do these basic things properly, the Will may be contested through litigation, which could end up costing thousands of dollars (or more), destroying relationships, wasting years, etc.

In addition to ensuring that the legal requirements of drafting a Will are met and that the specific wishes of the Testator are addressed, a lawyer will typically deal with a number of other issues which could jeopardize the validity of a Will.

First, a lawyer will inquire into the mental state of the Testator. A lack of capacity to enter into the Will may be grounds to invalidate it. In ***Banks v. Goodfellow***, 1870 WL 11622 – the English Court of Queen's Bench famously wrote:

> "It is essential to the exercise of (the power of testation) that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

If there is a doubt as to the Testator's mental capacity to enter into the Will (e.g. due to age or physical, mental or emotional illness, etc.), the lawyer may call an approximately qualified medical practitioner to be present at the time instructions are given. Those instructions may also be video recorded.

Second, a lawyer will also try to make sure that the Testator is not entering the Will as a result of some duress or improper or undue influence from an external force. The Testator must enter the Will freely and voluntarily or else it may be subsequently contested. A lawyer will typically exclude interested parties from being present at the time the Testator executes the Will.

Third, a lawyer will be able to discuss with you income tax, probate, and statutory claim considerations. When you die, you are automatically deemed to have disposed of (immediately before death) all your assets for fair market value under section 70(5)(a) of the ***Income Tax Act***, R.S.C. 1985, c. 1 (5th Supp.). As such, any resulting taxable capital gains have to be included in your income in that year. These capital gains, however, can be deferred through the use of a spousal rollover, which a lawyer can help structure. If you own shares of a qualified small business corporation (which a lawyer can advise you on), you may also be entitled to a lifetime capital gains deduction (which is presently $375,000). With respect to minimizing probate fees, there are a number of legal possibilities which can be canvassed with your lawyer – such as transferring assets into joint ownership, designating beneficiaries of RRSP's, RRIF's and insurance policies, establishing an *inter vivos* trust, and executing multiple wills. Finally, your estate may be liable to pay your dependents (pursuant to section 58 of the ***Succession Law Reform Act***) and spouse (pursuant to sections 5 and 6 of the ***Family Law Act***, R.S.O. 1990, c. F.3) more than what they would otherwise be entitled to under your Will. A lawyer can help you address these results. In the case of your spouse, for example, a lawyer can draft a marriage contract that would preclude your spouse's ability to entitlements under the ***Family Law Act***.

Finally worth mentioning is that, a lawyer is required to act in connection with International Wills (discussed in greater detail below).

For all of these reasons, it is generally advisable to contact a lawyer when you need to write or update your will.

Why should I have a Will?

With a Will, you can:

- Decide who will be the beneficiaries of your estate (i.e. the pool of assets which will be distributed after certain expenditures are paid);
- Give personal items to specific individuals;
- Include persons who are not related to you by blood to inherit a part or all of your estate;
- Allow you to divide the residue of your estate according to specifically identified trusts;
- Select an Estate Trustee (i.e. a person who will administer your estate and pay out the specific trusts described in your Will);
- Select a Guardian for your minor children (if you have any);
- Reduce the cost of administering your estate (e.g. by avoiding fighting and estate litigation); and
- Reduce income taxes (especially if you die and leave a spouse behind).

What happens if I die without a Will?

Basically, in Ontario, if you die with a Will, then someone will need to apply to the relevant court to be appointed the Estate Trustee. This application is made in the court office for the area (e.g. county, district, region, or metropolitan municipality) in which the deceased resided at the date of death. In Toronto, for example, the appropriate court is the Estates Court office located at 393 University Avenue, 10th floor, 416-326-4230 (otherwise, you make an application to the Ontario Superior Court of Justice).

Applications for Certificates of Appointment of Estate Trustee are processed by Ministry of the Attorney General court staff. They perform the duties of an estate registrar in the Civil Office of the Superior Court of Justice. These duties are prescribed by law. Staff must review each application to confirm that the application and all accompanying documents are complete and comply with the Ontario ***Rules of Civil Procedure*** (the rules of court) and other applicable legislation.

Section 74.05 of those ***Rules*** require that an **Application for a Certificate of Appointment of Estate Trustee** (Form 74.14 or 74.15) be accompanied by:

1. An affidavit (Form 74.16) attesting that notice of the application (Form 74.17) has been served on all persons entitled to share in the distribution of the estate (including special ways to serve minors under 18 years old and mentally incapable persons).

2. A renunciation (Form 74.18) from every person who is entitled in priority to be named as estate trustee and who has not joined in the application.

3. A consent to the applicant's appointment (Form 74.19) by persons who are entitled to share in the distribution of the estate and who together have a majority interest in the value of the assets of the estate at the date of death;

4. The security required by the ***Estates Act***; and

5. Any other additional material which the court may direct.

You should definitely consult with a lawyer about getting these and other necessary documents properly drafted and filed.

If court staff have concerns about the application or accompanying materials, the application must be referred to a judge for direction. The judge may require further materials to be filed or steps taken by the personal representative in relation to the application.

The Ministry strives to process certificates of appointment of estate trustee with or without a will within 15 days after the application and accompanying materials are complete and judicial direction, if required, has been obtained.

If a **Certificate of Appointment of Estate Trustee Without a Will** is issued, it will be in Form 74.20 (as per the ***Rules***).

To avoid headache and delay, be sure to consult with a lawyer about applying for a certificate of appointment of estate trustee.

If you want to read more about priorities of beneficiaries in cases where a person dies in Ontario without a Will (thereby triggering the rules in the ***Succession Law Reform Act***, keep reading...

How will my property be divided if I don't have a Will?

If someone dies without a Will in Ontario, their property will be divided according to rules set out in the ***Succession Law Reform Act***. There is a standard procedure which divides property according to family relationships. Here are some of those rules:

- If a person dies without a Will and is survived by a spouse without children, then the spouse is entitled to the property absolutely: s. 44.
- Worth mentioning is that a spouse is generally entitled to a preferential share (under the Regulations made under that Act) up to the first $200,000 of the estate before it is divided among any remaining heirs: s. 45 and 46.
- If a person dies without a will and a spouse and one child survive that person, then the spouse will be entitled to their preferential share and an additional 1/2 of the residue of the estate: s. 46(1).
- If a person dies without a will and a spouse and children survive that person, then the spouse will be entitled to their preferential share and an additional 1/3 of the residue of the estate: s. 46(2).
- If a person dies without a will and without any spouse or children surviving him or her, then their living parents will be entitled to the property either equally (or one of them will get it absolutely if only one is alive): s. 47(3).
- If a person dies without a will, without any spouse or children, and without any parents, then their property will be distributed equally among any living brothers and sisters (or their children): s. 47(4).
- If a person dies without a will, without any spouse or children, without any parents, and without any brothers or sisters, then their living nephews and nieces inherit an equal portion of the residue of the estate: s. 47(5).
- Finally, if a person dies and there is no surviving spouse, children, parent, brother, sister, nephew or niece, then the property "shall be distributed among the next of kin of equal degree of consanguinity to the intestate equally without representation". If a person has no such living next of kin, the generally the estate goes to the government.

So be sure to have your Will is properly drafted by a lawyer if you want to have control over your financial affairs when you finally pass away.

How do I prepare to have my Will drafted?

To prepare to have your Will drafted, you should gather some important and relevant personal and financial information. This information, which can be provided in the form of a checklist, will help the drafter tailor your Will to meet your needs. Having this information conveniently available alongside the Will can also benefit your trustee and beneficiaries, who won't have to be looking for hidden or hard to find assets and liabilities after you die. The following basic information should be included in the checklist:

- **Personal Information**: name, address, date of birth, marital status (past and present), residency, previous Will, marriage contract, etc.;
- **Family and Dependent Information**: names, addresses, dates of birth of spouse(s), children, and dependents, etc.;
- **Professional Advisors**: names and addresses of lawyer, accountant, investment advisor, life insurance agent, etc.;
- **Income Information**: amount of annual income from all sources (e.g. employment, business, rent, royalties, etc.);
- **Assets**: bank accounts, safety deposit boxes, real estate, life insurance, annuities, RRSPs, RIFs, pensions, investments, business interests, debts owing from third parties, automobiles/boats/recreational vehicles, machinery/tools/equipment, household goods and furniture, etc.; and
- **Liabilities**: mortgages, loans, credit card balances, etc.

Once these details have been gathered, the next step is for you to outline the instructions for your Will. To start, the following questions will need to be answered with respect to disposing of personal effects and the residue of your estate:

- How do you want your personal effects and estate residue to be disposed of with respect to your surviving spouse and children (if applicable)?
- How is the distribution to be effected (i.e. who does it and when can they do it; for example, the estate trustee can, in their sole and absolute discretion, effect the disposition of personal effects)?
- How is your real estate to be handled?
- How is your share of family business to be disposed of?
- Would you like to create a spousal trust, whereby your surviving spouse can live off of the income generated by the residue of your estate until he or she passes away, in which case, the residue is distributed among the beneficiaries (e.g. the children?)?

- What kinds of powers do you want your estate trustee to have with respect to you personal effects (e.g. power to sell, power to invest, power to distribute proceeds, power to loan funds to beneficiaries or others, power to take reasonable compensation from the residue of the estate, etc.) and assets?
- Do you want to have special clauses dealing with minors (e.g. property relating to minors, a trust relating to minors, guardians of minor's property, etc.)?
- What kind of funeral do you want to have?
- Do you wish to donate your organs?
- How are disputes to be handled (e.g. arbitration, mediation, court, etc.)?

These and other questions will need to be answered before your Will can be properly drafted.

What is the basic structure of a simple Will?

Simple Wills generally follow the same structure:

1. Identify the person who is making the will.

2. Revoke previous wills.

3. Appoint an Estate Trustee and a Substitute Estate Trustee (i.e. someone who is legally competent and will administer your estate as per your final wishes).

4. List your wishes concerning your taxes, funeral, and personal effects.

5. List and divide your gifts/assets.

6. Distribute the residue of your estate (i.e. left over after all liabilities have been paid and all other gifts distributed).

7. Outline the powers and limits of your Estate Trustee (e.g. manage investment, sell / dispose / retain assets, employ agents, deal with real property, make loans to beneficiaries, settle claims, make elections under the ***Income Tax Act***, etc).

8. Dispute resolution provisions.

9. Execution: sign and date the will and have it witnessed.

How can a Will be amended?

If you want to amend your will, you will generally need to create a **Codicil** (i.e. a legal document). The Codicil is a written document that refers to the Will and the parts that are being altered and must be signed, dated, and witnessed by two parties as per the regular rules of making a Will under the Succession Law Reform Act: s. 18.

Codicils that amend previous Codicils should also state that fact (i.e. that a particular Codicil is being revoked). Worth mentioning is that if there are many Codicils, it would probably make sense to re-write the entire Will (for simplicity's sake). You should contact a lawyer to prepare a proper Codicil for you if you need one!

How can a Will be revoked?

A Will can be revoked only by:

- Marriage (unless there is a declaration in the Will that it is made in contemplation of marriage in addition to other rules – see the Ontario ***Succession Law Reform Act***: s. 15(a) and 16.
- Another Will replaces it: s. 15(b).
- A written declaration with an intention to revoke which follows the rules of making a Will: s. 15(c).
- The Will being destroyed (e.g. burned, torn, etc.) by the testator or some person in his or her presence and by his or her direction with the intention of revoking the Will: s. 15(d).

How can a Will be revived?

A Will that is revoked can be revived only (s. 19 of the ***Succession Law Reform Act***):

- By a Will being made; or
- By a Codicil being made which shows an intention to give effect to the Will or the part of the Will that was revoked or
- By the re-execution of a previously revoked Will with the required formalities.

Worth mentioning is that there is a presumption (unless the contrary can be shown) that, when a Will is partially revoked and then afterward wholly revoked and then revived, the revival does not extend to the part that was partly revoked (i.e. before the whole revocation).

What if there is a Mistake in a Will?

A Will is only valid if the Testator knew and approved its content. If words have been mistakenly inserted into a Will without such knowledge or approval, then a court may strike out those specific passages or phrases. In ***Barylak v. Figol***, 9 E.T.R. (2d) 305, for example, a residuary clause had been inserted by mistake. That clause gave the residue of the deceased's estate to a fund to create a scholarship for needy students of Ukrainian origin. The Testator never gave his solicitor instructions to include that offending residuary clause. There was no evidence that the Will was ever sent to the Testator prior to its execution for review by him. Even if it had been, there was no evidence as to whether the Testator's command of written English was such that he would have fully understood it. Also, there was no evidence that a true copy of the executed Will was left with the testator or that a copy was sent to him. Overall, the Ontario Court of Justice (General Division) held that the Testator knew nothing about the residuary clause and that it did not reflect his expression. Accordingly, the Court deleted the clause from his Will based on the doctrine of mistake.

What if I am a Dependent?

If you're a dependent in Ontario and have not been adequately provided for in a Will, you might have some legislative recourse. Section 58(1) of the ***Succession Law Reform Act*** allows a deceased's dependents to apply to the court for support where the deceased (either through a Will or absent one) has not made adequate provision for their proper support. A dependent is defined under s. 57 of that ***Act*** to include your spouse, former spouse, common-law spouse, parent, grandparent, child, grandchild, brother, and sister. A dependant may have to prove that they are a dependent and entitled to financial support under s. 58(1) in court. If the court decides that the person is a dependant and that person can show a need for financial support, then it may order that a certain amount of money be paid to them out of the estate. If you think that you may be entitled to more from an estate than the amount provided for in a Will, or if you need to determine the rights of others when preparing your Will, consult with a lawyer (by making a post on Dynamic Lawyers).

What about International Wills?

Along with other provinces and countries, Ontario is a contracting party to the Convention Providing a Uniform Law on the Form of an International Will. This means that, if a Will is made in the form of an International Will (i.e. in accordance with the form prescribed by that Convention in the Schedule and Annex in the Succession Law Reform Act) concerning two or more contracting parties, then the Will is valid as between those parties irrespective of where it was made, the location of the assets and of the nationality, domicile, or residence of the testator. At present, some the contracting parties to the Convention include: Belgium, most Canadian provinces (Manitoba, Newfoundland, Alberta, Saskatchewan, Prince Edward Island, New Brunswick, and Nova Scotia), Cyprus, Ecuador, France, Italy, Iran, Portugal, the Russian Federation, the United Kingdom, and the United States of America. An important difference with an International Will is the requirement that an authorized person (in Ontario, this means a lawyer) attach to the Will a Certificate establishing that the obligations of the Convention have been complied with.

What is a Living Will?

In Ontario, the term "**Living Will**" is used to refer to a document in which a person states what their final wishes are to be concerning their life when they can no longer communicate those final wishes. Generally, people say that, when this state occurs, they want to be taken off of life support (artificial machines keeping them alive) and allowed to die in a natural and dignified manner and only receive medication to deal with pain. Alternatively, they can say that they want to be kept alive using all possible measures. These documents are not legally binding and enforceable contracts in Ontario, but rather are directives of mere expressions of people's final wishes. Indeed, there is no legal term in any statute that refers to a "Living Will". Keep in mind that a "Living Will" only has relevance while a person is alive (unlike a Last Will and Testament, which kicks in after a person passes away).

Please note that a Living Will is NOT necessarily the same thing as a Power of Attorney for Personal Care (discussed in greater detail below).

Contentious Proceedings against an Estate / Estate Trustee

I thought it would be worthwhile to discuss some of the **procedural steps** involved in commencing contentious legal proceedings against an estate and / or estate trustee in Ontario. The situation may arise where a person wants to challenge the estate trustee's administration of a will. Here are some of the major procedural steps involved in this process (remember: you should contact a lawyer if you need one!)

A. Application for Direction

Rules 75.01 through to 75.09 of the Ontario ***Rules of Civil Procedure*** deal with commencing contentious legal proceedings against an estate and/or Estate Trustee. To initiate these legal proceedings, a person having a financial interest in an estate must **first** apply to the court for directions by preparing and submitting an **Application for Direction** as to the procedure for bringing any matter before the court: **Rules 14.05(1) and 75.06(1)**.

An **Application for Directions** (Form 75.5) must be served on all persons appearing to have a financial interest in the estate (e.g. trustee and beneficiaries) at least 10 days before the hearing of the application: **Rule 75.06(2)**. So the steps involved for bringing the Application for Directions are:

1. Prepare the Application for Directions;
2. Call and book the application date with the court in the appropriate jurisdiction;
3. Attend and file the Application for Directions with the court and pay the $173 court fee;
4. Personally serve the Application for Directions on every other defendant;
5. File an Affidavit of Service with the court (this is a sworn document stating that the defendants have been served);
6. Fax a confirmation form (Form 38B) that the application is proceeding as scheduled by 2:00 p.m. at least 2 days prior to the Application being heard; and
7. Attend and argue the application before a judge on the motion date.

B. Court Order

On the hearing of an Application for Directions, the court may (among other things) give directions to determine the issues to be decided, identify the parties involved, address the method and times for service, and direct that the plaintiff file and serve a Statement of Claim (Form 75.7): **Rule 75.06(3)**.

An order giving directions shall be in Form 75.8 or 75.9: **Rule 75.06(4)**. The Court has a broad discretion in determining the appropriate procedures going forwards: pleadings (such as a Statement of Claim, Statement of Defence, etc.) may be dispensed with and replaced by a court order that simply directs the issues to be tried. Furthermore, cross-examinations on affidavits could be used to replace examinations for discovery.

C. Statement of Claim

When a Statement of Claim (Form 75.7) is ordered to be delivered, it must be served on each defendant. Among other things, the Statement of Claim could raise allegations against the Estate Trustee and seek damages for:

- Breach of trust;
- Breach of fiduciary duty;
- Acting unfairly and in bad faith;
- Unjust enrichment;
- Breach of ***Trustee Act***; or
- Breach of ***Estates Administration Act***;

The Statement of Claim could also seek an accounting of all of the assets, financial records and documents of the deceased prior to and following the death of the deceased.

D. Claim against Estate

Claims against an Estate are made by way of Form 75.14: **Rules 75.08**(2).

E. Statement of Defence or Statement of Defence and Counterclaim

Each defendant that is served with a Statement of Claim must serve on every other party and file with the court (with proof of service) a Statement of Defence or a Statement of Defence and Counterclaim: **Rules 75.07(1)(a)**. Alternatively, each defendant can serve and file with the court a Statement of Submission of Rights to the Court, which is discussed below: **Rule 75.07(1)(b)**.

F. Reply or Reply and Defence to Counterclaim

In response to a Statement of Defence or Statement of Defence and Counterclaim, the plaintiff may then deliver a reply or reply and defence to counterclaim: **Rule 75.07(2)**.

G. Statement of Submission of Rights

By submitting a Statement of Submission of Rights to the Court, the defendant acknowledges that it is not entitled to receive their costs in the proceeding and will not be liable to pay the costs of any party to the proceeding, except indirectly to the extent costs are ordered by the court to be paid out of the estate: **Rule 75.07.1(b)**.

The party must also acknowledge that they are not entitled to receive notice of any step taken in a proceeding except for the notice of trial and copy of the judgment disposing of the matter, if the proceeding is not settled: **Rule 75.07.1(a)**. A judgment on consent will not be given to the party submitting their rights unless they have consented or have been personally served with a Notice of Settlement and have not objected to it: **Rule 75.07.1(c)**. The form for giving notice of a settlement to a party who has submitted their rights to the court is Form 75.11: **Rule 75.07(1)(c)(ii)**. If the party who has submitted their rights to the court wishes to object to the settlement, they must file a Rejection of Settlement (Form 75.12): **Rule 75.07(1)(c)(ii)** [**source**: Karen M. Gibbs, Archie J. Rabinowitz, Risa Awerbuck, Danielle Joel, Elisabeth V. Atsaidis, and Ryan Lay, The Practical Guide to Ontario Estate Administration, 5th ed., (Toronto, Canada: Thomson Canada Limited, 2006), p. 239].

Typically, the rule permitting a defendant to file a Statement of Submission of Rights to the Court will be used by a beneficiary who does not wish to become embroiled in costly and protracted litigation. Nevertheless, by filing the Statement of Submission of Rights to the Court, the person is protected by ensuring that they receive notice of the trial or, if the matter is being settled, no judgment can be signed without notice to them or without their written consent [**source**: Karen M. Gibbs, Archie J. Rabinowitz, Risa Awerbuck, Danielle Joel, Elisabeth V. Atsaidis, and Ryan Lay, The Practical Guide to Ontario Estate Administration, 5th ed., (Toronto, Canada: Thomson Canada Limited, 2006), p. 239].

H. Notice of Contestation of Claim

If a claim is made against an estate, the defendant representing the estate may serve a Notice of Contestation upon the party making the claim, contesting all or part of the claim: **s. 44(1) of the *Estates Act***. Within 30 days after receiving a Notice of Contestation, the claimant must file with the court registrar a Claim Against Estate (Form 75.14) verified by affidavit and a copy of the Notice of Contestation. The claimant must then bring an application to the Court for an order allowing the claim and determining the amount of it. If the claimant does not make such an application within the time prescribed above, then they shall be deemed to have abandoned the claim and it is forever barred: **s. 44(2) of the *Estates Act***.

Once the claimant files all the necessary paperwork, the court registrar will fix a trial date which then typically proceeds in a summary manner (often without pre-trial discoveries) unless a judge orders otherwise. However, the defendant may request that documentary and oral discovery be held before the trial of the application [**source**: Karen M. Gibbs, Archie J. Rabinowitz, Risa Awerbuck, Danielle Joel, Elisabeth V. Atsaidis, and Ryan Lay, The Practical Guide to Ontario Estate Administration, 5th ed., (Toronto, Canada: Thomson Canada Limited, 2006), p. 240]. At the trial, the judge will hear the parties and their witnesses and can make such order as he or she considers just.

I. Next Steps after Pleadings

Once the pleadings (i.e. Statement of Claim, Statement of Defence, etc.) are exchanged, the action will proceed much like any other civil litigation case (i.e. exchange of affidavits of documents and oral discoveries of the parties) unless the court orders otherwise. Once discoveries are completed, a Trial Record is prepared and filed, and the matter goes on the trial list. The matter will come up first for a pre-trial conference. If no settlement arises out of the pre-trial conference, the matter proceeds to trial [**source:** Margaret E. Rintoul, A Practitioner's Guide to Estate Practice in Ontario, 3rd ed. (Markham, Ontario: Butterworths Canada Ltd., 1997), p. 157].

At the end of the trial, a judge will render a decision and will also typically award some legal costs against the losing party to pay for the other side's legal fees and disbursements**.**

J. Motion for Summary Judgment

If the defendant does not respond to the Statement of Claim within the time prescribed by the Rules (i.e. typically 20 days after being served with the Statement of Claim), then the claimant may ask the court registrar to note that defendant in default and then bring default proceedings against him or her to obtain an award for damages and proceed to enforce that award: **Rules 18 and 19**.

If the defendant responds with a Statement of Defence, then the claimant may bring a motion for summary judgment (**Rule 20.01(1)**) or to strike out that Statement of Defence on the grounds that it discloses no reasonable defence (**Rule 21.01(b)**).

Conclusion

At the end of the day, commencing and maintaining contentious legal proceedings is complex, costly, and takes time. There are a number of procedural steps along the way, each with its own time limit and substantive requirements. It's best, if you're contemplating or in the middle of contentious proceedings, to consult with a lawyer who has the knowledge, skills, and experience in dealing with these kinds of proceedings. FYI, you can make a post on Dynamic Lawyers to find such a professional (it's 100% free and anonymous!).

So that's it for Wills…Now, lets turn our attention to Power of Attorneys…

What is a Power of Attorney?

In Ontario, a Power of Attorney is a legal document that designate an individual (known as an **attorney**) to act on behalf of a person in the event, for example, that that person becomes disabled or incapacitated. The word "attorney" does not mean that the person is or becomes a lawyer. They are simply the person appointed as such and nothing more.

There are different kinds of power of attorneys. Some are concerned with property. Others are concerned with health or personal care. Typically, when you go to a lawyer's office to draft your will, they will include power of attorneys as part of the Last Will and Testament package.

Everyone should have power of attorneys to make sure that their financial and health care affairs are in order and capable of being looked after when they become unable to look after those things themselves.

What is a Power of Attorney for Property?

A **Power of Attorney for Property** is a legal document made under the ***Substitute Decisions Act*** wherein a person grants their decision-making authority over their property and financial affairs to another person (called an "**attorney**"). This document deals with things like banking, securities, insurance, retirement savings, annuities, real estate, businesses, etc. When it takes effect, the attorney takes over to make these decisions on behalf of the grantor.

Why should I have a Power of Attorney for Property?

The benefits of having a Power of Attorney for Property include having control over who makes decisions on your behalf (and sometimes how they make those decisions) concerning your property when you can no longer do so. Also, having a Power of Attorney for Property can help avoid litigation (and the wasted time, money, and effort) to see who will be appointed to be your representative or guardian. Remember: you can entirely limit the powers of your attorney such that they do not have the power to handle some of your property or financial affairs.

What if I don't have a Power of Attorney for Property?

If you do not have a Power of Attorney over property, your financial affairs are not automatically transferred to family members (a common misconception). Rather, someone must apply to the court for permissions to be your representative or a guardian must be appointed by the Office of the Public Guardian and Trustee or by the Court.

How long does a Power of Attorney for Property last?

It's important to remember that a Power of Attorney for Property generally takes effect as soon as it is signed. If you want the Power of Attorney to apply only at a certain time (e.g. when you end up at a hospital because you are incompetent or incapacitated or otherwise incapable of managing your property but not dead – as this will trigger your Will if you have one), then your Power of Attorney should clearly state that.

What are the legal requirements to have a Power of Attorney for Property?

To have a valid Power of Attorney for Property under the Ontario ***Substitute Decisions Act***:

1. The document itself must state that it is a continuing power of attorney or otherwise express the intention that the authority given may be exercised during the grantor's incapacity to manage property.

2. The document must authorize a person to be an attorney.

3. The grantor (i.e. the person giving the power of attorney) must have capacity to give the continuing power of attorney (i.e. through knowledge, awareness, appreciation, etc.).

4. A person with capacity is capable of revoking a continuing power of attorney.

5. The document must be signed by two witnesses who are (among other things) not the grantor or attorney's spouse or partner, a person less than 18 years old, or a child of the grantor (or someone who the grantor has demonstrated a settled intention to treat as his or her child).

The Power of Attorney for Property need not be in a set form or template: **s. 7(7.1)** of the Act.

A word or two on the requirement that the grantor must have sufficient capacity to grant the power of attorney. The grantor must be over the age of 18 and must be mentally capable as demonstrated by things like:

- knowing what kind of property he or she has and it's approximate value;
- is aware of the obligations owed to his or her dependents;
- knows that the attorney must account for his or her dealings with te person's property;
- knowing what authority is being granted to the attorney;
- appreciates that the attorney's mismanagement could result in a decline of the value of property; and
- understanding the consequences of an attorney misusing their authority.

How do you terminate a Power of Attorney for Property?

A Power of Attorney for Property can be revoked at any time while the person making it is legally fit or competent to do so. Under the ***Substitute Decisions Act***, a Power of Attorney can be terminated when (**s. 12**):

- the Power of Attorney is revoked (in writing and signed in front of two witnesses who are present – recall the legal requirements to have a valid Power of Attorney).
- the Grantor dies;
- the attorney dies, becomes incapable of managing property or resigns – unless a joint attorney or substitute attorney is authorized to act;
- the court appoints a guardian of property for the grantor;
- the grantor executes a new Power of Attorney (unless the grantor indicates that there shall be multiple continuing powers of attorney);

It is interesting to note that, if a continuing power of attorney is terminated or becomes invalid, any subsequent exercise of the power by the attorney is **NEVERTHELESS VALID** between the grantor or their estate and any person who acted in good faith and without knowledge of the termination or invalidity (**s. 13(1)**). The same applies if the Power of Attorney is ineffective because an improper person witnessed its execution.

What is a Power of Attorney for Personal Care?

A Power of Attorney for Personal Care is a legal document made under the ***Substitute Decisions Act*** wherein a person names another person (i.e. the **attorney**) and usually a substitute person (i.e. a substitute attorney who makes decisions in case the attorney cannot or will not) who will have decision-making authority to make health care decisions on the former person's behalf. Importantly, the terms of one's **Living Will** (as discussed above) can be incorporated into your Power of Attorney for Personal Care. The latter are legal documents which can be enforced. Keep in mind that your Power of Attorney for Personal Care only applies while you are alive (unlike a Last Will and Testament, which kicks in after a person passes away). A Living Will differs from a Power of Attorney over Personal Care because, with respect to the latter, no one needs to be named or appointed for one's final wishes to be known.

Overall, it is best to speak with a lawyer about preparing a Power of Attorney over Personal Care. For more information about Living Wills and Power of Attorneys in Ontario, check out these great government resources:

1. Power of Attorney and Living Wills, Questions and Answers, Ontario, The Office of the Public Guardian and Trustee (Reprinted in 2009); and

2. Power of Attorney, Booklet, Ministry of the Attorney General

When it's time to have your Will and Power of Attorneys prepared, a good lawyer typically provides you with (or has one to fill in themselves) an information checklist. I've seen quite a few of these kinds of checklists online, which typically tell you who the parties are, whether they have dependents, what their assets are, and what their liabilities are. This kind of information is very important to have because, when someone eventually passes away, the estate trustee and the beneficiaries are not left looking for hidden assets and not surprised by unknown liabilities. Here are a few of those website that I came across:

1. BC Heritage Law – headed up by Nicole Garton-Jones – has a great estate planning instruction questionnaire. It's 27 pages and chuck full of the good stuff: information about you and about your spouse or partner, your marriage, your children and dependents, your financial information (e.g. business interests, financial and personal assets, etc). It's definitely worth checking out!

2. Whitby law firm Siskay and Fraser have an awesome information questionnaire which includes things like personal info, info about trustees and guardians, gifts and bequests, what to do with the residue of the estate, special instructions, family disaster clause, power of attorney, and assets and liabilities.

3. The Nebraska National Guard has a detailed annual legal checkup information questionnaire for its service members.

What are the legal requirements to have a Power of Attorney for Personal Care?

To have a valid Power of Attorney for Personal Care under the Ontario ***Substitutes Decision Act*:**

1. It must be written and signed by the grantor and two witnesses (who must both be present when the grantor executes the Power of Attorney for Personal Care).

2. The document must authorize a person to be an attorney to make decisions, on the grantor's behalf, concerning the grantor's personal care: **s. 46(1)**.

3. A person cannot act as an attorney if that person provides health care to the grantor for compensation or provides residential, social, training or support services to the grantor for compensation. The exception to this rule is if that person is the grantor's spouse, partner or relative: **s. 46(3)**.

4. The grantor (i.e. the person giving the power of attorney) must have capacity to give the continuing power of attorney (i.e. through knowledge, awareness, appreciation, etc.): **s. 47**.

5. A person with capacity is capable of revoking a continuing power of attorney.

6. The document must be signed by two witnesses who are (among other things) not the grantor or attorney's spouse or partner, a person less than 18 years old, or a child of the grantor (or someone who the grantor has demonstrated a settled intention to treat as his or her child): **ss. 48 and 10(2)**.

The Power of Attorney need not be in a set form or template: **s. 46(8)** of the Ontario ***Substitute Decisions Act***.

A word or two on the requirement that the grantor must have sufficient capacity to grant the power of attorney. The grantor must be over the age of 16 and must be mentally capable as demonstrated by things like (**s. 47**):

- knowing whether the proposed attorney has a genuine concern for their welfare; and
- appreciates that the person may need to have the proposed attorney make decisions for them

When does a Power of Attorney for Personal Care take effect?

A Power of Attorney for Personal Care takes effect when a person is incapable of understanding information that is relevant to make a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene, or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decisions: s. **45**.

In other words, if a person cannot make some or all of their personal care decisions due to mental incapacitation, then the Power of Attorney for Personal Care is triggered.

Generally, it's the attorney appointed under the Power of Attorney who determines when this has happened, but you can designate in your Power of Attorney for Personal Care otherwise (e.g. you want a formal assessment from a medical practitioner to confirm your incapacity; you can specify who or just make a general request, etc.).

How do you terminate a Power of Attorney for Personal Care?

A Power of Attorney for Personal Care is terminated:

- When the attorney dies, resigns, or becomes incapable of personal care unless another attorney (joint or substitute) is provided for the in Power of Attorney for Personal Care;
- When the court appoints a guardian for the grantor;
- When the grantor executes a new Power of Attorney for Personal Care (unless multiple Power of Attorneys are personally provided for);
- When the Power of Attorney for Personal Care is revoked, which must be in the same way as it was executed – namely, in writing, signed and dated before 2 appropriate witnesses (and it should also refer to the Power of Attorney that is being Revoked or parts therein): **s. 53**

What is the basic structure of a Power of Attorney?

Identification

First, the grantor (the party making the Power of Attorney) and the nature of the document (i.e. it is a Power of Attorney) is identified. The date on which the Power of Attorney is made is typically included here too.

Revoke Previous Continuing Power of Attorney

Next, you'll need to revoke any previous power of attorney.

Appoint an Attorney

Next, you'll need to identify your attorney. Use their full legal name and even adding an identifier (e.g. my son, my spouse, etc.) may help. You can also consider appointing more than one person as your attorney. This may be to share or divide responsibilities and to make sure there are sufficient checks and balances on decision-making; at the same time, it may overly complicate things and cause headache (diverging opinions coupled with joint decision-making authority may cause delays and turmoil!).

Appoint a Substitute Attorney

For whatever reason, in case the individual you appointed is incapable (e.g. vacation, sickness, death) or unwilling (e.g. through retirement) to act as your attorney at the time they need to, you should appoint a substitute attorney.

Authority of Attorney(s)

This part of your power of attorney should outline the powers and restrictions on powers which your attorney will have over your property. Here, you can specify for example, that the attorney has the power, in his or her sole and absolute discretion, to make investments, to act as your litigation guardian to commence/defend/represent you in court, to take annual compensation in light of being your attorney, to deal with the Canada Revenue Agency on your behalf, etc. Part of the terms and conditions of the power of attorney may also include things like the power to make loans or gifts on your behalf, the power to consult with specific people before decisions are made, and what happens if disputes arise (e.g. are they to be resolved through mediation or arbitration?).

Date of Effectiveness

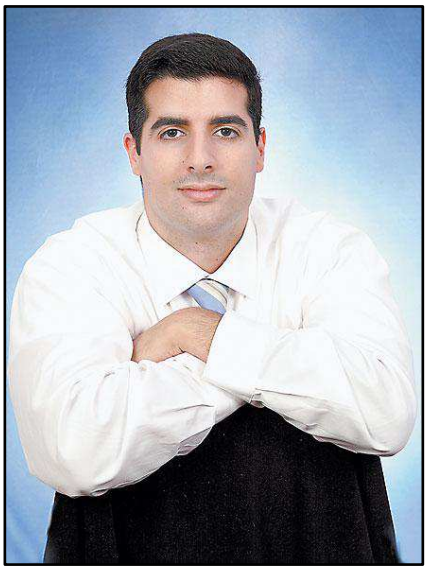
The power of attorney is effective as soon as it is signed and witnesses unless specified otherwise in the actual power of attorney. So you may state a specific date or event upon which the power of attorney becomes effective.

Signatures

Use blue ink (to show it's an original signature) instead of black. Also, please read above concerning who can qualify as a witness.

About Us

Dynamic Lawyers is a website that allows users to freely and anonymously post their legal issue(s) online and get free information and quotes from Ontario lawyers focusing on the legal area required. Multiple lawyers respond to user posts via e-mail and users can follow up with the lawyers of their choosing. Since launching in November 2008, Dynamic Lawyers has been featured in various local and national media.



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