# Frequently Asked Questions:

*Planning Your Estate*

Many people procrastinate about estate planning. It can involve difficult choices and discussions we'd rather not think about.

It may help to begin by considering the benefits of a clear and well prepared estate plan for both you and your loved ones. Without it, your spouse, friends and family will face higher costs and more stress after you pass away.

Below is a series of questions and answers outlining the common issues to consider in planning your estate. A worksheet to capture all of this information is also provided under Publications on houserhenry.com, which can be used to begin your estate plan.

## Getting started

***What will happen if I pass away without a Will?***

If you pass away without a Will (or intestate) your assets will be distributed among your spouse and relatives according to fixed rules and without regard to your wishes.

As well, the administration of your estate will cost more money, take more time, and cause more inconvenience for your spouse and family.

***Who should I choose as my estate trustees (executors)?***

Your estate trustees will administer your estate according to your Will and the law.

You should pick someone you know well and trust, and who is willing and able to fill the role. Ask the person now if he or she would want to assume this responsibility.

In case the person you name cannot or will not act, you should also have at least one backup estate trustee.

***How can I appoint someone to take care of my young children?***

If you have young children, in case both you and your spouse pass away, you should name guardians for your minor children in your Will. As with estate trustees you should ask the proposed guardians now if they will serve. Please bear in mind that the persons who are named will have to apply to a court for appointment after you pass away.

***What claims can my spouse make when I pass away?***

Ontario's *Family Law Act* provides that a surviving spouse has a right to "equalization" of both spouses' assets on death. There are rules as to what assets must be equalized. This includes the matrimonial home and the value of all assets acquired during the marriage. Thus you cannot ignore your spouse as a beneficiary when you make your Will.

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***Does my son or daughter have claims on my estate?***

No, unless they are financial dependents. You cannot ignore your spouse or dependents when you make your Will, but you have no legal obligation to anyone else.

***My son or daughter has a disability, how do I provide for him or her?***

You should consider creating a trust for that child in your Will. Usually, you do that by setting aside a specific amount of money to meet the financial needs of your son or daughter. Many disabled people receive financial assistance from government. For these benefits to continue, your trust must state that the payments from the trust are left entirely to the discretion of the trustees.

***At what age should my children or grandchildren receive their bequests?***

Usually, parents and grandparents do not want their children or grandchildren to receive all of their bequests until the age of 21 or older. To delay a bequest, a Will must provide for a backup beneficiary, in case the first beneficiary dies before he or she reaches the specific age. This provision for a backup beneficiary will serve two purposes. It will deal with the possible death of your child or grandchild and it will prevent your child or grandchild from demanding the bequest at the age of 18 years.

***What level of understanding do I need to make a will?***

You will be held to have the mental capacity (called testamentary capacity) to make a Will if:

1. You understand what a Will is and how your assets will be distributed according to your Will;
2. You understand the value and kind of assets that you are distributing in your Will;
3. You understand who your Will will affect;
4. You have considered any obligations you might have to others and how your Will might affect any claims those other people may have; and
5. You do not suffer from any insane delusion or influences that would lead you to dispose of your assets in a way that you would not have had you been sound in mind.

The person making the Will has to have testamentary capacity at two key moments:

a) when he or she provides instructions to his or her lawyer to make the Will; and

b) when he or she signs the Will.

***What is the process for planning my estate?***

Step 1 Consider what assets and liabilities you have, what you want to give and to whom. (The worksheet is a helpful way to complete this step, and you can contact us with any questions.)

Step 2 Using the worksheet, or similar summary of your estate, together we discuss your estate planning issues and the options appropriate to you.

Step 3 We will prepare and send you drafts of the necessary documents whether they are Wills, Powers of Attorney or Trust Deeds.

Step 4 Review the draft documents and let us know if you have any changes.

Step 5 With your comments, we will put the draft documents in the final form.

Step 6 We meet with you, review the final documents and arrange with you to have them signed.

***What would be your fees and expenses?***

Our accounts are divided into two parts: fees and expenses

Our fees will depend on the complexity and urgency of your estate plan. We can give you an estimate when we know more about your situation and your plans.

Usually fees will be higher when dealing with:

- families from different marriages;
- multiple Wills for shares in private businesses;
- valuable foreign assets;
- succession planning for businesses; or
- a long delay between our initial engagement and your signing of the documents.

Other expenses to budget for include out of pocket expenses like postage, courier charges, etc. Fees and some expenses are subject to Harmonized Sales Tax.

For new clients, we do ask for payment in advance of a retainer which we will hold in our trust account and apply to our invoices when we render them.

## Taxes

***What is probate tax?***

This tax is charged by the Ontario Court when the estate trustees of an estate apply for a Certificate of Appointment (formerly called Probate). The Certificate is official proof that the Will submitted to the Court is in fact the last Will of the deceased.

The Certificate of Appointment is required to transfer or sell assets which are in a public domain, for example, stocks, bonds and other securities issued by a public company. It is also required to transfer real estate and assets outside of Ontario.

The Court charges tax for a Certificate of Appointment based on the value of the assets held by the deceased and subject to the Will. Except for mortgages against real estate, debts cannot be deducted from the value of these assets. The present taxes are $5.00 per $1,000.00 for the first $50,000 of assets and $15.00 per $1,000 on the value over $50,000.

The taxes can be substantial depending on the size of the estate. For example, an estate valued at $100,000 would pay a probate tax of $1,000. A $500,000 estate would pay $7,000. A $1,000,000 estate would pay $14,500.

***How can I avoid or reduce probate tax?***

There are three main methods of avoiding or reducing probate tax: owning assets jointly; naming beneficiaries for RRSPs or insurance policies or pensions; or, using multiple Wills.

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| **Owning Assets Jointly** | Remember that a Will is only one way to transfer assets on death. If two people own an asset as joint tenants and one of them dies, the asset is automatically transferred to the surviving owner. It is not transferred by a Will.<br><br>In some circumstances it is possible to transfer the ownership of assets to joint names. This can be done easily where all or the bulk of an estate is left to one individual, for example, a spouse.<br><br>In these cases, there may be no probate taxes payable until the death of the last surviving owner.<br><br>Where the estate is divided among a number of individuals or among individuals under the age of 18, it may be very difficult to restructure the ownership of assets to minimize these taxes.<br><br>Before transferring assets into joint names, you should consider carefully tax issues such as attribution. There may also be a concern about losing control of the assets. There is the risk of abuse if a parent holds assets jointly with one child, and the parent intends that when he/she passes away, this child will share the jointly owned assets with his or her siblings. We encourage you to discuss these issues with your legal advisor. |
| **Beneficiaries for RRSPs, Insurance Policies or Pensions** | You should consider naming adult beneficiaries, like your spouse, for your RRSPs, insurance policies or pensions. This way, the proceeds of these assets will flow directly to your named beneficiary and your estate will not pay probate tax on the proceeds. Your estate may have to pay income tax on capital gains generated in your RRSP. It may be a good idea to require the beneficiary of the RRSP to pay the related taxes. Please discuss this with your legal advisor. |
| **Using Multiple Wills** | If you have valuable shares in a private company, you may want to consider using two mirroring Wills.<br><br>The first Will would relate to specific assets and shares in a private company which do not require probate to be transferred. The second Will would relate to your remaining assets which are in the public domain and real estate. Only the second Will would be submitted to the Court for probate and subject to tax. |

***What other taxes are due when I die?***

Usually, the most significant tax is on your capital gains. When a person passes away, he or she is deemed to have disposed of all capital assets for proceeds equal to their fair market value. This will trigger accrued capital gains or losses.

There are two key exceptions. Your estate will not pay capital gains on your principal residence and capital gain tax will be deferred on assets transferred to your surviving spouse or in a qualifying trust for that spouse. For transfers to spouses or a spousal trust, capital gains are then deferred until the assets are disposed of by your spouse or your spouse passes away. You must make sure the trust qualifies as a spousal trust. If it does not qualify, Canada Revenue Agency will claim tax. To qualify as a spousal trust, your surviving spouse must be entitled to all the income and no one else can be entitled to use the capital.

## Business succession

***My family has a successful business. How should I deal with the future of this business in my estate plan?***

You should develop a succession plan. With this plan, you can prepare over time either to sell the business or to pass control and management to your children. Unfortunately, most family businesses do not plan for their future. As a result, when family businesses are transferred from the founder to the next generation of the family, only 30% survive. When transferred to the third generation, only 10% of the family businesses survive.

***What are the benefits of a good succession plan?***

If you and your family wish to transfer control of the business, then a good plan will help ensure a smooth transition.

If you and your family decide to sell the business, then a succession plan can provide for an orderly sale to existing management or to outside party. If the business can be sold at a time chosen by the family, this will maximize the sale price.

A plan can mitigate the disruption of the business if its founders suddenly die or are incapacitated. For example, a plan can support the internal development of competent managers who will help ensure the business can continue.

***What are the features of a good succession plan?***

To develop a good plan, you should:

**Begin it now** There is no time like the present to begin your succession plan. To develop a plan, families will need to consult with legal and financial advisors and with the members of the family, including those who are not directly involved in the business. If the family plans to pass control of a business to the next generation, then preparing the future owners will take several years.

**Communicate** Owners should communicate with family members who are working in the business and those who are not. By communicating they can foster realistic expectations and gain consensus for a succession plan.

**Be fair** Being fair to your children does not mean treating them all the same. Assess the competency of each child and determine whether that child is suited to take over the business, or whether the business should be sold. Children may benefit from working outside of the family business to gain experience and fresh perspectives.

**Work together** Try to develop a shared vision among the family of where the business is going. It is not just for the founder to decide.

**Be flexible** Ensure the plan can accommodate changes in the family, unexpected events, deaths or opportunities.

## Power of attorney

***What are powers of attorney? Do I need them too?***

Yes, you should have powers of attorney. There are two kinds of powers of attorney: one for personal care (health); and one for property. They operate while you are alive.

With powers of attorney you can appoint someone you know well and trust to make medical and financial decisions for you while you are alive.

***Who should I appoint as my attorney(s) for property or personal care?***

These powers of attorney are powerful documents. Unfortunately, we often see abuse of the power of attorney for property. To guard against misuse, we recommend you consider appointing two people who must act together as your attorneys for property.

For both powers of attorney, you should appoint people you know well and trust. They should be concerned with your best interests and understand your values. Ask them if they are willing before you appoint them. You should always appoint backup persons.

**Worksheet also available on houserhenry.com*

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***About Houser Henry & Syron LLP***

For over 75 years, Houser Henry & Syron has helped entrepreneurs and private companies of all sizes grow and prosper. We provide a range of business law services - from assisting with day-to-day legal requirements to providing strategic counsel on highly complex transactions. We are uniquely positioned to provide high-quality legal advice, tailored to the specific needs of our clients, at a reasonable price.