



Where there's a will...

...there's a way to carry out your wishes after death

DIANA SWIFT
STAFF WRITER

A LOT OF PEOPLE think they don't need a will. *Wrong.* That's one of the most common misconceptions around estate planning, according to Pamela Earle, a lawyer in St. John's, Nfld. "If you don't, under the laws of intestacy, your assets will be distributed according to the government and not the way you want," says Earle, who specializes in wills and estate planning at the law firm of McInnes Cooper.

Maybe you want your wife to inherit your assets with nothing passing to your children until her death. If you die without a will, you should know that most provinces will divide the estate between the surviving spouse and all children. Although the strict formulas used to calculate such divisions may vary by province, the first \$200,000 might go to your spouse, for example, with the remainder split 50-50 between your spouse and an only child. Or there may be a one-third/two-thirds split between spouse and several children.

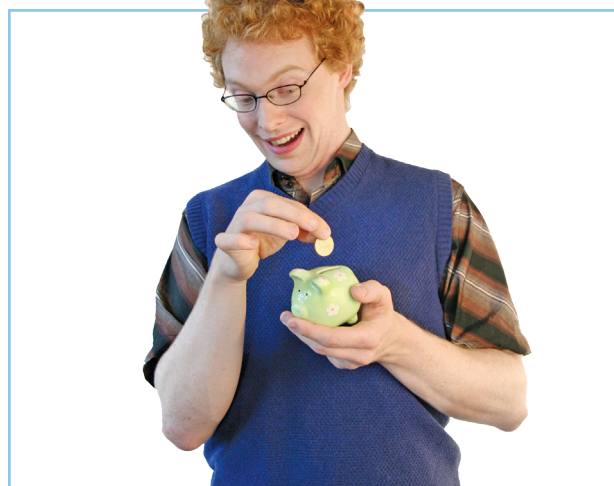
"People tend to think that a spouse automatically gets everything, but that's not true," says Earle. (And contrary to popular belief, the government only takes the estate if you die intestate with no living relatives.)

Having a will is especially important in the case of common-law unions. "Under the laws of intestacy, a common-law spouse takes nothing," says Susannah Roth, a wills expert with O'Sullivan Estate Lawyers in Toronto. Even a common-law spouse with whom you've shared an abode for many years and had several children will have no standing. Without a will, your estate will go to the kids.

Minor children are also a concern in intestacy. Quite apart from the unresolved issue of guardianship in the absence of a surviving parent or an appointed guardian, the children's share of your assets is paid into court and invested on their behalf until they reach the age of 18. "Not only is the rate of return low," notes Roth, "but the children are also entitled to the entire proceeds at age 18. Most people would want their children to wait longer to have access to that capital."

And don't assume that your family knows your wishes for the distribution of your assets and the disposal of your remains, says Roth. "Often, they have no clue."

"I encourage people to communicate their plans to their loved ones and executors so that there are no surprises after the individual passes," says Jordan Hardy, a lawyer with MacPherson Leslie & Tyerman in Regina who has seen a steady flow of wills litigation in the past few years. "A significant number of the cases I'm working on could have been avoided by better communication on the part of the testator."



Typical costs for wills

Costs can vary greatly by city, the size of the law firm and the complexity of the assets and beneficiaries. But a lot of the time, wills and living wills are not as expensive as you may think.

- Handwritten holographic will: \$00
- Stationary-store or online will kit: under \$30
- Simple "law shop" will: \$99
- Simple law-firm-drafted will that includes a living will: \$500
- Complex will with power of attorney, varied assets, trusts, different jurisdictions and multiple beneficiaries: \$1000 plus

THE RIGHT MINDSET

"I'll cut you out of my will!" Such utterances may be the stuff of Victorian melodrama, but the punitive sentiments behind them can taint modern will-makers, too. Before you pick up your pen or see your lawyer to set down your last wishes, you should get into an equitable frame of mind. This will ensure that your dependents and relatives are treated fairly and help avoid time- and money-draining legal costs later on. Bear in mind these principles.

1. Leave vengeance to the Lord. It's never a good idea to use your will to punish people who would reason-

ably expect to inherit from you. "That's a recipe for litigation, so consider that beforehand," says Roth in Toronto. And would you really want your last document to sow dissension among your kin and waste your legacy on legal wrangling?

2. Think outside the box. Probably you want the bulk of your estate to go to your spouse and/or children, but pause before you automatically assign the whole of it to close family. Is there a needy distant relative or a helpful friend to whom a small bequest of money or personal property would make a real difference? A down-and-out nephew? An impecunious friend who shares your interest in art books? Or could that empty spot in a favoured neighbourhood green space use a shade tree?

Before she died, Susan Friedman, a market research analyst in Toronto, added a directive to her will—which originally left all of her assets to her husband—allowing a small cash bequest to be made to an unemployed brother who was convalescing after a life-threatening respiratory illness. It made no difference to her well-off husband, but it was enough money for her ailing brother to take a much-needed winter vacation down south.

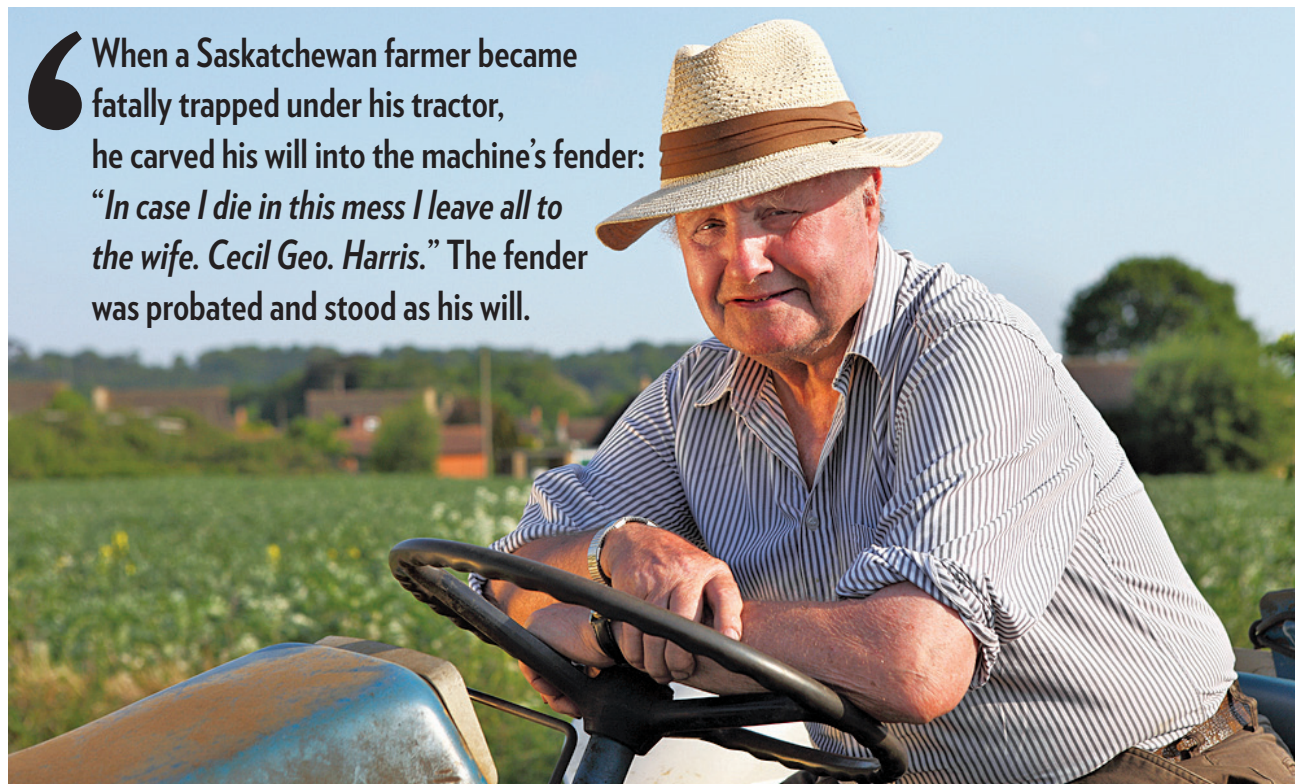
3. Be charitable. There are many worthy charities and religious institutions that can make good use of even modest bequests. Your estate will receive tax deductions for posthumous gifts to registered charities, and these will offset taxes on other assets. But, reminds Roth, "it's even better to make these donations during your lifetime so that you yourself enjoy the tax benefits."

PRACTICAL CONSIDERATIONS

1. A simple will? Don't fall into the trap of thinking that you need only a simple will, warns Roth. Perhaps you have an ex-spouse and children by a former union. Perhaps you have assets in other jurisdictions or potentially warring beneficiaries. "Above all, you want to set things up to avoid future litigation," says Roth. That's why precise lawyer-drafted wills are generally a safer bet than do-it-yourself efforts.

2. Who will execute your will? Carefully consider your executors, advises Roth. Think about their age, their organizational ability, their skill with numbers and the amount of time they have to give to administering an estate. If an executor is your contemporary, is she likely to die before or soon after you do? "Have an alternate executor in mind, especially if your first choice is an older person," says Roth.

See MINIMIZE, p. 8



PETER NADOLSKI

When a Saskatchewan farmer became fatally trapped under his tractor, he carved his will into the machine's fender: "In case I die in this mess I leave all to the wife. Cecil Geo. Harris." The fender was probated and stood as his will.

Do-it-yourself (DIY) wills

DIANA SWIFT
STAFF WRITER

SOME PEOPLE prefer to bypass the cost and time of the law office altogether and complete their wills on their own with fill-in-the-blanks kits you can purchase at business supply stores and online for less than \$30 and complete in half an hour.

"These are really just one step up from intestacy," says Pamela Earle, a lawyer with McInnes Cooper in St. John's, Nfld. "And they're as good as intestacy if they're not properly done." (Bear in mind that DIY options have been seriously cutting into lawyers' fees for will-making.) Common problems with DIY wills are lack of proper witnessing, imprecise language, improper placement of paragraphs and invalid additions.

"But if carefully completed and witnessed, they are valid and will stand up in court," says James Naumovich, a Toronto lawyer specializing in wills and estates. And they can be reasonable stop-gap measures if you need to make a will quickly and lack the time to seek legal advice.

Franklin Phillips, a Toronto-based filmmaker, for example, made a simple will using a kit just before his sudden departure for Africa to make a documentary film that would take him into some dangerous conflict zones. It was the only will he ever made, and after his death some 20 years later, his lawyer said the stationary-store testament was still valid, although it did not reflect the reality of his current assets.

The main drawback of a self-executed will, says Susannah Roth, a lawyer with O'Sullivan Estate Lawyers

in Toronto, is that you lose the benefit of professional advice that could alert you to tax savings, point out potential pitfalls for litigation and bring errors to your attention. If the testator's familial situation is simple, all may be well. But if there are multiple spouses and children from different unions, a seemingly simple will can get complicated.

She cites the reported case of a man who wanted to leave the bulk of his estate to his only living relative, a nephew, with a small bequest going to a helpful neighbour. In his thrifty do-it-yourself will, he accidentally named the neighbour, not the nephew, as the main beneficiary. After his death, the two had to go to court to fix the mistake. Luckily, the neighbour was co-operative, but it still cost money. "Having your will done is not a time to be overly frugal, as someone may pursue litigation after you're gone," says Regina's Hardy.

Adds Roth: "Litigation is very expensive and can cost \$20,000 before you even get to court."

Even less sophisticated are purely handwritten—or holographic—wills, where the testator doesn't even have the benefit of the legal language and prompts offered by the forms. These are often written in emergency situations where the testator is facing death. But these can stand, too. Naumovich cites the 1948 case of Cecil Harris, a Saskatchewan farmer who became fatally trapped under his tractor. He carved this will into the machine's fender: "In case I die in this mess I leave all to the wife. Cecil Geo. Harris." The fender was probated in court and stood as his will. It is currently on display at the law library of the University of Saskatchewan College of Law in Saskatoon.

Minimize estate tax

Continued from p. 7

"If you want to appoint more than one executor, make sure they get along," she adds. One man's will named his second wife and one of his sons by his first marriage as joint executors. By the time he died, the two executors were barely speaking to each other, hampering the administration of his will. "With ongoing trusts, it's better to appoint a third party such as a trust company or a lawyer," says Roth.

3. Minimize tax

"A lot of people don't realize that there are planning opportunities that will minimize tax on your estate," says Newfoundland's Earle. Strategies include naming your spouse as sole beneficiary of all your RRSPs and setting up a spousal rollover trust, which gives your spouse access to earnings on securities held in your name. "Your spouse gets the benefit of your portfolio, which is taxed only after the second spouse dies," she says. You can also set up trusts for minor children and even adult offspring if you have concerns.

4. Major changes

If you are elderly and decide to make major changes to your will, you may need extra documentation of competency to make sure no one claims you did not know what you were doing or were unduly influenced by a particular beneficiary. Sometimes that works for good. After having a minor stroke, an elderly Winnipeg music teacher was persuaded to change her will, leaving her house and assets to her cleaning lady instead of the conservatory where she had studied music. Her family lawyer challenged the change on grounds of incompetency, and the original will was reinstated.

5. Resist pressure

Some relatives may pressure you to reveal what you are going to leave them and may try to influence the distribution of your assets or even demand their share. "This can happen especially if you're dependent and vulnerable," says Roth. She advises a person in that situation to keep his own counsel and tell the important relative he's still considering the best way to divide things but all will get their fair share. "If you know a beneficiary will be unhappy with your will, discuss with your legal adviser how to prevent that person from derailing your plans."

6. Remember to make a living will

You should give power of attorney to a trusted individual who can make health-care decisions on your behalf in case you become incapable of doing so. The emphasis is on "trusted." One Toronto man gave power of attorney over his end-of-life care to his son not his spouse, because, he said, "she had insisted on keeping an old family dog alive too long!"

7. Keep up to date

Review your will and estate planning periodically to ensure it is realistic in terms of your current assets, executors and the needs of your beneficiaries.

Encouraging Anglicans to be thoughtful, generous trustees

JOHN ROBERTSON

"Consider your possessions loaned to you by God."

—St. Catherine of Siena, 14th c.

CANADIAN Anglicans are increasingly taking to heart St. Catherine's sound advice. After all, what can be more certain than death and taxes—and almost always in that order. By careful planning



Robertson

for the sharing of your estate with family members, close friends, your church and favourite charities, you will have gone a long way toward minimizing taxes owing upon your death. You will also have peace of

mind, knowing that you will be supporting those people, ministries and causes you feel are important and that reflect your priorities and values.

If, for some reason, you feel you should leave everything to your adult children, why not ask them if they would be happy to share 90% of your estate, and then give 10% to your church, university, hospital foundation or other charitable organization? Or consider wealth-replacement insurance, so you can make

a charitable gift and with the tax credit, purchase an insurance policy on your life so you can provide for your grandchildren. Fortunately, you don't have to die first to be generous. During one's lifetime, a gift of securities, a charitable gift annuity or a significant cash gift can make all the difference in the world...and if your contribution is for your church or registered charity, you will receive substantial tax relief.

Archdeacon John Robertson is senior gift planning officer, General Synod.

For more gift planning information, contact: Archdeacon John M. Robertson, Resources for Mission, Anglican Church of Canada, 80 Hayden St., Toronto, ON M4Y 3G2 Telephone (toll free) 1-888-439-GIFT (4438) Email: jrobertson@national.anglican.ca