

AGE FRIENDLY
Manitoba



A LEGAL INFORMATION GUIDE FOR SENIORS

**Wills and Estates
Power of Attorney
Health Care Directives**

This publication has been prepared jointly by:
The Seniors and Healthy Aging Secretariat,
Healthy Living and Seniors,
The Public Guardian and Trustee
and
The Community Legal Education Association
April 2014

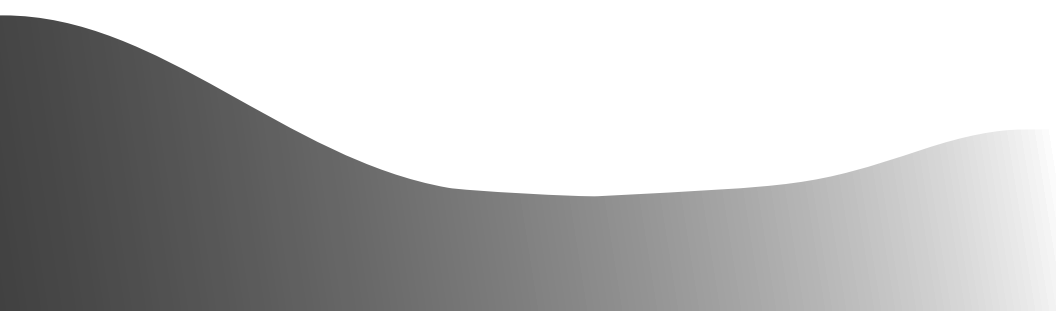


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INTRODUCTION

Nearly everyone has an estate – the things we own and accumulate over our lifetimes, such as real estate, savings, investments and items of personal or sentimental value. Deciding what is going to happen to the contents of your estate is one of the most important decisions you will ever make. A whole body of law exists to govern and make this process easier. This booklet has been developed by the Seniors and Healthy Aging Secretariat, The PGT and the Community Legal Education Association (CLEA) to help Manitoba seniors better understand wills and estates, and related matters of powers of attorney and health care directives. The contents reflect questions seniors raise on the Seniors Information Line and with seniors' organizations.

Before publication, the Secretariat consulted with the Manitoba Council on Aging, A & O: Support Services for Older Adults, and a number of seniors' groups. Comments and suggestions were sought from a cross-section of service and seniors' organizations. The responses are reflected in the contents, and we thank everyone who has assisted in this vital part of the development of the booklet.

In the following pages, there are certain points to note. All areas of the law use special terms and phrases. These terms and phrases are defined in a glossary at page 57, and written in **bold** letters in the text when they first appear.

This booklet is intended to provide general information only. How the law affects you depends on your individual circumstances. Also, the law may change from time to time. If you have a legal problem or need specific advice, it is best to consult a lawyer.

A Note about the Public Guardian and Trustee (PGT)

Throughout this booklet, you will see references to *The PGT*. The PGT is both a person and a branch of Manitoba Justice. Its duties include:

- Acting as committee or substitute decision maker of last resort for people who are not mentally capable of managing their own affairs, and who do not have anyone willing, able or suitable to manage for them;
- Administering the estates of people who die in Manitoba with no one else capable or willing to act as personal representative; and
- Administering trust monies on behalf of children.

Further information about *The PGT* may be obtained by contacting:

The Public Guardian and Trustee of Manitoba
155 Carlton Street – Suite 500
Winnipeg, MB R3C 5R9 (204) 945-2700

340 – 9th Street, Room 131
Brandon, MB R7A 6C2 (204) 726-7025

Information is also available at The PGT's Website:
www.gov.mb.ca/justice/publictrustee
Email: **PGT@gov.mb.ca**

WILLS AND ESTATES

WHAT IS A WILL?

A will is a written document that controls the disposal of a person's property after death.

Manitoba law provides for two forms of wills: the formal will and the holograph will.

Most wills are formal wills. For a description and more information on the laws on formal and holograph wills, see page 16.

A will must meet the following requirements in order to be valid.

1. The person making the will (the ***testator***) must be at least 18 years old. There are exceptions to this rule which are discussed on page 16.
2. The testator must have the necessary mental capacity to understand what he or she is signing.
3. The will must be in writing. Tape recordings and videos do not meet the requirements of *The Wills Act*.

Generally, a witness to a will (and the spouse or common-law partner of that witness) cannot receive any benefit from the will. Similarly, a person who signs a will on behalf someone who is unable to write (and the spouse or common-law partner of the person who signs) cannot be a *beneficiary* under the will.

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IS MAKING A WILL NECESSARY?

Having a will is important. It disposes of your property under law as you would wish and covers unforeseen circumstances in your life. Even if you think you own nothing of value, a will enables you to take care of items of sentimental value, property that might be inherited before death, or money acquired at death through life insurance, pension benefits or court awards.

People often believe the property they do own will automatically pass to the right person whether or not they have a will. If you don't have a will, this may not always be true; if you have a valid will, your wishes will be followed.

REASONS TO HAVE A WILL

There are many good reasons to have a will, including:

Personal Wishes

Having a will is an effective way to ensure your personal wishes are followed with a minimum of expense and delay. It is also an act of kindness and consideration to surviving family members who will already be suffering emotionally.

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Cost

If you die without a will, the court will have to appoint an **administrator** to settle the estate. In some cases, this person will have to purchase a bond to ensure satisfactory administration of the estate. When it is necessary to purchase the bond from a bonding company, it may cost more than it would have cost to draw up a will.

In contrast, an **executor** named in a will does not have to post a bond unless he or she does not live in Canada.

Estate Management

An administrator appointed by the court has less power to deal with the estate than has an executor, and no power at all until officially appointed. This can affect that person's ability to manage the property in a way that will most benefit the people who are to inherit it.

Estate Planning

Your will can be an important tool in estate planning. Estate planning involves arranging your property to maximize the benefits of your estate – for example, by deferring capital gains and tax obligations.

Estate planning also involves ensuring that your estate is transferred in a manner that meets your needs and wishes. For example, you may want to preserve assets for your family's benefit. Or, you may want to ensure the orderly succession of ownership and control of some estate assets.

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The details of estate planning and related tax implications are complex. You can get further information from your lawyer, accountant, investment adviser or banker.

Property Distribution

If you die **intestate** (without a will), your estate will be distributed according to the inflexible provisions of the law, with no consideration for your personal wishes. In such a case, the law provides benefits only to close relatives. Friends, distant relatives and worthy causes you have supported in the past will receive nothing.

Distribution of personal effects and heirlooms can cause bitterness and division among family members at an emotional time, especially if they believe something was promised to them years ago. This kind of problem can be avoided if there is a will that clearly states who is to get which special items. Similarly, if you are owed money and want to forgive the debt in the event of death, you can do this through your will.

Trusts

Some important matters involving children and grandchildren can be dealt with in a will. The portion of the estate going to a **minor** is held in **trust**. Without a will, the capital portion of the trust that may be required for the minor's education and maintenance can only be made available after permission is granted by the court. In contrast, power to use trust property can be given to a **trustee** in a will, and can be used without special court permission. Trusts may also be useful to achieve tax savings.

WILLS AND ESTATES

Guardianship of Minor

A will is also one way to clearly state your wishes concerning guardianship of minor children. Although a court must make the final decision on guardianship, instructions in a will can be taken into account as a persuasive statement of the parent's preference.

Other Reasons

Due to certain legal intricacies, people who fall into the following special categories have a greater need for a will than others:

- common-law partners;
- people who wish to leave nothing to certain family members;
- people who own land outside the province;
- people whose residence is unsettled;
- people who have recently married or are thinking of doing so;
- people who are thinking of living as common-law partners;
- people who are separated or divorced;
- older adults who may be under pressure from others to dispose of their property; and
- people who have children with special needs.

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CONTENTS OF YOUR WILL

A will can be very simple or very complex, depending on your desires, your needs and your estate. Although everyone needs their own will to suit their own circumstances, most people usually include clauses that deal with the following kinds of things:

Distribution

Clear instructions about how to **dispose** of the property in the estate. Gifts of real estate are called **devises** and gifts of personal property are called **legacies**. Personal property is any type of property other than real estate.

Residue

The residue of an estate is the property not specifically distributed in a will. Wills should include a clause stating how the residue is to be distributed. Beneficiaries of the residue are called **residual beneficiaries**.

Debts

Wills should contain a clause about how the debts of the estate are to be handled.

Trusts

Wills are commonly used to create trusts for family members, especially spouses and minors. Trusts can often be used to gain tax savings.

WILLS AND ESTATES

Common Disaster

This clause states how a will should be read in the event that a spouse, common-law partner, child or other loved one dies at the same time as the testator.

Funeral Instructions

Funeral instructions should not be included in a will, since in many cases the family will attend to the funeral arrangements before the will is located or read. In addition, directions in a will regarding funeral arrangements are persuasive but not legally binding. It is better to give a copy of funeral instructions to a trusted friend or relative before death.

MAKING A WILL

Although you can make either a holograph or a formal will without a lawyer's help, it is always a good idea to obtain the services of a lawyer or trust company.

As a will is one of the most important documents you will ever sign, you should seek professional advice in preparing it. This is particularly true when dealing with guardianship of minors, trusts, or beneficiaries with special needs. One small mistake can cost the estate a great deal of money or even invalidate the entire will. The cost of making a simple will is usually quite small.

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If you have not already chosen a lawyer to write your will, the Law Phone-In and Lawyer Referral Program can give you the name of a lawyer who has experience in this area. The first half-hour interview with the lawyer is free. After the initial interview, you are free to hire the lawyer at a fee to be decided between you and the lawyer. Phone (204) 943-3602 or toll-free, outside Winnipeg at 1-800-262-8800. For more information about working with a lawyer, see the section “Choosing and Working with a Lawyer” on page 54.

Before Visiting a Lawyer

Since a lawyer will need certain information to write a will, there are several steps you can take before the first interview to save time and expense:

- Make a list of everything you own including all valuables, property you own or which will belong to your estate at the time of your death, bank accounts, insurance policies and pensions;
- Make a list of jointly owned items;
- Consider or write down what you want your will to contain, including who is to get what, whom you want to act as your executor, and any special **bequests** or gifts you may have in mind;
- Obtain and list the names, addresses and occupations of the people named in the will; and
- Consider discussing your plans with your family and anyone you wish to appoint as executor, **guardian** or trustee under the will.

WILLS AND ESTATES

Choosing an Executor

Your executor is the person responsible for settling your estate after your death.

Being an executor can be a difficult job, and should be left in the hands of someone capable of performing the required tasks. Often it is best to name a trusted friend or relative. An executor must be 18 years of age or older. Non-residents of Canada may be appointed, but they may be required to furnish security in the form of property or an insurance bond.

- The executor is entitled to fair and reasonable compensation for the work done in settling the estate. When deciding who to name as executor, you should consider the following:
- The size, complexity and value of your estate;
- The timeframe involved in the administration of the estate. Certain estates, especially those that set up trusts for minors may require a commitment of several years;
- Whether you wish to have your personal or business affairs handled by someone close to you or by an unrelated person, financial institution or trust company; and
- Whether the person you're considering for appointment is able and willing to accept the position.

You can appoint more than one person to act as executor. You should also name a second choice, in case the first choice dies before you or is unable or unwilling to act.

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Safekeeping a Will

After your will has been written and signed, a copy should be made, labelled as a copy and left in an accessible place, such as your desk or filing cabinet. Store the original will in a safe place, such as a bank safety deposit box, your lawyer's office or your trust company. You may also want to give your executor a copy.

FORMAL REQUIREMENTS OF A WILL

As noted earlier, certain requirements must be met to create a valid will. They can be put into three basic categories:

1. Testamentary Capacity

The first requirement for a valid will is that you must be mentally capable at the time your will is made. Judges and lawyers use the term "testamentary capacity". In general terms, this means that you have enough mental ability to make a valid will.

If a will is challenged on the basis that you did not have testamentary capacity when you wrote the will, the court will consider four basic factors to decide the issue:

(a) Nature of the act

The court will ask whether you knew you were making a will and that this document would determine how your property would be distributed after death.

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(b) The property disposed

The court will want to determine if you generally understood and appreciated how much (and what kind) of your property was to be distributed.

(c) Normal expectations

The court will want to know whether you understood what one normally does in a will. For example, a person may certainly leave a child out of his or her will (with certain exceptions for dependants), but if he or she simply forgot the child existed, the court may conclude that there was not sufficient testamentary capacity.

(d) Rational consideration

The court will ask whether you gave rational thought and consideration to the above items before deciding how to dispose of your property.

The person asking the court to approve your will must prove you had testamentary capacity when it was made. However, if on the surface the will appears in order, the court will presume that capacity existed. In that case, anyone opposing the will must prove the contrary. Although determining whether the testator had sufficient mental capacity is a legal and not a medical test, medical evidence from a doctor or other health-care expert will be considered. Other evidence the court will consider includes the testimony of the witnesses to the will and the lawyer who prepared the will, and the opinions of friends and relatives.

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If there is any doubt as to testamentary capacity, the lawyer drafting the will should ask questions to determine whether the testator has the four elements of capacity. If the will is later challenged, the lawyer can then testify about the testator's responses.

2. Age

In Manitoba, a minor cannot make a valid will. However there are exceptions. If a minor:

- is or has been married;
- is in the armed forces; or
- is a sailor at sea,

he or she may make a valid will. If a minor testator does not come within one of those exceptions, the court will likely find the will to be invalid, regardless of the minor testator's age.

3. Legal Formalities

In Manitoba, *The Wills Act* prescribes the formalities that must be complied with for a will to be valid. *The Wills Act* recognizes two types of will: the formal will and the holograph will. A holograph will is an informal type of will and is discussed separately.

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For formal wills, The Wills Act outlines four basic requirements:

- i) The will must be in writing;
- ii) It must be signed at the end by the testator or by someone else at the testator's direction and in his or her presence;
- iii) The testator must sign (or acknowledge his or her signature) in front of at least two witnesses who are present at the same time; and
- iv) At least two witnesses must sign in the presence of the testator.

Though not required by *The Wills Act*, it is now common practice for the testator and witnesses to initial every page of the will at the bottom right corner.

Holograph Wills

A holograph will is one that is written and signed entirely in the testator's own handwriting. It is not necessary to have witnesses sign a holograph will. To be valid, a holograph will must clearly contain a fixed and final expression of intent to dispose of property upon death and not merely state a future intention.

When a holograph will is probated, the **Probate Court** will require affidavits from two people who are not beneficiaries, who knew the testator for a number of years (including the time when the will was written), who are familiar with the testator's handwriting and who can verify the testator's testamentary capacity at the time the will was written.

WILLS AND ESTATES

You should consult your lawyer before drafting a will on your own. A simple will prepared by a lawyer need not be expensive and offers certain assurances that the document is valid and accurately reflects your intentions.

Pre-Printed Will Forms

These are wills often sold in drug stores, stationery shops or by mail order or internet. They are usually a fill-in-the-blank form, on which the testator inserts the names of beneficiaries and witnesses.

If properly prepared, these forms may constitute a valid will. *Unfortunately, it is very easy to make mistakes.* These types of wills often are not prepared properly. If the will is not properly witnessed, the court can look only at the handwritten words, and not the typed or pre-printed ones. If the handwritten words, on their own, accurately express the testator's intentions within the context of the law, the document may be a valid holograph will. However, such a result is rare.

CHANGING OR REVOKING A WILL

You should review your will every few years to make sure it is current. It is wise to review your will whenever you move, change marital or common-law status, acquire or lose a substantial amount of property, want to add or remove a beneficiary, or when new laws are passed.

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You may change a will as often as you wish. Changes can be made by an addition to the will, called a **codicil**, or by making an entirely new will. In order to be valid, all changes to a will must comply with the usual legal requirements for a valid will as discussed previously.

A will can be **revoked** or cancelled in the following ways:

Marriage

Generally, when someone marries, all previous wills are automatically revoked. This occurs even if the testator intends the will to remain the same. The one exception is if the will was made in contemplation of a specific marriage.

The will not only would have to state that it was made in contemplation of marriage, but must also name the person whom the testator was marrying. If the will is made in contemplation of a common-law relationship and the testator marries that common-law partner, the marriage does not revoke the will.

Destruction

If you destroy your will with the intention of revoking it, it is revoked and therefore invalid. Even if the will is not completely destroyed and is still readable, the court will consider it revoked if your intention was to revoke it. However if the will was destroyed or lost accidentally, a copy might still be found to be a valid will.

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Document of Revocation

A will should contain a clause stating that all prior wills are revoked. This is usually the first clause of any will.

If it does not contain this clause, previous wills are not necessarily invalid. A previous will executed before the new will would be invalid only to the extent that it is inconsistent with the new one.

Alterations to an existing will

An alteration to an existing will is invalid unless the change was properly executed. Like a will, a properly executed alteration should be signed by the testator and two witnesses. The court will presume that any alteration occurred after the will was first executed. If the alteration is ineffectual, the original clause will remain valid. One exception to this rule is if the clause that was altered is now unreadable. In this case, the original clause and the attempted alteration are revoked and therefore invalid.

ESTATE ADMINISTRATION

Grant of Probate

If you have been named executor of an estate, you will have to ask the court to have the will probated. Probate is a legal word meaning proof. When a person dies leaving a will, the executor named in the will must probate the will before proceeding to administer the estate of the deceased person.

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There are some exceptions as to when a will must be probated. (See “Estates of Small Value” page 24). In Manitoba, the application for probate must include the will, an oath signed by the executor, affidavits signed by the witnesses to the will and an inventory of the property in the estate. If the court is satisfied that the will is valid, it will make an order called a **Grant of Probate**.

Letters of Administration

Where a person dies without having made a will, anyone who lives in Manitoba and has an interest in the estate may apply to the court for permission to administer the deceased’s affairs. The court will determine who the appropriate person is to administer the estate and appoint that person by issuing **Letters of Administration**. Generally, the closest relative who applies (the surviving spouse or common-law partner having the best right) is appointed administrator by the court.

The administrator must give a personal guarantee to the court that he or she will administer the deceased’s affairs properly. Where the estate is large, the administrator may be required to purchase a bond from a commercial bonding company to ensure the proper administration of the estate.

DUTIES OF AN EXECUTOR/ADMINISTRATOR

The duties of the executor and administrator are very similar. The term *personal representative* is often used as a generic term for both. In addition to obtaining a grant of probate or letters of administration, the personal representative must perform several duties, which include the following:

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Funeral arrangements/expenses

The personal representative has the authority to incur reasonable funeral expenses, including burial and a headstone, on behalf of the estate.

Debts

The personal representative must ensure that outstanding debts and obligations of the deceased are paid. An advertisement should be placed to notify all creditors that the estate will pay lawful claims against it. The claims of creditors take precedence over beneficiaries. The personal representative must also collect any debts owed to the estate.

Family Property Act Notice

According to *The Family Property Act*, the personal representative must give notice within 30 days of the grant of probate or letters of administration to a spouse or common-law partner of the deceased. This notice tells the spouse or common-law partner that they have 6 months to make a claim against the estate for an equal division of marital property.

Taxes

The personal representative is responsible for ensuring that the final tax returns of the deceased and the estate are filed and that income tax is paid. For more information about these matters, phone Canada Revenue Agency (CRA) toll- free at 1-800-959-8281 or visit the CRA website at www.cra-arc.gc.ca.

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Distribution of the Estate

Once the debts of the estate have been settled, the remaining assets may be distributed to the beneficiaries. If not enough funds remain to satisfy the gifts in the will, the gifts will be reduced according to established rules.

Settlement and Allowance of Accounts

The personal representative has the duty of keeping accounts for all funds collected or distributed by the estate. Before the estate is wound up, residual beneficiaries (see page 10) must approve the accounts. Also, any interested party (e.g. possible beneficiary, creditor) may ask the court to approve the accounts. If any of the residual beneficiaries cannot or do not approve the accounts, the personal representative must ask the court to approve the accounts.

OTHER MATTERS

Legal Fees

The court has specific rules for the legal fees that may be charged in the administration of an estate. The fees depend on the value of the estate, and may be changed by the court when the personal representative passes the accounts of the estate.

Details of these rules can be obtained from your lawyer or the lawyer for the estate.

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Estates of Small Value

A will must be probated, unless the value of the estate at the time the testator dies is less than \$10,000. In such a case the executor may avoid the cost of probate by applying to court for an *administration order*.

Survivor Benefits

Survivor benefits under the Canada Pension Plan may be available to the estate and to survivors of the deceased. There are three kinds of survivor benefits:

- surviving spouse's pension;
- orphans' benefits; and
- death benefits.

The spouse's pension is paid on a monthly basis. The amount of the pension depends on the amount the deceased had contributed to the plan.

Orphans' benefits are monthly benefits provided for the dependent children of the deceased. To qualify, the children must be under the age of 18 or be between 18 and 25 and attending school or university full time.

Application for these benefits should be made as soon as possible. If not made within a year of death there may be a loss of benefits. For more information, contact Canada Pension Plan toll-free at 1-800-277-9914, or reach them at their Web site: www.servicecanada.gc/eng/isp/cpp/cpptoc.shtml

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WHEN THERE IS NO WILL

The Intestate Succession Act

If you die without a valid will, you are considered to have died intestate.

In this case, your property will be disposed of under *The Intestate Succession Act*, which contains a set formula for distributing an intestate's property. You may also die partially intestate if you have a valid will that fails to completely dispose of all property. In this case, only remaining property outside your will's provisions will be dealt with under *The Intestate Succession Act*.

If you die intestate, the court must appoint an administrator of your estate. An administrator's duties are similar to those of an executor, except that most discretion is eliminated by *The Intestate Succession Act's* inflexible distribution scheme. The administrator must take inventory of all your property and must then satisfy all outstanding debts, estate fees, funeral expenses, income tax and any other obligations. The rest of the estate is then distributed according to the following basic provisions:

1. If there is a surviving spouse or common-law partner and no issue, the spouse or common-law partner receives everything.
2. If there is a surviving spouse or common-law partner and issue, and all of the issue of the deceased are also issue of the surviving spouse or common-law partner, the surviving spouse or common-law partner receives everything.

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3. If there is a surviving spouse or common-law partner and one or more of the issue of the deceased are not the issue of the surviving spouse or common-law partner, the surviving spouse or common-law partner will receive the greater of the first \$50,000 or half of the estate plus half of the remaining estate.
4. In the case of a partial intestacy, the surviving spouse or common-law partner's entitlement to the first \$50,000 or one half of the estate would be reduced by an amount equal to the value of any benefit received by the surviving spouse or common-law partner under the will.
5. If the deceased and spouse or common-law partner were living separate and apart at the time of the deceased's death and either or both of the following conditions is satisfied, the surviving spouse or common-law partner shall be treated as if she or he died before the deceased.
 - a. During the period of separation, one or both of the spouses or common-law partners made an application for divorce or for dissolution under *The Vital Statistics Act*, or an accounting or equalization of assets under *The Family Property Act* and the application was pending or had been dealt with by final order at the time of the deceased's death;

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- b. Prior to the deceased's death, the deceased and his or her spouse or common-law partner divided their property in a manner that was intended by them to separate and finalize their affairs in recognition of their marriage breakdown or the break-down of their common law relationship. When the parties have been separated for a long period of time it is often difficult to ascertain whether this condition has been satisfied. If there is a surviving spouse and one or more common-law partners, the spouse or common-law partner whose relationship with the deceased was the most recent at the time of the deceased's death has priority over the spouse or common-law partner from an earlier relationship.
6. The balance of the deceased's estate not going to the surviving spouse or common-law partner, or the entire estate if there is no surviving spouse or common-law partner, shall be distributed among the issue of the deceased on a ***per capita*** basis as set out in section 5 of *The Intestate Succession Act*.
7. If there is no surviving spouse or common-law partner or issue, the estate goes to the deceased's parents or the survivor of them.
8. If both of the parents have predeceased, the estate is distributed among the issue of either or both of the parents of the deceased on a ***per capita*** basis as set out in section 5 of the Act. This includes all issue resulting from any relationship of either parent of the intestate.

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If there is no spouse, common-law partner, issue, parents or issue of parents, *The Intestate Succession Act* provides further detail on how the estate is to be distributed to more distant relatives. These provisions of *The Intestate Succession Act* are quite complex and have frequently been misinterpreted. It is very important to get legal advice prior to distributing an estate according to these provisions.

If there are no heirs to the estate, the estate will be paid to the Crown (the provincial government). If heirs later come forward, they can make a claim to the Crown for their share.

LIMITS ON TESTAMENTARY FREEDOM

The general freedom to dispose of your property upon death is not absolute. *The Dependants Relief Act*, *The Homesteads Act* and *The Family Property Act* all work to provide adequate support for a surviving spouse or common-law partner and/or dependants. Each of these acts can be used to challenge the provisions of a will.

The Dependants Relief Act

Under this act, a person dependent on the deceased may apply to the court for support if the provisions of the will are not adequate. A current spouse, an ex-spouse who was receiving maintenance payments, a dependent child or grandchild may all be entitled to relief. There are no distinctions between adopted and naturally born children.

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A common-law partner of the deceased may also be eligible for support if they lived together for a least three years with no children or lived together for at least one year and had a child, or if the surviving common-law partner was entitled to support payments.

The court will consider all relevant factors to determine if relief should be granted for a dependant. These factors include:

- the conduct and character of the dependant;
- whether the dependant is entitled to any other provision for maintenance;
- the financial circumstances of the dependant; and
- evidence of the testator's reasons for not providing for the dependant.

Once a court has decided that relief is warranted, it has broad discretion to determine the nature and extent of reasonable support. Such support is granted from the estate of the deceased.

The Homesteads Act

The act creates two basic rights for a spouse or common-law partner who does not own the family home.

WILLS AND ESTATES

First, the spouse or common-law partner who owns the home may not sell it during the lifetime of the other spouse or common-law partner without consent. Second, if the spouse or common-law partner who owns the home dies, the surviving spouse or common-law partner is granted a *life estate* in the home. This means the surviving spouse or common-law partner has the right to live in the home until he or she dies, even if the home was left to someone else. The act also provides various forms of relief if either of these rights are violated.

Only one spouse or common-law partner has **homestead rights**. A subsequent spouse or common-law partner would only have homestead rights if the homestead rights of the first spouse or common-law partner have been released or terminated.

The Family Property Act

The *Family Property Act* provides that the accumulation of assets during a marriage or common-law relationship is a joint effort and when the relationship ends, those assets should be divided equally. Upon the death of one spouse or common-law partner, the surviving spouse or common-law partner may apply for an equal division of family property.

The surviving spouse or common-law partner has six months to apply to court for an equal division of assets. These provisions do not prevent the spouse or common-law partner from also accepting gifts under the deceased's will. Similarly, any rights under this act are in addition to those under *The Homesteads Act*. However, if the deceased died without a will, the value of any property received under *The Intestate Succession Act* is deducted from the equalization payment under *The Family Property Act*.

WILLS AND ESTATES

OTHER CHALLENGES TO A WILL

Besides other limits on testamentary freedom, a will can be challenged on any of the matters discussed with respect to the formal requirements of a will. A will can also be challenged on grounds of fraud, undue influence or suspicious circumstances.

Fraud and Undue Influence

Fraud occurs when a person deceives the testator into making a gift in a will that he or she might not otherwise make. To tell an aging person that you were his long-lost son or that all his other children were dead when that was not true may result in that person's will being invalidated by the court.

Undue influence is different from fraud in that it does not involve deception but rather pressuring the testator into making a gift in a will. The courts have held that an attempt to persuade a person into making a gift in a will is allowable as long as it is not coercion. Fraud and undue influence are difficult to prove because the party making the allegation must prove that it occurred.

Suspicious Circumstances

A *suspicious circumstance* is anything that excites the suspicion of the court, such as an unusually disproportionate gift to a particular person. The test for suspicious circumstances is embedded in mental capacity and not fraud. As such, the burden of dispelling any suspicious circumstances falls on those wanting to prove the will valid. The proof necessary will be proportionate to the gravity of the suspicion.

WILLS AND ESTATES

FREQUENTLY ASKED QUESTIONS

Does the administrator of an estate have to post a personal bond?

Yes. In most cases an administrator must give a personal bond to the court for twice the amount of the estate. In addition, a **surety** may be required. When the total value of the estate is less than \$50,000, a surety is not required. When the total value is more than \$50,000 but less than \$100,000, only one surety is required. When the estate is valued at more than \$100,000, two sureties are usually required. However, if all of the heirs of the estate are adults and give their consent, the court may dispense with the requirement of having a bond, reduce the amount of the bond, or dispense with the need to have a surety.

Generally speaking, an executor named in a will does not have to post a bond or obtain a surety.

I have recently moved here from another province, where I had a will made. Should I have my will rewritten in Manitoba?

Under *The Wills Act*, moving to Manitoba from another province after a will has been made does not necessarily render the will invalid.

Provisions made in wills made in other jurisdictions dealing with **movable property** are valid in Manitoba if, when they were made, they complied with the law of the jurisdiction where the testator lived or where the will was made. Provisions dealing with land are valid in Manitoba if they are also valid under the law of the jurisdiction where the land is located.

WILLS AND ESTATES

Can I overrule the executor's decision regarding the funeral arrangements?

Generally, the executor, not the surviving spouse, has the right to decide on the type of funeral arrangements to be made for the deceased. As well, directions contained in a will respecting funeral arrangements are not legally binding. Similarly, it has been decided that directions in a will respecting funeral arrangements that are objectionable to the deceased's family do not have to be followed. Incidentally, since wills are often left unread until after the funeral, it is usually better to put directions about funeral arrangements in a memorandum to be read upon death instead of in the will.

If a person gets a divorce, is a will made before the divorce valid?

Yes, but that changes if the will contains a gift to the ex-spouse or the ex-spouse is appointed an executor or a trustee. In such cases, unless otherwise stated in the will, the bequest or appointment is revoked and will be interpreted as if the ex-spouse died before the testator.

In contrast, marriage revokes a will unless the will declares that it is made in contemplation of marriage to a specific person. Other ways for a testator to revoke a will include making another will or destroying the will with the intention of revoking it.

WILLS AND ESTATES

What if a person is living in a common-law relationship and the common-law partners separate? Is a will made before the separation valid?

The will is still valid but a gift to a common-law partner and an appointment of that common-law partner as executor or trustee will be automatically revoked if the common-law partners separate for three years or their common-law relationship is dissolved under *The Vital Statistics Act*.

How old must one be in order to be an executor of a will?

In Manitoba a person must be at least 18 years of age to be an executor. Where a minor is the sole executor named in a will, responsibility for administering the estate is usually given to the guardian of the minor. The guardian retains responsibility for the estate until the minor reaches the age of 18, at which time the named executor may act.

If a gift in a will is made to a person who dies before the testator, does the gift still have to be given out?

Generally, if a gift is made to a person who dies before the testator, it fails and falls to the residue of the estate.

However, this is not true if that person was a child, grandchild, great-grandchild, brother or sister of the deceased and left issue surviving the testator. In this case, the gift would be distributed as if the person to whom the gift was left died intestate without a surviving spouse or debts.

WILLS AND ESTATES

For example, let's say you leave an item in your will to your married son, but he dies before you. In that case, the gift will be distributed as if he had died without leaving a spouse or debts. The effect would be that the issue of your son, not your daughter-in-law, will inherit the gift that would have gone to your son had he lived.

All of this may be overridden by statements to the contrary made by the testator in the will. The will might state that in such a case, the gift should go to the residue of the estate. The residue of an estate includes all property not specifically distributed in the will. Wills should contain a clause stating how the residue should be distributed.

Is my will valid if I do not have witnesses to the signature?

A holograph will does not require witnesses to the testator's signature. A holograph will is valid in Manitoba if it is written entirely in the handwriting of the testator and is signed and dated. A formal will (one that is not entirely in your handwriting) must be signed by two witnesses. Generally, witnesses and spouses or common-law partners of the witnesses cannot benefit from the will. In addition, other requirements apply to all wills:

- they must be in writing,
- the testator must have had testamentary capacity; and
- must be at least 18 years of age.

WILLS AND ESTATES

My daughter witnessed my will. Can she also be a beneficiary?

No. If a will makes a gift to a witness or the spouse or common-law partner of that witness, the gift becomes invalid. It is possible to validate a gift, however. By drafting a codicil that confirms the contents of the existing will and is signed by two different witnesses, the gift would then become valid. Also, in certain circumstances, the court can validate a gift to a witness.

Can the executor of a will also receive a gift in the will?

Yes. There is no rule that prevents an executor from being a beneficiary under a will.

What happens when you cannot find the will of the deceased person?

This situation raises two distinct problems. First, if the will was destroyed, it is presumed that the testator revoked it. The presumption will be strong if the testator was a careful person who would not misplace or accidentally destroy the will, and was known to have custody of the will.

It must be shown that the will was either misplaced or accidentally destroyed. Second, if the will cannot be found, it is very difficult to prove what was in it. The court may hear from someone who saw or heard the testator discuss the will. The court may also review the lawyer's draft or notes if applicable. If the court does not feel it knows most of the will's contents, it may ignore it completely.

WILLS AND ESTATES

What happens if the testator sells something given in the will?

If a person writes a will and then sells or gives away the proposed gift, there is no gift and the beneficiary gets nothing.

There is an exception to this rule in s. 24(1) of *The Wills Act*. If a committee or a Substitute Decision Maker disposes of real or personal property during the lifetime of the testator and that property was specifically gifted in the will, the persons who would have otherwise inherited that property have the same interest in the proceeds of sale as they would if the property had not been sold. However, the committee or substitute decision maker may use the proceeds of sale for the testator's benefit during his/her lifetime.

POWER OF ATTORNEY

Planning Your Future

Everyone should anticipate the possibility that at some time in the future they may not be able to manage their own affairs.

People can make arrangements in advance so that if they become physically or mentally incapacitated their financial affairs are handled properly.

This type of planning has two major advantages. First, although you will give up control over your affairs when you are no longer capable of handling them, you will have the satisfaction of knowing you have ensured that they will be managed properly. Second, whoever has been entrusted with this responsibility will benefit from knowing your wishes. There are a number of ways in which a person's affairs can be managed once he or she is no longer capable. A common method of doing this is by a power of attorney.

The Function of a Power of Attorney

A **power of attorney** is the legal authority contained in a written document that allows someone else to manage your legal and financial affairs. Although this power can be very broad, it does not allow a person to make health care or other personal decisions. A power of attorney may be useful if you are unable to adequately manage your affairs due to limited mobility or an extended absence.

POWER OF ATTORNEY

The person who transfers the power is called the donor, and the person receiving the power is called the attorney. An attorney need not be a lawyer. The person you choose may be a trusted friend or relative, a spouse or common-law partner or a trust company. Whoever you choose, the person will be legally obligated to act on your behalf if he or she accepts the appointment.

It is also important to note that when you give someone power of attorney, you retain the right to manage your own affairs. You are still free to deal with any property, bank accounts or investments that are included in the power of attorney.

Requirements

Almost anyone can be chosen as an attorney, as long as he or she is age 18 or more and mentally capable. A person named as an attorney does not have to accept the responsibility and may refuse to act in that capacity.

The only requirements for being a donor are that you be an adult and mentally capable to understand the consequences of your decision. You must be mentally capable of understanding what a power of attorney is and what authority you are giving to the attorney.

The document itself must be in writing and signed by you. While the document must bear your signature, it need not be signed by the person chosen as attorney. The document is usually signed by a witness. The witness should not be the spouse or common-law partner of the attorney. There are specific rules for witnessing an enduring power of attorney. These will be discussed later on page 41.

POWER OF ATTORNEY

Duties of the Attorney

An attorney must always act in accordance with the instructions in the power of attorney. Further, the power granted must always be used for the donor's benefit, and no other purpose. The attorney must keep accurate records of all transactions concerning the donor's affairs.

Types of Powers of Attorney

A power of attorney may be detailed or broad. The scope of the authority granted to an attorney depends on the type of power given. There are two types of power of attorney: general and specific power. A power may also be temporary or enduring.

Specific Power of Attorney

This is used to grant a power of attorney for a specific task, such as selling an asset. The power granted to the attorney is limited to the specific task, as detailed in the power of attorney document. The power ends when the task is completed or if the donor becomes mentally incapable.

General Power of Attorney

A general power of attorney allows the attorney to make decisions concerning all of the donor's business and financial affairs. The attorney has the authority to manage the donor's banking and investments, and sign all documents with respect to the donor's property. This type of power of attorney also ends if the donor becomes mentally incapable.

POWER OF ATTORNEY

Enduring Power of Attorney (EPA)

This type of power of attorney allows the attorney's authority to continue even if the donor becomes mentally incapable. An EPA can be granted only while the donor is mentally capable and must be witnessed. It must contain a statement that its authority will continue even if the donor becomes mentally incapable. Some of the rules about EPA's follow. Information on acting as an attorney for someone else can be found in the PGT's publication entitled "Enduring Power of Attorney: A Guidebook for Donors and Attorneys". A copy can be requested from the PGT at (204) 945-2700 or on its website at www.gov.mb.ca/publictrustee

Execution

An EPA must be witnessed by a person qualified to perform marriages, a judge, justice of the peace or magistrate, licensed physician, notary public, lawyer or police officer.

This witness should sign a document swearing under oath that he or she saw the donor sign, and that the donor was apparently mentally capable at the time. This document, called an Affidavit of Execution, is then attached to the EPA.

If the donor is physically unable to sign the power of attorney, or is unable to read, he or she may direct someone else to sign it for them. This also must be witnessed by a qualified witness.

POWER OF ATTORNEY

Attorney

The donor must be mentally capable when the EPA is signed and may appoint any person over the age of 18 who is mentally capable to be the attorney. An exception to that rule is that the attorney may not be an undischarged bankrupt.

The donor may appoint more than one person. If they are to make decisions together, the donor must say so in the EPA. Otherwise, the attorneys will be considered to act consecutively, with the second named person having authority to act only if the first named is unable to do so.

Before signing the EPA, the donor should ask the proposed attorney whether he or she is willing to act. Should the donor become mentally incapable and the attorney has begun acting, the attorney must act as directed in the EPA. In that case, the attorney may only resign with the permission of the Court of Queen's Bench.

Accountability

The EPA may contain the name of a person to whom the attorney must account on a regular basis. If no person is named, the attorney must account to the donor if he or she is mentally capable, or if not, to the donor's nearest relative. This ensures that there will be someone watching over the attorney's actions.

POWER OF ATTORNEY

Springing Power of Attorney

A springing power of attorney is designed to come into effect at some time in the future. For example, the donor may provide that the EPA will only come into force if the donor is declared by a doctor to be mentally incapable. The attorney may only act after the springing event has happened.

The donor may also name a person (called the declarant) to declare that the event has occurred, which brings the springing power of attorney into effect. The written declaration of the declarant is attached to the EPA, and presented to banks or financial institutions to prove that the attorney has authority to act.

The PGT

It is possible that The PGT of Manitoba may be appointed as committee for a person, even though that person had previously made a valid EPA. This could happen because the donor has since become mentally incapable, and no one knows of the existence of the EPA. It could also happen when an attorney is managing the donor's affairs pursuant to the EPA, but others, such as family members or care-providers, are concerned that the attorney is not managing properly and in the donor's best interests.

POWER OF ATTORNEY

If The PGT is appointed as committee in these circumstances, the provisions of *The Powers of Attorney Act* provide that the EPA is suspended while The PGT conducts an investigation. The purpose of the investigation is for The PGT to determine whether the donor's best interests will be served by returning authority to the attorney, or by terminating the EPA.

When the investigation is complete, The PGT will advise the donor, the attorney and the donor's close relatives of its decision. If the decision is to return authority to the attorney, The PGT will return any assets in its possession belonging to the donor, and will end its involvement. If the decision is to terminate the EPA, The PGT will provide reasons for the decision, and will offer to refer the matter to the Court of Queen's Bench if the donor or attorney disagree.

If the donor or attorney do not ask to have the matter referred to court, or the court upholds The PGT's position, the EPA will be terminated and The PGT will continue to act as the donor's committee in accordance with the provisions of *The Mental Health Act*. (Further information about committeeship can be found on page 47 of this booklet.)

Termination of EPA

An EPA may be terminated in one of several ways, including by the death of the donor or the attorney, the bankruptcy of the donor or the attorney (unless the power of attorney provides otherwise) or the involvement of the PGT. As long as the donor is competent, he or she may revoke the EPA in writing at any time.

POWER OF ATTORNEY

An EPA is a very valuable and important planning tool. It should be properly prepared and executed, preferably with the assistance of a lawyer experienced in this area of the law.

FREQUENTLY ASKED QUESTIONS

My mother granted an EPA to my brother, and she is now mentally incapable. I don't believe my brother is acting properly. What can I do?

You should first ask the attorney for a full accounting of everything he has done as attorney. If you don't receive it, or aren't satisfied, you can apply to court to force the attorney to account, or be removed as attorney. You could also apply to be committee of your mother in place of the attorney. As a last resort, you could ask to have The Public Trustee appointed as committee of your mother.

How can I prevent the misuse of a power of attorney?

It is a good idea to put a clause in the power of attorney document to provide that the attorney regularly give an accounting of your finances to you and/or someone else you name. If you don't name someone to whom the attorney must account, your closest relative is entitled to ask for and receive an accounting from the attorney. As long as you are mentally capable, you can revoke the power of attorney at any time by giving written notice to the attorney.

If I fill out a power of attorney form with one bank, will this cover my account and mortgage at another bank?

No. Every bank has its own power of attorney form.

POWER OF ATTORNEY

A form from one bank will relate only to your dealings with that bank (and its branches). It will not cover your dealings with another bank. Also, bank powers of attorney are not EPAs, unless they are witnessed by a qualified witness. (See page 41).

If you have a valid EPA, you will not need a bank power of attorney because the EPA will cover all of your assets, including those in a bank or other financial institutions.

Can the person I name as attorney sell my house?

Yes, if you have granted that power to your attorney. You can grant power of attorney for a specific task (e.g., banking, paying bills or selling your house). Or you can grant a general power, over all or most of your financial affairs. This could include selling your home.

However, there are some exceptions to this rule. For example, if the house is jointly owned, both owners must consent to the sale. Also, if you gave power of attorney to your spouse or common-law partner, the power of attorney is not valid for the sale of the marital home.

COMMITTEESHIP

Dementia, a stroke or other health problems can cause mental incapacity that results in the loss of legal capacity to administer personal and financial affairs. If this happens, a committee may be appointed by the court, or in the case of the PGT, by the Chief Provincial Psychiatrist.

Private Committee

A family member, friend or trust company wishing to assume responsibility for the affairs of a mentally incapable person must apply to a court. Because the court documents must comply with the law and rules of court, a lawyer should be retained to prepare and present the application. The court may order that the estate of the mentally incapable person pay the fees for this application.

A court-appointed committee, called a **private committee**, has the power to handle financial affairs, and must pass the accounts of the estate on a regular basis. This means getting court approval of the financial records. The private committee must seek court approval for major decisions such as the sale of real estate. The court may also authorize the private committee to make decisions about personal care, including health care, where and with whom the person will live, and decisions about daily living.

Once appointed, the private committee has certain duties and responsibilities. Information on acting as a private committee can be found in the PGT's document entitled: "A Guidebook for People Appointed as Committees". A copy can be requested from the PGT at (204) 945-2700 or on its website at www.gov.mb.ca/publictrustee.

COMMITTEESHIP

The PGT

When there is no one willing or able to be the private committee of a mentally incapable person, the Chief Provincial Psychiatrist may appoint The PGT of Manitoba to act in this capacity. In such a case, The PGT is responsible for making all decisions affecting the incapable person's personal and financial interests.

HEALTH CARE DIRECTIVES

Advances in medical research and treatments have, in many cases, enabled health care professionals to extend lives. Most of these advancements are welcomed, but some people fear that life can be prolonged regardless of the quality of life or the patient's wishes.

In Manitoba, *The Health Care Directives Act* acknowledges and respects that people have the right to accept or refuse medical treatment. A **health care directive**, also referred to as a living will, allows you to make choices about your future medical care.

The Function of a Directive

A health care directive is a written document that allows you to express your specific instructions as to the level and type of medical treatment you want performed if you are ever unable to indicate your wishes because of mental incapacity or inability to communicate. A directive also allows you to appoint another person, called the **proxy**, to make health care decisions on your behalf if you are unable to do so.

Legal Requirements

To be valid, a health care directive must be in writing, signed and dated. There is no required form. A valid directive may be any written document that is signed and dated. The directive will be binding on health care professionals and your proxy, provided the instructions are consistent with accepted medical practices. Also, the health care professionals must be aware of the existence of the directive. It is up to the **maker** or proxy to provide a copy.

HEALTH CARE DIRECTIVES

The maker must be at least 16 years of age and be able to understand the consequences of his or her decision. Once completed, a health care directive records only your current wishes and can be changed at any time.

The Manitoba Government has prepared a health care directive form for your convenience. To obtain a copy, call the Seniors Information Line at (204) 945-6565 (toll-free 1-800-665-6565) or go to: www.gov.mb.ca/health/livingwill/html.

Before Completing a Directive

The decisions a person makes in a health care directive are very important and should never be entered into lightly. When you make a directive, it is important to discuss your intentions with your doctor and other health care professionals so that you are aware of the medical terms used for different types and levels of medical care. This will help ensure that your wishes are clearly understood.

It may also be useful to talk to your lawyer, to help you understand any legal issues/terms involved. For example, if you spend time outside Manitoba, you may wish to ask your lawyer about the validity of your health care directive in another jurisdiction.

You should discuss your intentions with close family members and your potential proxy, so they are fully aware of your wishes. This ensures that they will know a health care directive exists and can refer to it if necessary. It can also be useful to read booklets, pamphlets and articles on the subject to become even more informed.

HEALTH CARE DIRECTIVES

Choosing a Proxy

As it is impossible to anticipate every circumstance, it is important to choose a proxy. The proxy will make medical decisions on your behalf if you are unable to do so. The proxy's decisions will be based on the specific instructions in your health care directive and his or her personal knowledge of your wishes.

Choosing a proxy is a very personal decision and should be made with care. The proxy should be someone you trust, such as a close friend or family member. The proxy should also be willing to accept the responsibility. You should ensure that the proxy is well aware of your wishes.

You may choose more than one person as a proxy. If you choose more than one person, you should indicate in your directive whether they are to act jointly or consecutively. If acting jointly, the people named will make decisions together as a group. If acting consecutively, the second proxy named will make medical decisions only if the first person named is unable to do so. You should also indicate in the directive whether decisions will be by consensus or by majority.

Changing your Directive

You may change your health care directive at any time and do so as often as you wish. Your opinions about certain types of treatment may change over time, and should be reflected in your current health care directive.

HEALTH CARE DIRECTIVES

Also, medical technology is constantly changing and improving, and these improvements may affect your decisions. If you have a specific illness or disease, you should stay up-to-date on the treatments available. Your doctor can assist you. In general, a health care directive should be reviewed at least every couple of years

To change your health care directive, you need only prepare a new document. If you do, however, you should destroy any former directive to ensure your instructions are clear to those who are asked to follow them.

Safekeeping your Directive

You should keep your health care directive in a safe place but where it is still accessible to family if they need to refer to it. However, do not keep a health care directive in a safety deposit box, since your family cannot obtain it quickly. Give a copy to your doctor to be kept in your medical records. It is also wise to give a copy to your proxy and tell that person how to obtain the original if necessary. You may also wish to have your directive reduced in size and laminated so you can carry it in your wallet.

Some hospitals keep these documents on file. You may wish to ask your doctor about whether the hospital where he or she practices has such a policy.

HEALTH CARE DIRECTIVES

FREQUENTLY ASKED QUESTIONS

Is a health care directive the same as euthanasia or assisted suicide?

No. Euthanasia and assisted suicide involve taking positive steps to end someone's life. In an assisted suicide, such steps would be at the other person's request. Euthanasia is sometimes referred to as mercy killing. In Canada, both of these acts are illegal under the Criminal Code. In contrast, a health care directive is simply a written indication of your wishes for specific medical treatment and involves no positive action to end your life. The Manitoba Government has recognized the validity of health care directives in *The Health Care Directives Act*.

Why should I have a health care directive?

By preparing a health care directive, you can relieve those closest to you of the burden and stress of trying to guess what your wishes might be at a very emotional time. Also, a directive can ensure that your personal wishes are respected.

How do I choose a proxy in a health care directive?

As this decision is very important, the proxy you select should be someone you trust, such as a close friend or family member. You should make sure that each person chosen is willing to accept the responsibility. If more than one proxy is chosen, you should indicate whether they are to act jointly or consecutively in making decisions.

CHOOSING AND WORKING WITH A LAWYER

Your lawyer acts as your trusted representative in legal matters. As a member of the Law Society of Manitoba, a lawyer is bound by a standard of professional conduct that seeks to ensure reliability and integrity in the profession.

Finding a Lawyer

People find lawyers in different ways. You may find the following tips helpful:

- Before you look for a lawyer, write a description of the work you want done. Give as much detail as possible.
- Check with relatives, friends and neighbours for recommendations. Also consult local community agencies, such as the Law Phone-In and Lawyer Referral Program, and the A&O: Support Services for Older Adults. Remember: some lawyers are more experienced in some fields of law than others. These agencies can refer you to a lawyer familiar with the area of law concerning you. They can also give you a list of lawyers who practice in the field in which you are seeking professional assistance.
- You can also check the Lawyers listing in the Yellow Pages. Some of the lawyers indicate their areas of expertise and practice. Call a few lawyers listed to discuss your problem. (However, most lawyers prefer to discuss details in person rather than over the phone.)

CHOOSING AND WORKING WITH A LAWYER

Your Lawyer's Fees

During your first appointment, you should discuss:

- availability of legal aid;
- how and what you will be charged;
- when you will be billed; and

what disbursements (out-of-pocket expenses) you may be charged in addition to the fees.

It's also a good idea to ask your lawyer to put the answers to these questions in writing.

Keeping Your Legal Costs Down

You are paying for your lawyer's time. Therefore, the less time you use, the less it will cost. Here are some points on keeping costs down:

- Before you go to see your lawyer, get all of your papers and documents together and put them in order; and
- When you talk to your lawyer,
 - stick to the facts;
 - ask questions when you don't understand; and
 - ask what you can do to reduce your costs.

CHOOSING AND WORKING WITH A LAWYER

- After you have talked to your lawyer,
 - don't make unnecessary phone calls;
 - consider writing to the lawyer instead of calling; and
 - your lawyer's secretary may be able to help you in routine matters.

Complaints and Discipline

The Law Society of Manitoba is the governing body for Manitoba Lawyers. It licenses lawyers and has the power to look into and deal with complaints about lawyers.

The Law Society has a procedure for dealing with complaints of unprofessional or unethical conduct. You can get more information by calling the Law Society at (204) 942-5571 or on their Web site at www.lawsocietymb.ca.

(Information for the above section provided by The Law Society of Manitoba)

GLOSSARY OF TERMS

Every area of the law has its own jargon. The following glossary defines some of the most common examples of legalese in several areas of the law.

Administration Order

A document granted by the Court of Queen's Bench appointing someone to administer an estate with a value of less than \$10,000 at the time of death.

Administrator

A person appointed to handle the estate of someone who has died without a will, or who has not named an executor in the will.

Beneficiary

A person named in a will to receive a benefit or advantage under the will.

Bequest

A gift of personal property by means of a will.

Codicil

An addition to a will made by the testator, which is attached to and forms part of the will.

Committee

A person or persons, including The PGT, appointed by Court or pursuant to *The Mental Health Act* to manage the personal and/or financial affairs of a mentally incompetent person.

GLOSSARY OF TERMS

Common-Law Partners

Couples, either same sex or opposite sex, who either have registered their relationship under *The Vital Statistics Act* or who have lived together for three years or more. Under *The Intestate Succession Act*, *The Wills Act* and *The Dependents Relief Act* this also includes those couples who have lived together for a year or more and have a child together.

Devise

To make a gift of real estate by means of a will.

Dispose

The name for making a gift that includes both a bequest and a devise.

Estate

All of the real estate and personal property of a person or a deceased person.

Executor

The person named in the will to administer the estate.

Fraud

Using deception to gain material advantage for oneself.

Grant of Probate

An order made by a judge of The Court of Queen's Bench authorizing an executor to administer an estate in accordance with a will.

GLOSSARY OF TERMS

Guardian

A person legally appointed to care for and provide the necessities of life to a child.

Health Care Directive (Living Will)

A written document that states a person's preference as to the type and level of medical care he or she would or would not want to receive, and/or names a person (known as a proxy) to make medical decisions for the maker of the directive. The directive is legally binding if the maker becomes incapable of making medical treatment decisions or is unable to communicate his or her wishes.

Homestead Rights

The *Homesteads Act* creates two basic rights for a spouse or common-law partner who does not own the family home:

- 1) the spouse or common-law partner who owns the home may not sell it during the lifetime of the other spouse or common-law partner without consent; and
- 2) the surviving spouse or common-law partner has the right to live in the home until he or she dies.

Intestate

To die without a valid will. Also a person who dies without a valid will.

Issue

The lineal descendants of an individual. These include children, grandchildren, great-grandchildren, etc.

GLOSSARY OF TERMS

Legacy

A gift of personal property by will. Personal property includes all types of property other than real estate.

Letters of Administration

An order made by a judge of the Court of Queen's Bench appointing someone to administer the estate of a person who has died without a will, or without having appointed an executor under a will.

Maker

A person who makes a Health Care Directive.

Minor

A person under the age of 18 years.

Moveable Property

All property other than land or an interest in land, such as a mortgage. It includes most types of personal possessions such as cash, vehicles, stocks, bonds, furniture, etc.

Per Capita

An equal share is given to each person who is of equal relationship to the deceased.

Power of Attorney

A document signed by a person authorizing a person or corporation to handle his or her financial and/or legal affairs.

GLOSSARY OF TERMS

Private Committee

A committee, other than the PGT, appointed by the Court of Queen's Bench.

Probate

The procedure used to determine the validity of a will and the proper distribution of an estate. In probating a will, the court determines whether the testator had the capacity to make the will, whether the will was properly signed and witnessed, and that it was not made as a result of fraud or undue influence.

Proxy

A person or persons named in a valid Health Care Directive to make health care decisions on the maker's behalf.

Public Guardian and Trustee (PGT)

An official appointed by the government to act for the public in administering trusts.

Residue

That part of estate assets not specifically distributed in a will.

Residual Beneficiary

The people named in a will to receive the residue.

Revoked

Cancelled or made of no legal effect. Annulled or made void.

GLOSSARY OF TERMS

Spouse

Persons who are married to each other.

Substitute Decision Maker

A person or persons, including the Public Trustee appointed pursuant to *The Vulnerable Persons Living with a Mental Disability Act* to make decisions for a person who has been deemed incapable of making some or all of his/her own decisions within the meaning of that Act.

Surety

A person who undertakes to the court to satisfy the financial obligations of another person if the other person fails the obligation.

Suspicious Circumstances

Anything in a will that arouses the suspicion of the court.

Testament

Generally used to mean a will, but strictly it is a statement of a person's wishes concerning the disposition of his or her property after death.

Testate

Having left a valid will at one's death.

Testator

A person who makes a will.

GLOSSARY OF TERMS

Trust

A right to property held by one person for the benefit of another.

Trustee

A person who holds legal title to property in trust for the benefit of another person or has been given power affecting the disposition of property for another person's benefit.

Undue Influence

Pressuring someone so as not to allow that person to exercise free judgment in making a decision.

Will

A person's written declaration of how his or her property is to be disposed of upon death. It may also contain other declarations of the testator's wishes.

USEFUL TELEPHONE NUMBERS & WEB SITES

MB Seniors & Healthy Aging Secretariat (204) 945-2127

Seniors Information Line (204) 945-6565
(toll-free) 1-800-665-6565

Seniors Abuse Support Line (toll-free) 1-888-896-7183

Web site:

http://www.gov.mb.ca/shas/elder_abuse/abuse_support_line.pdf

A & O: Support Services for Older Adults
(legal clinics are held at A & O Centres) (204) 956-6440

Web site: www.ageopportunity.mb.ca

Canada Pension Plan (CPP)/
Old Age Security (OAS/GIS)..... (toll-free) 1-800-277-9914

Web site: www.servicecanada.gc.ca

Community Legal Education Association
(CLEA)..... (204) 943-2382

Web site: www.communitylegal.mb.ca

Canada Customs Revenue Agency
(formerly Revenue Canada) (toll-free) 1-800-959-8281

Web site: www.cra-arc.gc.ca

USEFUL TELEPHONE NUMBERS & WEB SITES

Law Phone-In and Lawyer Referral Program (204) 943-3602
(toll-free) 1-800-262-8800

Public Guardian and Trustee (204) 945-2700
(toll-free) 1-800-282-8069
Web site: www.gov.mb.ca/publictrustee

Veterans Affairs Canada (toll-free) 1-866-522-2122
Web site: www.vac-acc.gc.ca

If you have comments or feedback pertaining to this Guide, please contact the Seniors and Healthy Aging Secretariat at (204) 945-6565 or 1-800-665-6565.



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