



SOME TIPS REGARDING WILLS AND POWERS OF ATTORNEY

Did you know that a Will made prior to a marriage is invalid after the marriage if the Will was not made in contemplation of that marriage? In other words, although wills do not become stale dated, they do become null and void after a marriage, unless the Will contains a provision that it is made in contemplation of that marriage.

A Will is only deemed to be valid if it is witnessed by two persons who are not related to the testator and if one of the witnesses completes an Affidavit of Execution. An Affidavit of Execution needs to be sworn in the presence of a person authorized to take an oath or solemn affirmation (commissioner of oaths) or a notary public (lawyer) and contains information regarding the execution of the Will. Without the proper execution and confirmation of same, courts are likely to judge that the testator died intestate (without a will) and, as a result, the division of the estate is made pursuant to the applicable legislation.

If a Will is altered by hand, it could be revoked or be rendered ineffective as changes done to a Will need to be made by way of a Codicil, which must be witnessed by two persons not related to the Testator. An Affidavit of Execution is also required to give effect to the Codicil.

The place of residence of an Executor and Trustee named under a Will can affect the taxation of the Estate if the place of residence is not Canada. If an Executor and Trustee under a Will moves to the United States for example, the estate of the testator may be subject to U.S. estate taxes. It is important to discuss any changes in the residency of an Executor and Trustee with a lawyer and an accountant.

A will is always revocable or can be changed from time to time as desired by the testator, unless the Will is subject to a contract pursuant to which the testator agreed not to make certain changes to his/her Will without the consent of their spouse for example.

The guardianship of minors can be addressed in a Will. Guardians named in Wills only have legal authority to act for 90 days after death. Within that time period, it is usual for the person or persons named to apply to court to be approved as guardian. These appointments are not binding on a court, and the court will appoint the person whose appointment it believes is in the best interests of the children.

Powers of Attorney are used during a person's lifetime, where a Will is used after one's passing. A continuing Power of Attorney for Property can be used by the named attorney(s) even if the person is capable of managing their affairs if the attorney(s) is in possession of the original Power of Attorney for Property or a certified copy of same. On the contrary, a Power of Attorney for Personal Care can only be used by the attorney(s) if the person is incapable of managing their affairs. They are either not of sound mind or in a physical state that prevents them from making decisions regarding their health.