This booklet was developed for families caring for a relative with disability and provides an overview of the important elements of estate planning.
AN INTRODUCTION TO WILLS

What is a will?

A will is a written legal document that gives instructions about how you wish your affairs to be handled after your death.

Given the legal and regulatory complexities of caring for a family member who is vulnerable, especially if they are receiving disability support benefits, we strongly recommend that you consult a lawyer with expertise in disability issues when preparing your will.

Brendon Pooran, an Ontario lawyer specializing in disability issues, explains why it is so important to get started on writing a will.

“Getting Started”

For a listing of lawyers with experience working with individuals with disabilities and their families, check out the new Professional Services Directory on the P4P Planning Network.
Who can make a will?

To be eligible to make a will, you must:

- Be at least 18 years old or married.
- Have testamentary capacity.
  
  Testamentary capacity means that you know what a will is and understand that it will be legally binding upon your death.
  
- Know what property you own and its approximate value.
- Know who you owe a legal or moral obligation to look after when you die.

“ A will is a written legal document that provides instructions about how you wish your affairs to be handled after your death. ”
THE IMPORTANCE OF HAVING A WILL

Preparing a will has many benefits. Most importantly, it can make sure that your loved ones are taken care of after you die.

A will gives you control over your estate and permits you to:

• Appoint an executor - someone you trust to manage your affairs;
• Ensure that there is a guardian for your child or children who are legal minors;
• Protect your estate for your son or daughter with a disability;
• Protect your son or daughter with a disability from losing their disability assistance;
• Provide a separate, independent income for your surviving spouse;
• Distribute your assets according to your wishes;
• Pay your debts, taxes, and other liabilities;
• Maximize the size of your estate for your children;
• Implement tax-planning strategies;
• Reduce the cost of administering your estate;
• Set up trusts that comply with Ontario Disability Support Program (ODSP) rules and protect vulnerable beneficiaries;
• Appoint trustees and direct them as to how you would like the money spent;
• Allocate a portion of your estate to the charities and causes you are passionate about;
• Help you and your family avoid delays, strife, needless taxation, costly legal challenges, probate fees, and government involvement.
**What are the implications of not having a will?**

If you die without a will, the impact on your family, particularly your child or children, can be extreme, affecting every aspect of their lives.

Without a will:

- Your estate is divided according to an asset formula defined by the government;
- Your family may experience delays in receiving your assets;
- Your family may experience strife;
- Your estate may be subject to unnecessary taxation; and
- Your family member with a disability may lose their disability benefits.

**YOUR WILL AND MARRIAGE**

If you are married and die without a will, your spouse will get a fixed sum of money from your estate. The balance of your estate will then be divided between your spouse and your children.
New marriages

A new marriage may void existing wills. As such, you and your spouse should consider creating new and separate wills.

Creating separate wills as opposed to a joint one offers has benefits:

• You can change your separate wills without the knowledge or consent of your spouse.

• You can avoid lengthy delays before your assets are transferred to the intended beneficiaries.

Divorce and separation

If you are getting a divorce, you also need a new will. Separation from your spouse does not automatically affect your will. If you are separated and pass away, your spouse will receive all of the assets gifted to them in your existing will.

If you are divorced but have not updated your will, all of the provisions in your will dealing with your ex-spouse may be deemed invalid. This situation can cause many problems for your family and the executor of your estate.
What are your obligations?

Despite best intentions, there are legal protocols that must be followed when a parent passes away. In Ontario, a parent has a legal obligation to provide for their spouse and children.

If you have a child with a disability, your executor is required by law to forward a copy of your will to the Office of the Public Guardian and Trustee which will review your will to ensure that you have treated your child with a disability fairly.

Some parents mistakenly believe that the best strategy is to leave the share for a child with a disability to a sibling so that they can look after the child. However, as far as the law is concerned, you have left your child nothing and have treated them unfairly. In this case, the Office of the Public Guardian and Trustee would intervene.

Providing an inheritance to a child receiving ODSP benefits

If your child receives ODSP benefits and you leave them an inheritance without setting it up in a trust, they may become ineligible for ODSP and lose their benefits. Our best advice is to consult a lawyer specializing in disability issues when preparing your will.
STAYING ON TOP OF YOUR WILL

When should I review my will?

It is important that you review and update your will regularly. You should review your will:

• If there is a major change in your life (e.g., marriage or divorce):
• If someone passes away or there is a change in financial situation;
• If you learn about a new policy or regulation that affects your estate plan; and
• Approximately every three years.

Where should I store my will?

You will want to keep the original copy of your will, along with back-up copies, filed safely. It is important to let your family or the executor of your estate know where your will is kept. Many lawyers will retain and file a copy of your will at no cost to you.
AN INTRODUCTION TO GUARDIANS & EXECUTORS

What is a guardian?

A guardian is a person who has legal responsibility for children under the age of majority. A guardian can also be appointed to make decisions for an adult with a disability regarding their personal care or finances.

If a guardian for minor children (under the age of 18 years old) living in Ontario is not appointed, custody of the person is given to the Ontario Ministry of Children and Family Development. Custody of their inheritance is given to the Public Guardian and Trustee.

For children, guardians appointed in a will are temporary only. An application to the court must be made within 90 days to extend this authority.

What are the types of guardianship for adults with disabilities?

The law presumes that everyone over 18 years of age can manage his or her own affairs. As such, parents cease to be the legal guardians of their child once the child turns 18 years of age. This situation poses several challenges for parents with an adult child who is living with a disability.

In Ontario, there are two types of guardians for adults: a guardian for personal care and a guardian for property.

1) Personal Care Guardian:

The role of a personal care guardian is to act as a substitute decision maker and make personal care decisions for those deemed as incapable when required. Personal care decisions can include choices concerning where to live, what to eat, safety, clothing, personal hygiene, and health care. Currently, a guardian to support an adult with their personal care can only be appointed by the court. Most families and people with disabilities are less than enthusiastic about applying for legal guardianship. The process is costly, time consuming and results in the complete loss of legal status. There is a great deal of indignity in working through a process to deem your loved one incapable.
2) Guardian for Property:

A guardian of property is someone who is appointed to manage the financial affairs of a person who is deemed as mentally incapable of doing so for him or herself. A guardian to support an adult with their property can be appointed by the court or an application to be a guardian of property can be submitted to the Office of the Public Guardian and Trustee.

*We would caution parents to think carefully about the benefits and implications of applying for guardianship of their adult children and to consider legal advice carefully.*

What is an executor?

An executor is the person or professional named in the will who is responsible for ensuring the wishes in your will are carried out.

Here are a few tips and ideas to keep in mind when choosing executors of your will:

- Most often people choose a family member or friend to be executor.
- An executor can be any person over the age of 19 or a corporation.
- It is okay to choose a beneficiary to be your executor.
- Choose someone you trust.
- Choose someone you think will outlive you.
- Choose someone who is able to carry out your instructions.
- Have at least two executors in case one cannot fulfill the task or dies before you do.

On Page 16, a brief action plan will help get you started on selecting your executors.
How do I choose a Guardian for my children?

Thankfully guardians for under-age children are rarely required to fulfill that role. Regardless, many parents feel that choosing a guardian can be a very difficult and emotional decision.

Ideally, you would like the guardian(s) to be someone your children know well and care for, and someone who knows and cares for them.

Grandparents are often the first option but do they have the energy, health and resources to raise young children. A parent’s adult siblings may take on the role but often, they have a family of their own to care for. If they are willing to care for your children, they may need additional resources and supports and these are things you can plan for.

Like many aspects of estate planning, there are never easy answers. The best outcomes are achieved when you take action and make the hard decisions.

Take a look at the Action Plan on Page 15 for more tips and insights on selecting a guardian for your children.

*When your child reaches age of majority, parents are no longer legally responsible for their children regardless of their abilities.*
TAking action

Why is it important to consult with a lawyer knowledgeable about disability issues?

It is essential that you consult a lawyer who understands not only wills and estate law but also disability benefits legislation. An easy way to determine this is to simply ask him or her how disability benefits legislation will affect your will. If they cannot give you an informed answer, move on to someone else.

Before your appointment with your lawyer, collect as much of the necessary information as you can and complete as many of the forms required as you can manage on your own. Preparing your information before you meet with a lawyer will save time and reduce legal fees.

The more thorough and accurate the information you provide, the more effective your will will be.

Be open and frank.

Keep in mind that:

• Not all lawyers understand wills and trusts; and
• Not all wills and trust lawyers will understand disability issues.

It is critical to find a lawyer who understands disability issues as they relate to your estate because inaccuracies can be very costly later on.
How can I find a knowledgeable lawyer?

When searching for a lawyer, it helps to ask family members, friends, or colleagues for a referral. The new online Professional Services Directory on the P4P Planning Network is an excellent place to start. Keep in mind that many lawyers will offer a complimentary 30-minute introductory conversation.

• Take your time - Meet several lawyers
• Prepare a few key questions in advance to test their knowledge of disability issues
• Find a lawyer you are comfortable with and you feel will work with you

Refer to the worksheet on Page 13 to help you work through the process of finding a lawyer and scheduling your first appointment.
COMMON QUESTIONS ON WRITING A WILL

1. **Do I need a lawyer to create a will?**
   Yes. Your lawyer has expertise that will ensure that your will is properly drafted and valid. She or he will answer any questions you may have, help you with your tax planning, assist you in deciding on an appropriate executor, and make sure that your assets are distributed according to your wishes and the best interests of your beneficiaries.

2. **How do I approach a lawyer about creating a will?**
   Just ask one. Call a lawyer and say you’re interested in planning your estate. The lawyer will need information about your assets, liabilities, and any other wishes you may have.

3. **How much will a lawyer cost me?**
   The cost of drafting a will varies according to your needs and the lawyer. A lawyer can estimate this cost after an initial interview.

TIPS FOR WILLS & ESTATE PLANNING

Creating a will can be difficult, but a will is the best way to provide for your children, particularly if they live with a disability or are a minor. So try not to get discouraged!

Here are several tips to follow when drafting your will:

- Before creating your will, think about what you and your child or children will want for the future. This will help you start planning.
- Get started by organizing a list of assets and liabilities.
- Make sure your will clearly describes how you want your estate to be divided.
- Designate a guardian for young children. It’s a very good idea to list a back-up guardian in case the first one cannot fulfill the task for any reason.
- Decide who you want to serve as your estate trustees, the people who will make sure that the instructions in your will are carried out. It’s a good idea to have multiple trustees in case one cannot fulfill the task or dies before you do.
- Make sure that the final document is kept very safe and secure. Many lawyers offer to retain it for you for free. Another safe place is in a safety deposit box. Just make sure your family or friends know where to find it.
- Have your forms filled out before you go to a lawyer. This will save you time and money!
Action Plan: Choosing a Lawyer and Scheduling Your First Appointment

When choosing a lawyer, it helps to ask family members, friends, or colleagues for a referral. You can also refer to the new Professional Services Directory on the P4P Planning Network for Ontario lawyers in your region.

List the names and information for three lawyers or law firms you want to contact for more information.

Lawyer/firm name: ____________________________
Telephone number: ____________________________

Lawyer/firm name: ____________________________
Telephone number: ____________________________

Lawyer/firm name: ____________________________
Telephone number: ____________________________

Once you have a few lawyers you are interested in speaking with, you will want to get answers to the following questions before you schedule an appointment:

• Is their office conveniently located?
• Can you get an appointment with them relatively soon (e.g., within two weeks)?
• Do they have experience working with families with a relative living with a disability?
• Can they offer you tax planning as well?
• How long has the firm offered estate planning services?
• Are they knowledgeable about disability benefits legislation?
• Can they suggest trust firms who can act as your trustee?
• Do they have experience helping clients set up trusts?
• What are their fees?
Action Plan: Selecting a Guardian

Selecting a guardian for your child/children is a major decision. When choosing a guardian, make sure to consider the following:

• Do these people have a personal relationship with your minor child/children?
• Do they share your core values?
• Do they understand and agree with how you’ve chosen to raise your child/children?
• Can they provide the care and support that your child/children need?
• Will your child feel comfortable and happy in their care?

Make a list of all the people who you think would make a good guardian for your under-age child/children. List these people by preference. For example, if you would ideally like your sister to be your child/children’s guardian, put her name first. Be sure to list at least two people.

1. ____________________________________________
2. ____________________________________________
3. ____________________________________________
4. ____________________________________________

Once you’ve made your list, contact the people on it about your desire for them to be your child/children’s guardian when you pass away. Start with the first and second person (or couple) on your list. If they can’t serve as guardians, move down your list until you find someone who can.

Once you’ve made decision on a guardian and a back-up ensure your lawyer has been updated and includes these in your will.

Guardian ________________________________________
Back up Guardian ____________________________________
Action Plan: Selecting Executors of Your Will

An executor is the person and/or professional named in the will who is (or are) responsible for ensuring the wishes in your will are carried out. Here are a few tips and ideas to keep in mind when choosing executors of your will:

• Most often people choose a family member or friend to be executor.
• An executor can be any person over the age of 19 or a corporation.
• It’s okay to choose a beneficiary to be your executor.
• Make sure to choose someone you trust.
• Make sure to choose someone you think will outlive you.
• Make sure to choose someone who is able to carry out your instructions.
• It’s a good idea to have at least two executors in case one cannot fulfill the task or dies before you do.

Make a list of people you will ask to be the executors of your will. List these people by preference. For example, if you would ideally like your nephew to be your child/children’s executor, put his name first.

Names of Potential Executors

1. _______________________________________

2. _______________________________________

3. _______________________________________

4. _______________________________________

Once you’ve made your list, contact the people on it and ask them to be the executors of your will. Start with the first or second person (or couple) on your list. If they cannot serve as executors, move down your list until you find someone who can be.

Once you’ve decided on an executor(s), write their name(s) here and share with your lawyer:

1. _______________________________________

2. _______________________________________

partners
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