LAST WILL AND TESTAMENT

WHAT IS A WILL?

A will is a legal document prepared during your lifetime to take effect upon your death.

IT ALLOWS YOU TO:

- decide what to do with your Estate rather than have the Government through legislation do it for you, subject, of course, to certain statutory limitations;
- appoint a Guardian for your minor children should both parents die, rather than have the courts do it for you;
- set up trusts for the maintenance, education and benefit of your children and to delay their receiving all of their inheritance beyond the legal age of majority;
- appoint an Executor who will administer your Estate in accordance with your wishes rather than have an Administrator appointed by the courts who may not have been your choice.

HOW CAN NOT HAVING A WILL CREATE HARDSHIP?

The procedure of applying to the courts to appoint an Administrator will not only result in additional expense, which will come out of your Estate, but it could make this trying time even more difficult for your family since the Estate assets could be frozen until an Administrator has been appointed.

WHO SHOULD PREPARE YOUR WILL?

Since a Will is a technical and complex document with wide-spread legal and personal implications it should be prepared by your lawyer. This will ensure that your intentions are actually carried out upon your death.

WHEN SHOULD YOU MAKE YOUR WILL?

If you are married you will need a Will to provide for what is to happen with your Estate should you die or should both you and your spouse die at the same time.
If you have children you will want to have a say in who you would prefer to raise your children in the event that both you and your spouse die. While not conclusive, your preference will have a persuasive influence in any custody application to the Courts. Even if you are single and/or have no immediate family you will want to have control over how your possessions are distributed upon your death.

WHEN SHOULD YOU REVISE YOUR WILL?

Your Will should be revised when your intentions change, when your circumstances alter financially or when you marry, separate, divorce or re-marry.

If the value of your Estate increases certain tax problems that arise on death may need to be minimized by your Will.

A divorce or declaration of nullity revokes a bequest to the ex-spouse unless a contrary intention is expressed in your Will.

A marriage automatically revokes your Will unless it states that it was made in contemplation of the intended marriage.

Should your executor or beneficiaries named in your Will die or become mentally or physically disabled your Will should be revised.

WHAT SHOULD YOU CONSIDER BEFORE HAVING YOUR WILL DRAFTED?

Executor: Your executor must be at least 18 years old, should not be considerably older than you, should possess good common sense, and should be consulted before the appointment.
It is wise to choose an alternative executor should your first choice predecease you or become unable or unwilling to act.

As between spouses it is common practice to be Executors under each other's Wills with provision for an alternative Executor should one spouse predecease the other or become incapable. You may add to or place limits on the powers given to your Executor in administering or distributing your estate.

Guardian: The person or persons you choose as Guardian for your infant children should be at least 18 years of age, should not be considerably older than you, should have your children's best interests at heart, and should be consulted prior to appointment.

Specific Bequests: You may wish to provide in your Will for cash legacies or particular bequests of identified property to named individuals or charities.

Distribution: You may consider leaving the whole of your Estate to your surviving spouse with a gift over to your children should your spouse predecease you. During their respective minorities such a gift over will be held in trust, in accordance with your expressed intentions for your children or you may specify that they receive the full benefit from your Estate at an age when you feel they will have achieved a certain level of maturity. It is also prudent to provide for possibility of a common disaster befalling your immediate family (both spouses and children killed). In such an event you may wish to consider a gift over to other relatives, friends or charities.

Formalities: It must always be remembered that there are certain formalities required by law related to the drafting and execution of your Will. Unless these formalities are strictly followed your Will may not be valid and your wishes could be defeated. The use of commercially pre-printed "Do it yourself" Wills forms can be disastrous as they are often held to be invalid by the Courts.

Tax Implications: A properly drafted Will may permit your Executor to take advantage of certain tax benefits or elections so as to reduce the impact of taxes on your Estate.

Multiple Wills: In order to lessen the impact of Probate Tax on your estate you should discuss with your lawyer whether multiple Wills would be of benefit to you.

Impact of the Family Law Act: Under this legislation, the value of what was owned by each spouse at the time marriage and on the date of the death of the first spouse to pass away must be determined. The difference is called "Net Family Property". When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the survivor, then the surviving spouse is entitled to one-half of the difference between them.

The surviving spouse now has a right to make an election for an "equalization" under the Act or to take under the terms of the deceased spouse's Will**.**
It is therefore more important than ever that both spouses be part of the estate planning process, or minimally, should agree with the plan of the other.

Special Burial or Cremation Instructions: Your specific desires as to the manner in which you are to be laid to rest may be detailed in you Will. However, these desires should be made known to your executor since your Will may not be read until after your funeral.

HOW OFTEN SHOULD YOUR WILL BE REVIEWED?
Since our succession laws are constantly evolving it is advisable to have your existing Will reviewed by your lawyer at least every 3 to 5 years to ensure that any changes in your circumstances or in the law are reflected favourably in your Will.

POWER OF ATTORNEY FOR PROPERTY

DO YOU NEED A POWER OF ATTORNEY?

Most of us assume that if we are incapacitated and unable to manage our own financial affairs, a family member, be it a spouse, parent or child, will step in and assume control. This is not the case. Unless you have appointed an attorney (this does not mean a lawyer), the Public Guardian and Trustee of Ontario steps in and assumes control over your assets and all of your financial affairs. Think of the hardship that could result if your spouse could not withdraw funds from your bank account to buy groceries, pay the mortgage or buy a new winter coat for one of your children, without applying to the Public Guardian and Trustee with all the bureaucracy and red tape that involves. We all know how well governments manage finances. Do you want a provincial agency to manage your finances as well? A recent report by the Provincial Auditor showed that 55% of the trust and estate files it examined were grossly mishandled by the Public Trustee's office.

Your spouse or other family members could apply to the courts to take over the administration of your affairs, but such applications take time and are very expensive.

WHAT IS A POWER OF ATTORNEY?

Pursuant to the *Powers of Attorney Act* (Ontario) and the *Substitute Decisions Act, 1992* (Ontario), you may, by means of a document called a Power of Attorney for Property, appoint someone as your attorney to do anything you can lawfully do by an attorney in respect of your financial affairs. A Power of Attorney for Property can be general in nature or restricted to specific matters or transactions. For example, a Power of Attorney for Property could be given solely for the purpose of selling a house or writing cheques on a particular bank account. On the other hand a Power of Attorney for Property which is not subject to restrictions would confer broad powers on your attorney to administer generally all of your financial affairs. It is this latter type of Power of Attorney for Property that is most often given reciprocally between spouses or from a parent to an adult child.

A Continuing Power of Attorney for Property makes it easier for your attorney to manage your finances and property even if you become mentally incapable.

HOW DOES THE CONTINUING POWER OF ATTORNEY FOR PROPERTY COME INTO EFFECT?

If you are capable of granting a Power of Attorney for Property it may come into effect in one of three ways:

- the power of attorney may provide that it will take effect when a specific event occurs or when the attorney or some third party (for example, your doctor) judges that you have become incapable;

- the power of attorney may specify that it takes effect immediately. Of course, the attorney need not take over decision making immediately, but will be free to do so when he or she feels it is necessary to do so. If you make your power of attorney effective immediately, you may choose to leave it with your lawyer for safekeeping subject to the provisions of an escrow agreement which instructs him/her under which circumstances he/she can release it to the named attorney; or,
- if the power of attorney specifies that it is to become effective upon your incapacity but does not specify how or by whom this incapacity is to be determined, an "assessor" may be called in to determine your mental capability. The assessor is required to explain the purpose of the assessment. If you are assessed as incapable, your power of attorney will become effective upon the attorney being notified that a Certificate of Incapacity has been issued.

When a Certificate of Incapacity has been issued, the Public Guardian and Trustee will become the statutory guardian of the incapable person's property. An attorney under a continuing power of attorney for property must apply to replace the Public Guardian and Trustee. The application will normally be granted unless the Public Guardian and Trustee has reason to believe that the attorney is unsuitable to manage your financial affairs. Unfortunately there may be a delay in managing your affairs while the application is considered by the Public Guardian and Trustee.

WHO SHOULD YOU CHOOSE TO BE YOUR ATTORNEY?

Your attorney must be at least eighteen years old, should possess common sense and should be someone of the highest integrity in whom you have absolute faith. General powers of attorney are most often given to a spouse, or to an adult child. You may also wish to choose an alternate attorney in case your first choice predeceases you, or becomes unwilling or unable to act. You can appoint more than one person and can provide in the Power of Attorney for Property that either one of the attorneys has authority to act alone, or that two or more of them must act together to carry out the administration of your affairs.

WHAT IF THERE IS NO POWER OF ATTORNEY?

If you become mentally incapable without having executed a Continuing Power of Attorney for Property, your spouse, partner, child, parent, brother or sister may apply to become the statutory guardian of your property. The application is made to the Public Guardian and Trustee. The prospective guardian must:

- file with the application a management plan for the property in the prescribed form;
- file a statement that he or she was in personal contact with you during the preceding twelve months and was on good terms with you;
- prepare an annual financial statement; and,
- provide security in a form approved by the Public Guardian and Trustee.

The costs of such an application and the ongoing costs of annual financial statements make it worth your while to consider a Continuing Power of Attorney for Property now.

POWER OF ATTORNEY FOR PERSONAL CARE

WHAT IS IT?

A power of attorney for personal care is a legal document in which a person gives someone else the authority to make personal care decisions for them if they become incapable of making decisions on their own.

Personal care decisions include those involving health care, housing, food, clothing and safety. Further, you can give your attorney the authority to refuse or consent to medical treatment. Your power of attorney for personal care can be, in effect, a "living will".

WHO MAY GIVE A POWER OF ATTORNEY FOR PERSONAL CARE?

To give a power of attorney for personal care, a person must be at least 16 years of age and mentally capable. People are considered capable of giving a power of attorney for personal care if they can:

- understand whether the attorney has a genuine concern for their welfare; and,
- appreciate that the attorney may need to make personal care decisions on their behalf.

WHO MAY BE THE ATTORNEY FOR PERSONAL CARE?

A person may name anyone who is at least sixteen years old, but must not be your landlord, social worker, teacher, homemaker, attendant, counselor, advocate, doctor, nurse or therapist. These persons are excluded because it is feared that a conflict of interests might arise if such persons were to act both in their professional or service provider role and as your attorney. This rule does not apply to a spouse, partner or relative. More than one person may share the responsibility as attorneys, or one person may be named as attorney and another person as an alternate or substitute attorney in the event that first person named cannot act when the time comes.

WHEN CAN A POWER OF ATTORNEY FOR PERSONAL CARE BE USED?

A power of attorney for personal care can only be used if the person granting it has become incapable of making personal care decisions. However, no formal process is necessary for its implementation. Your attorney can begin making personal care decisions on your behalf if:

- you do not object;
- your attorney has reasonable grounds to believe you are incapable; and,
- your attorney explains why a decision is necessary, what it will be, and that you have the right to object to it.

If you do object, your attorney cannot make personal care decisions unless your power of attorney has been validated or registered. Validation is a process which confirms that a person who has granted a power of attorney has become incapable. It also confirms the authority of the attorney.

Registration allows you to speed up the validation process. So long as the grantor remains capable, a power of attorney for personal care can be registered with the Public Guardian and Trustee**.** In some cases the grantor may want to have the power of attorney registered now rather than wait. For example, some people with certain types of illnesses are aware that they may go through periods when they will need help but will resist attempts to provide it.

CAN A POWER OF ATTORNEY FOR PERSONAL CARE BE REVOKED?

As long as a person is capable of granting a power of attorney for personal care, he or she is capable of revoking one that has already been granted. The revocation must be in writing and witnessed by two persons. If the grantor has been assessed as mentally incapable and the power of attorney validated, it cannot be revoked unless the validation is cancelled.

CAN I PROVIDE SPECIFIC INSTRUCTIONS TO MY ATTORNEY?

You may provide instructions in your power of attorney for personal care about such things as where you want to live, what kinds of food you would like to eat, or what you want to wear. You can give instructions about medical treatment, for example, you may give your attorney the authority to allow or refuse treatment for you. Your attorney must follow your instructions and wishes made when you were capable, even if you did not write them down. If it is not possible to follow your instructions, your attorney must make a decision that is in your best interests. The attorney must consider the values and beliefs you held while capable and any current wishes you may have, if he or she can determine what they are.

Put your Instructions in Words your attorney Can Understand - There are many things to keep in mind when writing instructions about medical treatment. It is important to put your instructions in words your attorney can understand. For example, if you used the expression "no heroic measures" will your attorney understand what you meant?

Be Clear and Specific - You might say that you do not wish to be hooked up to a machine, but remember machines may be used in an emergency or during surgery and this is not the same thing as being dependent on a machine to live. Careful consideration must be given to instructions about medication. You may suffer from a life threatening infection that could be easily treated with an antibiotic.

There Are Different Degrees of Illness or Conditions - You may want to give your attorney certain instructions depending on the physical or mental condition you may be in and whether the condition is permanent. You may want differing degrees of treatment in different circumstances, for example, if you are conscious or unconscious, mobile or bedridden, able or unable to recognize loved ones, suffered a severe stroke or only a mild one.

WHAT ABOUT A LIVING WILL OR ADVANCE MEDICAL DIRECTIVE?

Living wills and advance medical directives are documents people write to say in advance the types of medical treatment they would choose or refuse in certain circumstances so that their wishes will be known in case they are incapable of making decisions at the time they are required. These documents should be prepared in consultation with your medical practitioners and can be incorporated into your power of attorney for personal care.