

# WILLS and ESTATE PLANNING: A Beginner's Guide - Presentation

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## Disclaimer

Today's presentation is a "hit the high points" of some key areas regarding wills and estate planning, with a very heavy emphasis on wills. It is not a detailed canvass of the current state of the law nor does it stand as formal legal advice nor does it purport to be a "complete briefing. In the interest of brevity this presentation does not address many very important issues, including intestacy (whole or partial) and guardianship of children, to name just two.) ". This presentation is a "starter" on key issues that you must consider. Estate planning and the preparation of wills should be done in full consultation with your lawyer and financial advisor(s).

## A note on terminology

The estates laws and courts no longer use the term "probate", nor do they use the term "probate fees" to describe the estate administration tax. That said, the terms are still in colloquial use, and are well-understood by the public. I will therefore use terms like "probate", "letters probate" and "probate fees" in this presentation rather than their more accurate technical equivalents.

*Thank you.*



## What is “Estate Planning”?

### **Estate Planning is planning for, and executing so far as possible:**

- the preservation, increase and protection of assets during your lifetime to ensure that what you want to get done actually gets done;
- the orderly transfer of your assets to the beneficiaries both during your lifetime and on death, with minimum tax obligations and maximum effectiveness; and
- the continued preservation of property once it has been transferred to the beneficiaries.

### **Fundamental starter questions:**

- What do you own? What will you own? What may you own?
- What do you owe? What will you owe? What may you owe?
- How can you own more and owe less?
- Who do you have to provide for? Who do you think it best to provide for? (Remember, who you are legally *obliged* to support is not the same as who you *wish* or *need* to support.)
- Does your family have enough money to manage without you?
- Who do you want to get your property. Which property? And how?

*What are the best ways to achieve all of these?*

## Estate Planning – Tools and Troubles

### Estate Planning tools include:

- Wills.
- Powers of Attorney for Property and Personal Care.
- Life and other insurance.
- Gifts
- Trusts
- Joint ownership
- Life insurance

### Three ways of distributing your estate:

- Before your death, with lifetime transfers.
- After your death, through your will.
- After your death, through insurance and related private distributions.

## Wills – What's a Will?

### What's a "Will"?

A will is a written document by which a person instructs how his or her estate should be distributed after death. It includes codicils (a document which modifies a will) and similar written testamentary dispositions.

### Holograph Wills

The term "will" includes a "holograph will", which is a will that is not required to be attested in a normal manner. The phrase is also used colloquially to mean a handwritten will. There is no necessity for the presence, attestation or signature of a witness.

*Don't mix writing and printing* -- A holograph will *must* be wholly in the handwriting of the testator or testatrix and must be signed by him or her.

### Are they "simple"?

It is very common (indeed, *usual*) for clients to seek out lawyers to do a "simple will". Whether a will is "simple" or not depends on the individual situation of the client, which may far more complex than the client realizes (or wants to believe). The question then becomes whether a Will will suffice, or whether the lawyer and client need be involved in a full estate planning process.

## Wills – Simple may not be simple

### Camberwell House breaks down Wills into three different types for retainer and billing purposes:

We use the term “**Simple Will**” to describe one with no complicating factors in either people or property, *i.e.* the trustees/beneficiaries situations are straightforward, as are the nature and extent of your assets. Examples: Single or married with no ex-spouses or step-children or potential support claimants. Property is wholly owned and not subject to rights or claims (either current or potential) of others. All property is in Ontario, and of standard types.

We use the term “**Complex Will**” to describe a Will that isn't simple, but doesn't involve yet involve what we call our “Estate Planning Retainer”. Examples of when a Will can become Complex are: there are ex-spouses, or blended families, or handicapped children; ownership of a business which can continue after your death; property in other jurisdictions or of unusual type; any property subject to potential contractual or equitable claims from other people, (*i.e.* shares in a family business subject to a shareholders' agreement); any distribution or trust plans which are restrictive or unconventional.

We use the term “**Estate Planning Retainer**” to describe retaining Camberwell House to do a simple or complex Will which involves liaising with other professionals (*i.e.* accountants, trustees, *etc.*) to properly complete the Will.

**Our process:** We supply clients with questionnaires which examine their individual situations, and determine whether their needs can be met with a simple Will, or whether they require a complex Will or a complete estate planning process.



## Wills –Types of Will

There are other kinds of will in addition to what we can call a “standard” will.

### Joint Wills

A will made and executed by two or more testators contained in the same document duly disposing either of their separate properties or their joint property. It is, in effect, two or more wills made either in one or several documents. The joint will creates separate distribution of property by each executor and will be treated as such on admission to probate, even if it is only one document. These can be revoked during the lifetime of the testators.

### Mirror Wills

Mirror Wills – Wills (usually between spouses, but not always) where the Wills are identical, save for the switching of the names: one spouse will give his or her estate to the surviving spouse (and, failing that, the estate will the children, or others.) Most often found with first marriages.

Remember, testamentary freedom remains: either spouse can change their will at any time, (subject to trust law). This can create problems later if one spouse chooses (for example) to draft a new will disinheriting the children of her deceased spouse (*i.e.* her stepchildren).

## Wills –Types of Will ... *continued*

### **Mutual Wills**

Very similar to Mirror Wills, in that they are identical and reciprocal, but different in that there is an agreement between the two testators not to change their Wills. In other words, they have a contract either embodied in them or a separate one linking them which, if done properly, binds them not to change the wills at a later date. (They are very often found in second marriages where the parties do not want their children later disinherited by the surviving spouse.) Obvious drawback: the surviving spouse is free to dispose of all the assets in her lifetime, leaving any future testamentary disposition hollow.

The situation should be one in which one party would not make his will unless the other one also made a will conferring similar benefits. All testators have the right to revoke any will, but the contractual nature of a mutual will means that the person who benefits from the revocation may be held to receive the benefits of it as trustee for the person who had the benefit under the contract. Put colloquially, the court recognizes the testator's right to revoke their will, while retaining the power to claw back the benefits of that change in favour of the original beneficiary.



## Wills –Types of Will ... *continued*

### Multiple Wills

A testator has a right to draft multiple wills instead of having one will to deal with all of his property. This is done for two main reasons:

*Different wills to address different kinds of property, or different property in different locations.*

For example, a testator might have an Italian will governing Italian property and an Ontario will handling Ontario property.

*An estate planning tool to reduce probate fees or for tax purposes.*

These involve multiple wills dealing with assets *in the same jurisdiction*. For example, a testator may have money in the bank, and value in shares in a privately held company. The bank will not transfer the ownership to the beneficiary without Letters Probate but the corporation will transfer the shares without them. It makes sense, therefore, to have one will for the bank assets and another for the shares: one would probate the former (and pay probate fees only on those assets) and not probate the latter, (saving the probate fees on the shares).

*Caution:* There must be no gaps left in the description of assets being disposed of in each case, one Will must not revoke the other, and there must be no conflict between the two wills.

## Wills – Testamentary Capacity and Status

### Testamentary capacity

A “testator” [f. “testatrix”, the person who makes the will] must have “testamentary capacity” for the will to be legal and enforceable. Questions to ponder:

- Can the testator actually legally dispose of the property, movables or immovables?
- Has the age of majority [18] been reached (exception examples: marriage or armed services)?
- Is the testator mentally capable?
  - Understand the nature and extent of assets.
  - Comprehending and appreciating the persons who should / will receive the assets.
  - Undue influence.

### Marriage

- Marriage revokes a will executed prior to the date of marriage.
- Wills made in contemplation of marriage need have a statement to that effect.

## Wills – Dependents' Relief

### Provision for Dependents

A testator is free to dispose of their own property, and leave their assets to whom they want and to disinherit who they want. They are even free to disinherit those to whom they have a legal obligation to support, be it a spouse, or a child, or some other person. *However* they cannot escape their support obligations. A court can order that support be granted to that dependent, and can even make a lump-sum award, thus *actually* awarding a share in the estate to the dependent even though *technically* not permitted to do so. This is done under Part V of the Succession Law Reform Act [SLRA] in Ontario.

### Who can be a “dependent” for the purposes of the SLRA?

A person claiming to be a dependent must be both of the following things:

- a spouse, parent, child or sibling of the deceased.
- someone to “whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death”.

## Wills — Dependents' Relief - continued

**Spouse”, “parent” and “child” all have expanded definitions under the SLRA. Egs:**

- **Spouse** “*includes* a former spouse, a common law spouse, and a same sex spouse with whom the deceased was cohabiting continuously for a period of not less than three years, or with whom the deceased was in a relationship of some permanence if they are the natural or adoptive parents of a child.”
- **Parent** “*includes* a grandparent and a person who has demonstrated a settled intention to treat the deceased as a child of his or her family, except under an arrangement where the deceased was placed for valuable consideration in a foster home by a person having lawful custody;
- **Child** “*includes* a grandchild and a person whom the deceased has demonstrated a settled intention to treat as a child of his or her family (other than a foster child)”. [Laidlaw & Tator, “Estate Litigation”]

### **The current state of the law**

It is fair to describe the current state of the law as *very* favourable to support claimants. While the courts set a number of seemingly hard tests to determine whether a person is a potential dependent, and whether they should receive support those tests are rather gently applied at the present time, making such claims fairly easy to win. Testators should factor this into their planning and when pondering how to provide for people in their Wills. This is *especially* so in common law relationships, or in relationships which can later be claimed to have been common law.

## Wills - Restrictions

### What can't a testator give away? - "Restrictions on alienation"

A testator can't give away what they don't own, or those things to which others have prior claims.

Examples:

- Joint tenancies
- Limited interests (*e.g.*: estates for life, partnership property, some joint bank accounts).
- Corporate shares with limitations on transfer
- Franchises.
- Controlled items; (*e.g.*: firearms or currency).
- Professional society rules on business transfer
- Contracts / agreements limiting right of disposition (*e.g.*: a prenup mandating certain divisions, a contract giving a right to certain property).
- Property subject to a lien or charge.

## Wills – Some Things to Watch Out For

### Conflicts of Laws

- “Movables” are handled by the law of where the testator lives (“domicile”), but “immovables” (*i.e.* real property *etc.*) are handled by the law where that property is located.
- Some jurisdictions have “forced heirship” laws restricting testator’s rights.

### Perpetuities and Accumulations

- No accumulation of income of income is allowed beyond 21 years from a testator’s death.
- Ensure that a no gift will vest outside the perpetuity period.
- “*Rule in Saunders and Vautier*”: See “Trusts” section, below.

### Execution of the Will.

- Form is very important, and may vary from jurisdiction to jurisdiction.
- Affidavits of Execution (affidavits by witnesses attesting to proper execution of Will)
  - are required;
  - need be properly done (eg: age of witnesses).

## Wills - Executors

### What's an Executor?

An executor [f: executrix] is the person named in the will who has the legal authority and responsibility to carry out the terms of the will.

### Executor as Trustee

All executors are trustees of your estate: they hold your property in trust for the beneficiaries. The term "trustee" is often used to describe an executor.

### Who can and can't be an Executor?

There are legal limitations on who can act as an executor, *e.g.* must be of the age of majority (18), and resident in Ontario, otherwise he may have to post a bond with the court.

### Who should and shouldn't be an Executor?

There are practical considerations as to who should be an executor: please see the next slide.

## Wills – Executors - *continued*

### Things to consider in choosing an executor

- Age (too young? too old?)
- Consent of the executor: are they *willing* to act?
- Personality of the executor: are these duties compatible with their personality?
- Skills of the executor: do they have the skills to manage the estate?
- Resources available to the executor : you may value their judgment more than skills which executor can obtain from professionals?
- Conflicts of interest.
- What is the will actually doing? Different situations might require different talents.
- Specialized executors for specialized functions.
- Spouses: what if there is an FLA election? There, (s)he is treated as predeceased.
- Is the proposed executor living close by? Travel time and costs may be prohibitive.



## Wills – Executors - *continued*

### **More than one executor**

Joint executors can be appointed, with survivorship clauses in case of death or inability to act.

It is important that joint executors be compatible.

It is very important that joint executors have decision-making authority spelled out.

### **Dispute Resolution [“DR”], especially amongst multiple executors**

You should have a general DR Plan: avoid court.

You should always have a general DR Plan where there are multiple executors.

### **Alternate Executors**

***Don't choose just one executor.*** Have an alternate and an alternate to the alternate, and they too must meet the requirements.

## Wills - Executors - *continued*

### **Professional Executors:**

An independent professional such as a lawyer or accountant who specializes in such matters can be retained, but it is an expensive choice.

### **Trust company to act as trustee:**

Some estates, or specific asset in that estate require the experience, expertise and specialized skills of a trust company organization.

- Onerous duties of administration would place too great a burden in terms of time and effort on any individual(s).
- Assets to be held in trust over a period of years and the administration therefore requires the continuity, permanency and record-keeping provided by a corporate trustee.
- Impartiality solution to conflicting interests.
- Security regarding physical arrangements, governmental supervision and malpractice insurance.

## Wills – Executors - *continued*

### Executor Compensation

It is quite common for executors (even if they are family or close friends) to be compensated, and the courts have permitted this. (Professionals will not act as executors without compensation, naturally.) The executors are entitled to 2.5% on each of the following: capital receipts; capital disbursements; revenue receipts; revenue disbursements. And, where applicable an annual care and management fee of 2/5 of 1% on the gross value of the estate.

The courts can determine “fair and reasonable” and can do so over the above-noted mandates. The court will examine: 1) the size of the estate; 2) the actual care and responsibility involved; 3) the time occupied in performing the duties; 4) the skill and ability shown; and 5) the success resulting from the administration.

If you wish your executor to be compensated, *mandate* that it happen in the will, lest there be pressure on your executor (whether from personal guilt or outside pressure) to forego compensation

## Beneficiaries

### *Who do you choose?*

Intensely personal to the testator and to their family and/or personal situation, but remember to ask yourself, “is a Will the best way of doing this?” Are there alternative methods of giving which achieve the same end in a way which is morally or practically better? For example:

- outright bequests;
- life interests with or without powers to encroach;
- trust funds;
- discretionary powers in the trustees to split income or to encroach on capital;
- provisions for gifts over.

Watch out for “need and greed” issues.

### *What must you consider?*

- People who may be entitled to support by a deceased under Part V of the SLRA.
- Any potential claims that could be made by people covered by statute but not to be included in the will: spouses under FLA, for example.
- Any possible restriction that would prevent the beneficiary from enjoying the will’s benefits, (eg: undischarged bankrupt, or a bequest which they cannot use due to personal restrictions).

## Beneficiaries - *continued*

### Other things to consider:

- Any restrictions under the applicable law?
- Any conflicts of law, (eg: foreign laws in conflict with your bequest).
- Minors; related trust issues.
- Children born outside of marriage: are they to be included? Does phrasing elsewhere in the will or applicable legislation preclude them? (In Ontario these children must be specifically excluded if that is the intent.)
- Stepchildren: “If these children are to benefit, they should be specifically included.” (Cross-reference: Dependents’ right to support.)
- Adopted children: In Ontario, these children will be treated as natural children unless the will provides otherwise.
- Mentally incapable persons. Is the proposed beneficiary capable of managing his or her property?
- Beneficiaries in foreign jurisdictions. Are there any restrictions on the payment or transfer of gifts to foreign beneficiaries? Tax issues.

## **Beneficiaries - *continued***

### **SCHEMES OF DISTRIBUTION WITHIN THE WILL**

#### **Specific Bequests**

A specific gift to a specific person. For example: heirloom X to family member Y, or a sum of money to a specific friend or charity.

#### **Life interests**

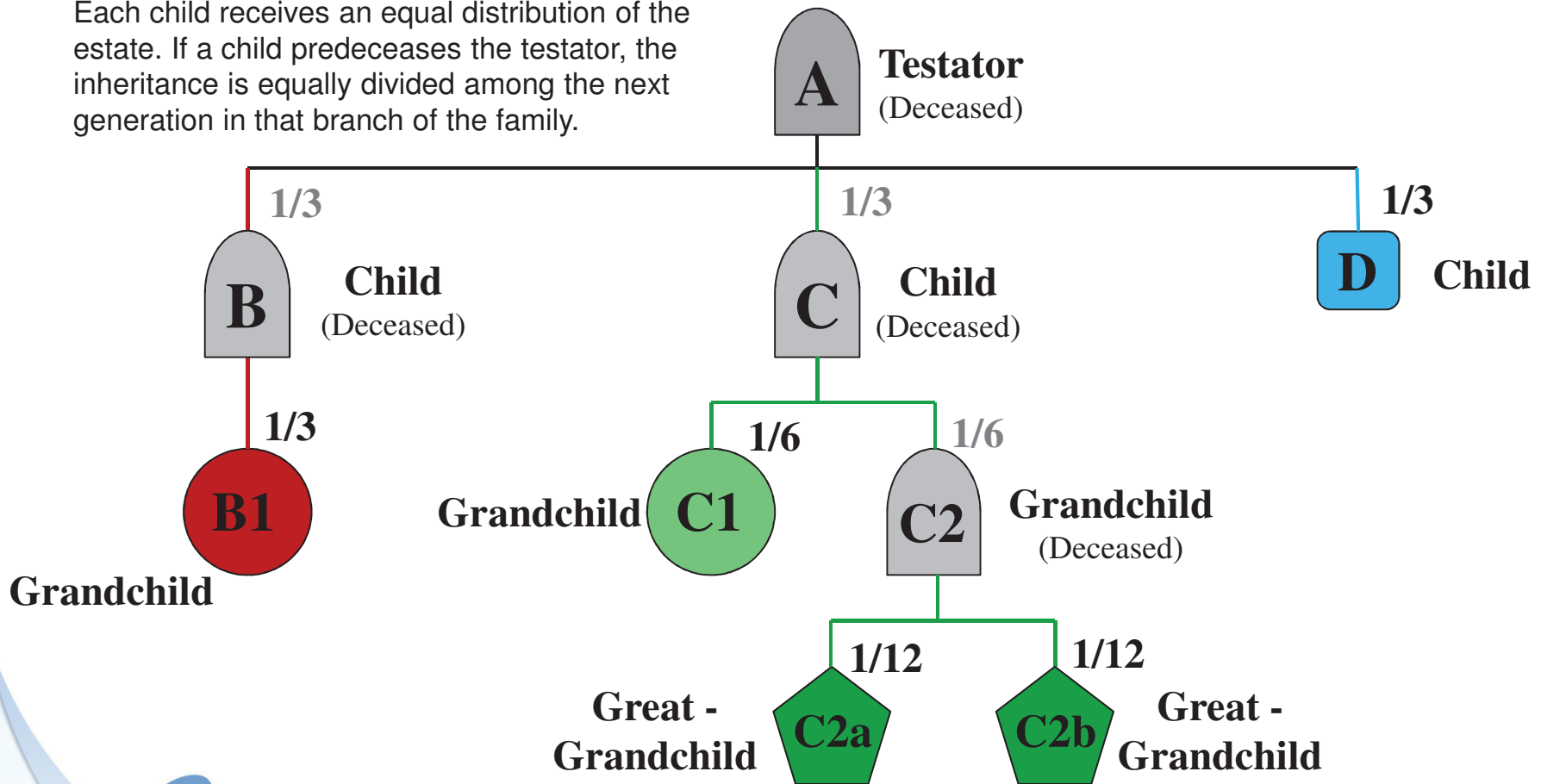
This is a right under a trust that exists so long as that beneficiary does. For example, leaving the family farm to the children but with the widow's right to use and income until she dies.

#### **Residue**

"Residue" is everything that's left (and/or value thereof) after all specific bequests are done and estate obligations are complete. Distributions, especially those of residue are either multigenerational, or may be multigenerational by the time you die. For example, you may have two children at the time of making your will, but many years later at the time of your death you have four living children, one deceased child, and two grandchildren. How does a gift of residue, for example, "flow down" the generations? And in what proportions do you want them to take. Assuming that you wish to split such funds, the three main options are "per stirpes" [the most common], "per capita" and "per capita at each generation". Each is explained in a graphic on the following pages.

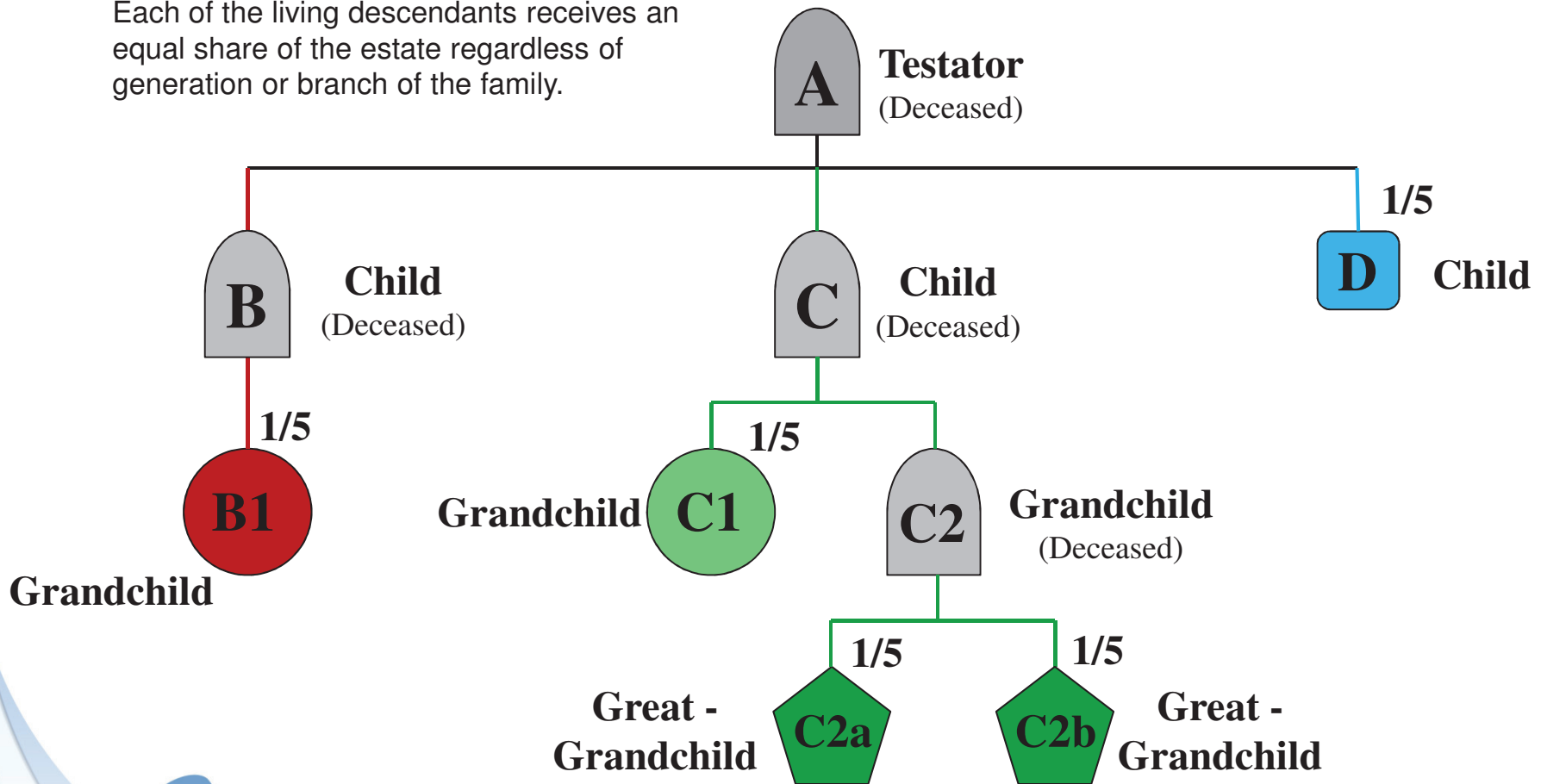
## Per Stirpes (“by branch”)

Each child receives an equal distribution of the estate. If a child predeceases the testator, the inheritance is equally divided among the next generation in that branch of the family.



## Per Capita (“by person”)

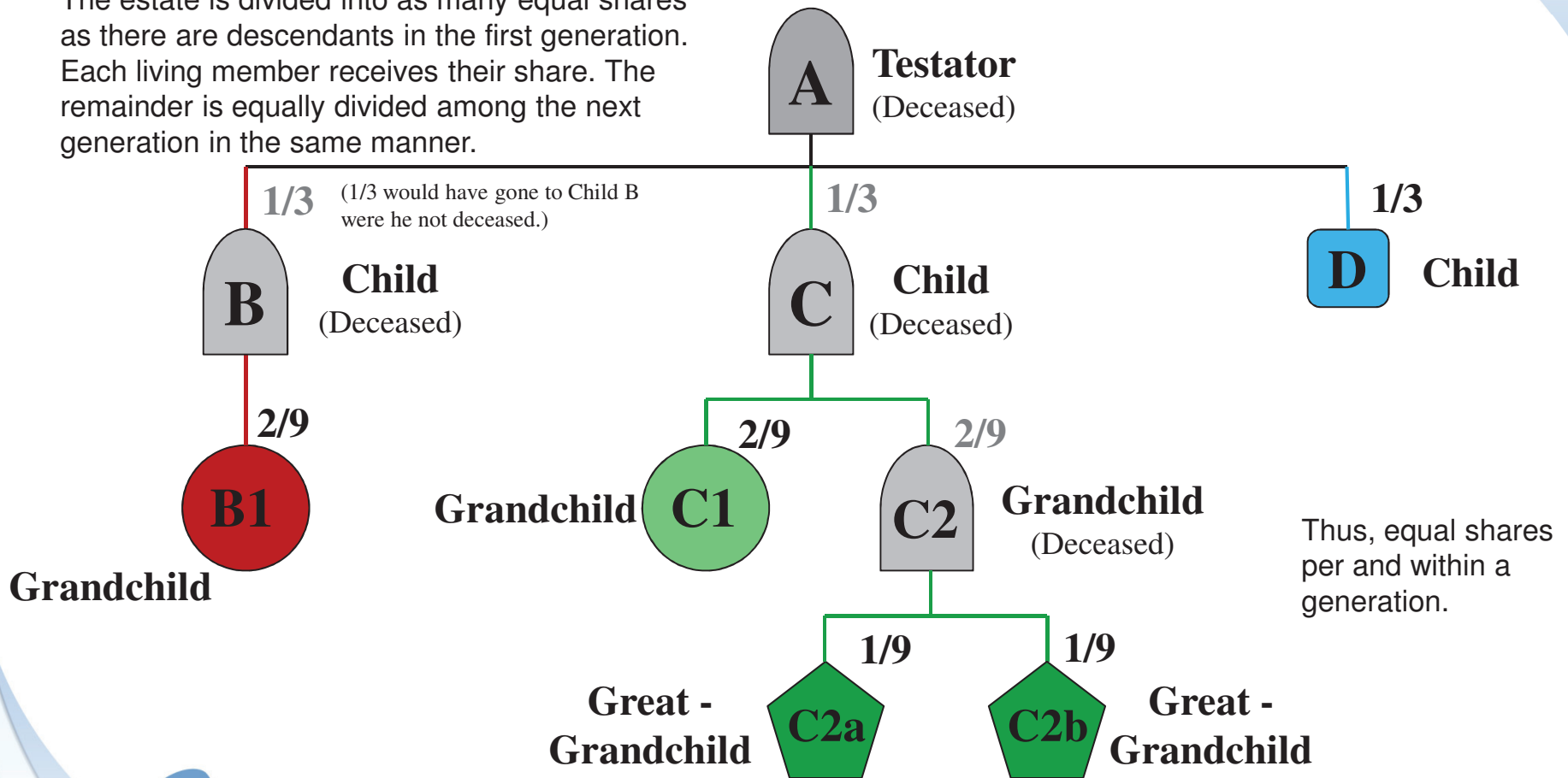
Each of the living descendants receives an equal share of the estate regardless of generation or branch of the family.





## Per Capita at Each Generation

The estate is divided into as many equal shares as there are descendants in the first generation. Each living member receives their share. The remainder is equally divided among the next generation in the same manner.



## Wills - Specific Drafting Issues

### Correct names

- Take the time and trouble to find out!
- Clarify “known as” issues, if necessary.

### Anticipating Future Events

- Likely or possible events: deaths, incapacity, marital breakdown, FLA entitlement.
- Even “merely possible” events: unexpected deaths, adoptions,

### Gifts to minors

Trust provisions:

- “eventualities awareness”; conflicts between guardian and your trustee;
- right to pay out interest or capital as required;
- right to make payments directly to guardian.

### Specific gifts

Beware small gifts holding up administration. Alternatives: asset purchases (eg: bonds); payment to guardian on bare trust satisfies obligation.

## Wills - Specific Drafting Issues - *continued*

### Survivorship Clauses

- Mandates that trustee must survive testator by a fixed time [usually thirty (30) clear days]; prevents having to probate two estates for two deaths close together.
- Problem: need for immediate action in interim.

### Ademption

- Meaning: specific bequest cannot be made, (e.g. a car that has since been sold).
- Remember, SLRA has given beneficiaries some limited rights re substitution of property.

### Abatement

- Meaning: net assets inadequate to meet bequests made in the will.
- Best addressed in pre-planning rather than get involved of intricacies of addressing the problem.

### Lapse

- Meaning: beneficiary predeceases testator or does not outlast survivorship period.
- Problem: gift reverts to residue when that may not be what is intended.
- Best addressed in proper selection and naming of alternate beneficiaries.

## Wills - Specific Drafting Issues - *continued*

### Residue

- Best addressed in proper selection and naming of beneficiaries, alternates and “issue *per stirpes*” (not “children”) designations.
- Be careful of per stirpes going on too long to too many generations and too small a gift. Some solutions: mandated cut-off after a given number of generations; or giving the trustee the right to ignore contingent and unascertained beneficiaries; or to pay adults out immediately and to pay minors' shares to their guardians; or to hold in trust to 18 with broad encroachment power.

### Partial Intestacies

Frequently occur when:

- draftsmen fail to account for interest accumulations;
- failure to have gifts over of residue.

Solution: Have a thorough lawyer! This is very much a question of technical competence.

### Class Gifts

If you are going to give a gift to a class you must *define membership* in that class. (Eg: “nephews”: does it include stepchildren?)

## Wills - Specific Drafting Issues - *continued*

### **Beneficiary Designation**

Designation, by will, of beneficiaries under life insurance, pension plans, RRSPs, retirement income funds. Be cautious:

- it supersedes all previous designations that may have been made by the testator;
- it covers only up to the date of the will, and does not cover after-acquired policies, (*etc.*).

### ***When it's a good idea.***

- When the testator wants the proceeds to be held for the beneficiary on trust until a certain age.

### ***When it's a bad idea:***

- When objective can be achieved more efficiently outside of the will.

## ***Family Law Act Issues***

### **Spouse's rights:**

A spouse (i.e. a married -- not common-law -- spouse) has extra rights on the death of the testator, and can override the Will's distribution provisions.

### ***Succession Law Reform Act – Dependent's Relief:***

See Slides 11 to 12.

### ***Succession Law Reform Act – Preferential Share [partial testacy]***

The SLRA gives the spouse a right to a “preferential share” of \$200,000.00 in partial intestacies.

### ***Family Law Act process:***

The FLA allows a surviving spouse to choose. They can:

- trigger an equalization, just as if they had been separated as of the date of death; or
- the benefits under the deceased's will or intestacy.

This must be done within six (6) months of the deceased's death.

### **What's an “equalization”?**

The right of a spouse to seek an equalization of the net family property [“NFP”] arising out of the marriage. *e.g.*: Deceased spouse has NFP of \$800,000; surviving spouse has NFP of \$300,000; survivor can claim equalization payment of \$250,000, “equalizing” two NFPs at \$550,000 each.

## ***Family Law Act Issues - continued***

### **Things to bear in mind:**

- Any gifts to the surviving spouse in the deceased spouse's will are revoked unless the will expressly provides for retaining them.
- "Life insurance owned by the deceased spouse and lump sum pension payments payable upon the deceased spouse's death are credits against the surviving spouse's section 5 entitlement. Any excess is recoverable by the deceased spouse's personal representative unless the deceased leaves a written designation to the effect that the surviving spouse is to receive the payment under the policy or plan in addition to the section 5 entitlement." [Histrop, "Will Planning and Drafting."]

### **COMPLEXITY ALERT!**

- Domestic Contract preparation to address Family Law Act issues.
- Trusts and other transfer options.

## ***Family Law Act Issues - continued***

### **Domestic Contracts**

Estates do not operate in isolation from other areas of the law. As already noted, family law legislation will come into operation in ways that impact on – and may completely upset -- your estate planning if you don't take them into account at the planning stage of your will. Examples:

- A spouse's right to preferential shares on intestacy or partial intestacy.
- A spouse's right to claim an equalization payment.
- The domestic contract that comes into existence with mutual wills.

### **What this means for you**

Courts retain their right to ensure that unlawful or unjust contracts are not enforced. The old cliché is that “courts will not interfere with an unwise contract but will with an unfair one”, but testators should bear in mind that courts are *much* more willing to interfere with domestic contracts than commercial ones, and will often seek to balance out matters between spouses even if there has been no unlawfulness or unfairness. Put bluntly courts may impose what they think fair rather than what the parties had contracted to be fair, and so any domestic contract should be made as airtight as possible: the courts must be given as few means as possible to upset your planning. This means that any estate-related domestic contracts should follow the highest standards of thoroughness and formality, including full independent legal advice for both parties.



## Tax and Estate Fee Issues

### Who *are* you?

- Foreign citizenship can give rise to tax issues independent of foreign assets.
- If necessary, retain foreign counsel or domestic counsel called abroad.

### “Death taxes”

While “succession duties” are notionally gone they remain in the form of “Estate Administration Tax”, [see next slide]. Also, deemed disposition of certain assets on death: GICS, for example, have a very high tax rate. You may want to move assets into lower-tax investments.

### Some areas of potential problems:

- Testator has foreign assets.
  - Real Property is handled differently than personal property.
  - Tax issues may arise in foreign jurisdictions.
- Foreign beneficiaries.

### Some means of addressing tax issues:

- Consult with and incorporate the advice of financial professionals. (This is **VERY** important.)
- Joint ownership.
- Trusts with life interest, (not subject to tax on death of beneficiary). Problem: tax consequences of holding capital assets in trust.
- Beneficiary designations for insurance, RRSPs, pension plans.

## Tax and Estate Fee Issues - *continued*

### **Estate Administration Tax (formerly “Probate Fees” or “Probate Taxes”)**

This amount depends on the size of the estate.

- \$5 per \$1,000 up to \$50,000 (thus, \$250.00 for the first \$50,000.00)
- \$15 per \$1,000 over \$50,000.

(Thus, on a half-million dollar estate the “EAT” would be \$7,000.00.)

*Note: Audit and verification measures are being tightened by the Ontario government.*

### **Some means of avoiding EAT “hit”:**

- Hold property in assets that do not require probate and execute multiple wills.
- Pre-death transfers of assets to intended beneficiaries.
- Joint ownership of assets. (But watch out for *Pecore*: see next page, “*Pecore* and the end of the presumption of advancement.”)
- Life insurance.
- Beneficiary designations on certain assets (eg: RRSPs).

Consult with and incorporate the advice of financial professionals. (This is **VERY** important.)

## ***Pecore* and the end of the presumption of advancement**

### **The Presumption of Advancement**

This was a legal principle wherein the court would, in certain circumstances, have held a rebuttable presumption that a spouse or parent who places property in the name of the transferee spouse or child (*i.e.* for no value, a “gratuitous transfer”) intends to make a gift and it is for the spouse making the transfer to the other spouse to prove there was no such intention. The Supreme Court of Canada has held (in the *Pecore v. Pecore* and *Madsen Estate v. Saylor* cases) that the rebuttable presumption no longer applies. This is due, in part, to the increased tendency of people (esp. as parents age) to place title to an asset (esp. a bank account) in the name of another (or jointly with another) in order to have that person *manage* rather than *keep* that asset.

### **How do you address this new reality?**

If you hold assets jointly with someone, or if someone holds an asset for you, you will have to decide whether *you want the asset transferred on your death* or *whether you want it to become a part of your estate*, in either event you must ensure that your intentions are properly recorded, and conveyed to those who might challenge a doubtful transfer.

Different assets will have to be handled differently. Please speak to the institution in question (*e.g.* the bank) and to your lawyer when seeing to this.

## Some areas of concern

### Change is the only constant

- People and their lives change and these changes may necessitate a change in your estate planning. Don't leave things static; re-examine them. Diarize as necessary.

### People often don't act the same after a loved one has died.

- Dissatisfaction with estate distribution: they got too little.
- Dissatisfaction with estate distribution: others got too much.
- *With you dead, the old restraints are gone*; saying and doing things which they wouldn't have (but may often have wanted to) while you were alive.

### Testators are often reluctant to face the worst

- The limitations of the people in their lives (i.e.: can't be trusted with money).
- Difficult choices. *eg*: An even split amongst children may not be fair but it may be wise.

### Potential trouble areas include

- Lack of thoroughness (on your part and/or that of the solicitor).
- Failure to balance technical (i.e. legal) with fiscal planning
- Second families; blended families.
- Being "*in loco parentis*" to dependent children.
- Significant life changes not provided for in planning, or adapted to when they occur.
- Will coordination between spouses

## Trusts in Wills

### What is a “trust”?

A “trust” is where an asset is held by one person for the benefit of another. All executors are trustees because they hold the estate in trust for the beneficiaries; in effect, the entire will and estate is a trust.

### What other trusts are there in a Will

There may be other, specific trusts set up in a will.

- The most common are those for beneficiaries who may not be of the age of majority. These are usually handled by general trust language found in the will, providing the executor trustee power where necessary.
- There may be specific trusts for specific purposes, *e.g.* a Henson Trust, or an educational trust, or some other trust set up to address specific needs of a specific beneficiary.

Testator needs to address eventualities such as death, interest and principal over extended period.

### "The Rule in Saunders and Vautier"

This is a rule of equity which provides that if all of the beneficiaries in the trust (and it must be a probably closed group) are of adult age and under no disability, then the beneficiaries may require the trustee to transfer the legal estate to them and thereby terminate the trust.

## Henson Trusts

### What is a “Henson Trust”?

A Henson Trust (sometimes called an absolute discretionary trust) is one designed to benefit disabled persons by protecting and ensuring that the assets of a disabled person can still be used to their benefit without compromising their right to collect government benefits and entitlements. This is done by ensuring that the trustee’s discretion in the operation of the trust is absolute, even to the extent of whether or not the trust assets are used (and, if used, to what extent) to provide assistance to the beneficiary.

Such a power means that the assets do not vest with the beneficiary and thus cannot be used to deny means-tested government benefits. There are also possible income tax relief elements because of taxation at a lower marginal rate. They are also sometimes used to shield assets from matrimonial division in case of divorce of the beneficiary. In most cases, the trust assets are immune from claims by creditors of the beneficiary. Henson trusts can operate as either living trusts (i.e. for the benefit of the beneficiary when you are still alive) or as a testamentary trust (i.e. for the benefit of the beneficiary after your death).

Further information can be found in "What Can You Do To Enhance The Quality of Life For a Family Member with a Disability: Consider a Henson Trust" (Reena/LFO).

## Insurance & RRSPs (*etc.*)

### **Insurance**

Insurance is a very useful tool for estate planning. Life insurance can provide direct payments to beneficiaries upon your death which do not flow through your estate and thus no Estate Administration Tax is payable.

### **RRSPs *etc.***

Many forms of investment instrument permit “beneficiary designations”. These can permit the testator’s funds in that investment to be transferred directly to the beneficiary without paying EAT.

#### *Things to avoid with these options*

- Avoid payments into the estate unless necessary to clear debts.
- Be certain and thorough as to beneficiary designations.
- Be cautious of restrictions regarding changing beneficiary designations, assignment, or commutation of income payments.
- Consult with your lawyer and accountant about FLA implications of such arrangements.

## Charities

### Potential Problems

Testators often leave amounts (large and small) to charities or social service organizations.

Problems may arise when:

- the testator does not use the correct name;
- the organization itself has changed its identity / organizational structure in the years since the will was drafted, or has disappeared entirely;
- the organization itself has changed purpose in the years since the will was drafted;
- the organization commences to operate in a manner which may negate the testator's desire to assist them. [e.g. MADD's scandal regarding poor donation-to-purpose ratio, or MADD in the USA becoming a neo-prohibitionist organization instead of focusing on drunk drivers]

### Solutions

- Ensure that technical requirements are met: correct Canada Revenue Charity number, for example.
- Do homework on the organization: "digging deeper" may change your mind.
- Provide a specific alternative beneficiary, and specific instructions about the triggering event for the switch to the alternate.
- Provide your trustee with an indefeasible discretionary right to switch to alternate(s) in certain conditions (e.g. scandal, change of purpose).



## Funeral

Those a testator leaves behind can be very testy about the format of funerals, and can often, in certain circumstances, be stubbornly insistent on their views of what you the testator “*really*” wanted. If you have preferences for your funeral it is important to ensure that you plan and document those preferences

It is your executor’s duty to ensure that your funeral arrangements are followed according to the instructions in the Will, but there are some problems with that:

- The Will might not be read until after the funeral.
- Family members may already have made or are making the funeral arrangements, arrangements which may not be the same as those given to the executor. Indeed, the executor may not even know about the death until these are well under way.
- There may be strong disagreements as to what might be done: issues such as organ donation, place of burial, service preferences, disposition of remains (*etc.*) are often contentious.

It is very important that your wishes be communicated to the executor, and to surviving family members beforehand.

## ADR – Alternate Dispute Resolution

### ADR: What is it?

Alternative Dispute Resolution (ADR) can be defined as resolving disputes through means other than direct negotiation or the intervention of the court system or administrative law tribunals. It is well established as a less expensive, faster means of resolving disputes. A great number of estate disputes can be avoided if handled right at the preparation stage, and can avoid court if proper ADR clauses are incorporated.

### What does it include?

- **Dispute *prevention* through** effective planning, consultation with heirs and trustees and proper legal drafting.
- **Dispute *resolution* through the setting up of mechanisms in the will for:** trustee decision making; resolution of disputes amongst trustees; if necessary, removal of trustee(s); resolution of disputes arising out of the will by means of mediation or arbitration.

### What to be cautious of

Changes to the FLA regarding family arbitrations may prevent arbitration of *some* estate disputes. Speak to a lawyer to clarify whether you would fit in this category.

## Power of Attorney

### What is a “Power of Attorney”?

“A Power of Attorney is a legal document that gives someone else the right to act on your behalf.”

#### *In Ontario there are three kinds of Power of Attorney:*

- “A **Continuing Power of Attorney for Property** covers your financial affairs and allows the person you name to act for you even if you become mentally incapable.”
- “A **Power of Attorney for Personal Care** covers your personal decisions, such as housing and health care.” (Note: The POAPC is the document which gives the attorney the authority; a “**living will**” is the document which details your instructions regarding your care, i.e., what the attorney must do with that authority.)
- “A **Non-Continuing Power of Attorney for Property** covers your financial affairs but can’t be used if you become mentally incapable. You might give this Power of Attorney, for example, if you need someone to look after your financial transactions while you’re away from home for an extended period of time.”