What To Put In Your Will

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Disclaimer:

Except where it is specifically stated that this paper is dealing with other jurisdictions or the world in general, this paper is only referring to the law of Manitoba, Canada.

This paper is a general summary of the points which this paper discusses. There are many other points of law, some of which could have an affect on what you are doing. Therefore, this paper is not a substitute for consulting a lawyer on the specifics of what you are doing.

You should also bear in mind that from time to time the law changes and that judges have a huge amount of discretion to make rulings which other judges and other people wound say are not in keeping with the law. Consequently, this paper is not a guarantee or warranty of what will happen. The author and the publisher of this paper are not liable to you and are not responsible to you or accountable to you for anything you do or do not do as a result of reading this paper.

The Purpose of a Will:

Most people believe that the reason for having a Will is to tell the world who gets what when they die; however, in many cases that is only part of the reason.

Some people want to accomplish other objectives in their Will in addition to simply saying who gets what when they die.

How complicated or simple you want your Will to be is up to you. This paper does not advocate simple Wills or complicated Wills; its purpose is to tell you a lot about what can be done in a Will, to help you make your own decision on what you want your Will to do.

The person who makes a Will is called a testator (if he is male) and a testatrix (if she is female). In the rest of this paper I will only use the female form (testatrix) because it is too cumbersome to write testator/testatrix, and because for all prior centuries when only one form was used it was usually the male form, so I'm evening the score a bit.

The person who receives something from a Will is called a beneficiary.

Sometimes a testatrix wants to have after-death control over some or all of their assets. By after-death control I mean that the property was not simply given to

the beneficiary, but that there were conditions, restrictions, contingencies, trusts, etc. attached to the property, which say, if, how and when the beneficiary gets the property, and how much of it the beneficiary will get at any time and from time to time. Hence even though the testatrix is dead, her words in her Will are exerting some control over that property.

It is neither good nor bad to exert after-death control over your worldly wealth and assets, because they are yours to do with as you please. You could have three billion dollars in assets and write a simple Will leaving it all, free and clear, to your brother, and if that's what you wanted to do, that's just fine. Alternately, you could have far less than a hundred thousand dollars and have a complicated Will leaving some assets in different Trusts, giving some of your assets on contingencies, giving some on conditions, setting up time frames for the distribution of some or all of your left behind wealth and assets, designating specific beneficiaries for specific items, setting up alternate beneficiaries, include tax planning, and other possibilities; it's your decision.

Typically, the greater a person's worldly wealth and assets, the more likely it is that they will want to exert more control over what happens to their worldly wealth and assets after they die. However, the size of your estate should not be your guiding light. If you want specific people to have certain of your possessions after you die, the best way to do that is in your Will. If you want someone to receive all or a portion of your estate after you die, but you do not want them to receive it all at once, the best way to do that is in your Will. If you want your estate distributed in different ways depending on what has taken place in your life or in other people's lives, or in certain parts of the world, the best way to do that is in your Will.

In your Will you can leave one or many or all of your assets in trust, or in multiple trusts. **When you leave an asset in trust, typically Person "A", called the trustee, has legal ownership of that asset, but they can only use it for the benefit of Person "B", called the beneficiary, and only according to the terms of the trust. For example, if you leave your boat in trust for George, and you name Diane as the trustee, with the trust conditions being that George can use the boat only on weekends and only while he has a full time job. Then Diane would be the legal owner of the boat, however, she could not sell the boat and she could not use it; and she would have to allow George to use it on weekends if he was employed full time, but she could not let George use it during weekdays or at any time during which he was not employed full time.**

For example, if you leave $50,000. in trust for George, and you name Diane as the trustee, with the trust conditions being that George can only get the money in amounts of $5,000. or less, and he can only get it once every six months. Then Diane would keep the money in a bank account, in trust, in her name, or she could keep it somewhere else, but she could not use it or spend it; and she would have to give it to George in the amounts that he requested as long as they were $5,000. or less and as long as he did not ask for an amount more frequently than every six months.

Trusts typically have more conditions which the Trustee has to follow for the protection of the assets; however, the above simple examples allow you to understand what a trust is.

In your Will you can state what happens to an asset which you had left to Person "A" if they die before you die.

In your Will you can state what happens to an asset which you had left to Person "A" if they die very soon after you die.

For example, you might want to leave your beach cottage to your cousin David, but you don't like David's children, so while you are happy for David to have it and use it, and for it to eventually go to his children or whomever he leaves it to in his Will, you don't want it to just go to David's children. If you simply left it to David and he died a week or a month after you died, then chances are he'd have had very little use of your beach cottage, however, because you died before David, the beach cottage would have passed (through your Will) to David, and then a week or a month later when David died it would have passed (through his Will) to his children or whomever he left his assets to; or if he had no Will, then by law to his wife and/or children depending on who was alive after David died. To prevent that from happening you can state in your Will that cousin David gets your beach cottage, but only if he survives you by a specified amount of time, and that if he does not survive you by that specified amount of time then your Will would state who gets your beach cottage instead of David.

In your Will you can require some or all of your beneficiaries to do certain things before they become entitled to receive what you have left to them.

In your Will you can distribute your estate in different ways depending on what has taken place in your life or in other people's lives, or in certain parts of the world.

In your Will you can do whatever you want with your left behind assets, subject to things the law does not allow you to do, or which the law requires you to do. The limit on how, and to whom, and when your assets are distributed, is your desires and imagination, subject to things the law does not allow you to do, or which the law requires you to do.

In your Will you can give non-binding advice. **Non-binding advice is simply you setting forth your thoughts on anything you want those whom you leave behind to have your final thoughts on; it does not obligate them to do anything or control how they use or spend what you left them. <u>However, BEWARE</u>, it has to be very specifically and accurately written or it may result in your Will being uncertain, which may result in it being challenged in court; and that could result in some or all of your assets being distributed in ways other than what you had wanted, and in court costs coming out of your estate, which would leave your estate with less money and less assets than if your Will had not been challenged in court.**

In your Will you can state to whom you decided to not leave anything, or state why you did or did not leave people something, or state why or how you decided who gets what and how much they get. **Such statements, if written very specifically and accurately can make it harder for someone who was not left anything or was left much less than they expected to receive, to challenge your Will in court, because if done properly those statements will make it clear that you did fully consider those people and you did fully consider what you wanted to leave to them, and that you left to them exactly what you wanted them to have. <u>However, BEWARE</u> that such statements, if <u>not</u> very specifically and accurately written, can cause your Will to be ambiguous and make it easier for your Will to be successfully challenged in court by people to whom you might have been expected to leave something, but to whom you did not leave anything or you left less than you might have been expected to leave them. Therefore, while such statements and other statements can be put in your Will, if they are not done expertly well they can cause your Will to <u>not</u> do what you had intended it to do, and they can cause your Will to be challenged in court, which could result in your Will being interpreted differently by the court than you had intended, or your estate divided differently by the court than you had intended; and the court may order that the costs of those court proceedings be paid out of your estate, which will leave much less in your estate than if your Will had not been challenged in court.**

How To Make a Valid Will:

Valid Wills can be as simple as a single handwritten sentence followed by the signature of the person who wrote the sentence; up to a complex fifty or more page signed document that is witnessed on each page. This is not to say that if you write a sentence and then sign your name after that sentence you have a valid Will; this is to say that if you do that you might have a valid Will. This is also not to say that a fifty page Will, written by a lawyer, that is signed, and witnessed on each page, will always be a valid Will.

To have a valid Will you must comply with the rules for making a valid Will in the jurisdiction in which you were living at the time of your death; those rules are usually found in a piece of legislation called the *Wills Act* or a similarly descriptive name.

Sometimes you also have to comply with the rules for making a valid Will in the jurisdiction in which you have property that you want to leave to someone in your Will; the only way to find the answer is to read the legislation in that jurisdiction.

In Manitoba, what can be disposed of (ie. given) by a Will is set out in section 2 of The *Wills Act*:

> **"A person may by will devise, bequeath or dispose of all real and personal property (whether acquired before or after the making of the will), to which at the time of death of the testator, the testator is entitled either at law or in equity, including**
> **(a) estates pur autre vie, whether there is or is not a special occupant and whether they are corporeal or incorporeal hereditaments;**
> **(b) contingent, executory or other future interests in real or personal property, whether the testator is or is not ascertained as the person or one of the persons in whom those interests may respectively become vested, and whether the testator is entitled to them under the instrument by which they were respectively created or under a disposition of them by deed or will; and**
> **(c) rights of entry."**

What the above means is that if you own it free and clear, or if you own it free and clear except that you also have a loan or a mortgage on it, you can give it away in your Will, whatever it is, with some exceptions that rarely come up. I am not discussing those exceptions because they would take a long time to explain and

the people to whom those exceptions are relevant very likely already know if they have something which they don't quite all the way just own, for example, they likely know if they have a fee tail.

If you own something which has a mortgage on it or a loan on it, that fact alone will not prevent you from giving it to someone in your Will. What happens is that the mortgage or loan stays with it until paid off; so if you gave your car to your son, and your car had an $11,000. car loan left on it when you died, your son gets the car but now he owes the $11,000. to the bank that gave you the car loan.

Alternatively, your son can refuse to accept the car and then the bank gets the car, which they will sell for whatever they can get for it, and your estate (not your son) will owe the bank the difference between what they got for the car and ($11,000. + their cost to sell the car). If the bank got more than ($11,000. + their cost to sell the car) then the bank will pay that extra amount to your estate, <u>not</u> to you son; and that extra amount will be distributed according to what your Will said would happen to cash and cash like assets that you had at the time of your death.

In Manitoba, what must be done to make a document a valid Will is set out in section 3 of The *Wills Act*, where it states:

> **"A will is valid only when it is in writing."**

Section 4 of the Manitoba *Wills Act* states:

> **"Subject to sections 5 and 6, a will is <u>NOT valid unless</u>,**
> **(a) at its end it is signed by the testator or by some other person in the presence and by the direction of the testator;**
> **(b) the testator makes or acknowledges the signature in the presence of two or more witnesses present at the same time; and**
> **(c) two or more of the witnesses attest and subscribe the will in the presence of the testator."**

Subject to sections 5 and 6 means that what it says in section 4 does not apply if what you have done is covered in sections 5 and/or 6.

The (a), (b) and (c) parts of section 4 mean that the testatrix has to sign her Will <u>at its end</u> while at least two witnesses are both present and that at least those same two witnesses must sign the Will while they and the testatrix are all present. Or someone had to sign the Will <u>at its end</u> on the instructions of the testatrix and on behalf of the testatrix while she was present and while at least two witnesses are both present and that at least those same two witnesses must sign the Will while they and the testatrix are all present.

Section 5(1) states:

> **"A member of the Canadian Forces while on active service pursuant to the *National Defence Act* (Canada), or a member of any other naval, land, or air force while on active service, or a mariner or a seaman when at sea or in the course of a voyage, may make a will by a writing signed at its end by the testator or by some other person in the presence and by the direction of the testator without any further formality or any requirement of the presence of, or attestation or signature by, a witness."**

Section 5(2) and 5(3) state how it can be proven that a person qualified to make a Will under section 5(1).

Section 6 states:

> **"A person may make a valid will wholly in the person's own handwriting and signed at its end by the person, without formality, and without the presence of, or attestation or signature by a witness."**

Section 6 is the section under which a handwritten sentence on a piece of paper, with the signature of the Writer after the end of that sentence could be a valid Will. The handwritten Will could also be many pages long and very complicated if the Writer so desired, and as long as it complied with what section 6 requires it is a valid Will.

(Keep in mind that the above are the rules set out in The *Wills Act* of Manitoba, hence they are the rules in Manitoba; they are not necessarily the rules outside of Manitoba; however, many jurisdictions have the same or similar rules to Manitoba. If you do not live in Manitoba, you have to read the rules in your jurisdiction to know what the rules are for a valid Will in your jurisdiction.)

Section 7(1) states:

> **"A will is deemed to be signed at its end, if the signature of the testator or of the person signing for the testator, is placed at, or after, or following, or under, or beside, or opposite to, the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as the testator's will."**

In Manitoba Sections 12 to 15 of The *Wills Act* state who can and who cannot be a witness if you want everything in your Will to be given out as stated in your Will.

You can get The *Wills Act* and all regulations made under the Will Act, free of charge online, just search for "Manitoba Laws online", and follow the appropriate links. At the time I wrote this paper the url was: http://web2.gov.mb.ca/laws/statutes/index_ccsm.php

The *Wills Act* also tells you what happens to your Will if you get married or divorced, or if you have a common-law relationship, or if you end a common-law relationship. It also tells you how to make changes to your Will (you cannot simply write in the change, there are formalities to be followed).

The *Wills Act* sets out far too many rules for me to cover in this paper, as the *Wills Act* is much longer than is this whole paper.

Choosing the Executor, Executrix, Trustee of Your Will:

Remember, an Executrix and an Executor are the same thing, Executrix is the term used when a woman is doing the job and Executor is the term used when a man is doing the job. In this paper I have just been using the term Executrix to mean both. Usually the Executrix and the Trustee are the same person or same group of people. If you want to have different people as your Executrix(es) and different people as your Trustee(s), then talk to a lawyer, as that can complicate matters and this paper does not go into scenarios in which that would make sense. As just stated, normally the Executrix and Trustee are the same person or group of people. The role of the Executrix/Trustee is to follow the instructions in your Will and see to it that your left behind debts are paid out of your estate and then that each beneficiary of your Will (ie. each person or entity to whom you left something in your Will) gets what you left to them, or might have to get it in a reduced proportion if your debts were too high to allow every beneficiary to get exactly what you wanted them to get. In order to accomplish the foregoing the Executrix/Trustee often has to put some of your assets in their name (in trust for the purpose set forth in your Will), and then after all debts and expenses have been paid, and they are sure no other creditors will come calling, to distribute your remaining assets as designated in your Will, or as closely to that as possible. Hence, typically the main beneficiary or main beneficiaries are listed as the Executrix(es)/Trustee(s). The two most important qualifications for an Executrix/Trustee are: (i) they can be trusted to not steal assets out of your estate, and (ii) they are sufficiently intelligent and sophisticated to do what is necessary to have your estate settled (ie. your debts paid off and your assets distributed as stated in your Will to the extent that is possible).

(In case you are wondering, when you die your debts become debts of your estate, they don't die with you; that is why they have to be paid off before your remaining assets are distributed as set out in your Will.)

Assets that will Not Be Part of Your Estate:

Jointly held property on which the current written ownership document would cause 100% of it to go to the surviving joint owner(s), and the pay out amount of an insurance policy which list a beneficiary that is to receive 100% of the pay out amount in the event of your death are each things that will not be part of your estate and therefore will not be distributed according to your Will. If you want them to be distributed according to your Will, or there are other things which you own or control or have rights in or to, the distribution of which you are concerned might not be controlled by your will, ask your lawyer about them.

Does the Law Dictate What Will Happen to Your Estate ? :

Sometimes the law requires you, and after your death, your estate, to pay certain amounts to certain people; in addition, some things that you might want to happen with your estate or portions of your estate could be illegal (ie. against the law). I am not going to give you a list monies your estate may have to pay by operation of the law, or of things which are illegal to place in your Will, because there are too many possibilities for me to cover in this paper, and those possibilities will likely change as time moves on. Therefore you are much better off knowing where to look to find out what amounts your estate might have to pay, and to find out, by asking a lawyer, of the types of things you cannot require to be done with your estate or portions of it.

In Manitoba a good start is to read each of:

The Family Maintenance Act
The Family Property Act
The Homesteads Act
The Wills Act

You should also read the regulations that are made under those acts.

Regarding what taxes, estate fees, etc., your estate will have to pay, contact the Federal Income Tax department and your jurisdiction's tax department and your jurisdiction's estate department, and ask them your tax and estate fee questions.

If you don't follow the law, either by doing as it requires or writing your Will and/or setting up your estate such that the law makes less requirements on your estate, then the law is likely to step in and deal with some or all of your estate as the law dictates.

Income Tax Planning and After Death Estate Planning:

They are not covered in this paper, except to say that if you want to know if your Will can be written in such a way as to minimize the amount of income tax and other after death payments that will come out of your estate, discuss that with your lawyer. Sometimes it is a good idea, other times the amount of money that might be saved is not sufficient to make you want to give out your assets in a more complex/convoluted way than you want it to be done.

The Cost of Having a Lawyer Write Your Will:

Each lawyer has their own fee schedule, and therefore I cannot tell you what another lawyer will charge to write a Will.

It is possible that a lawyer who charges very little may write a high quality Will; and it is possible that a lawyer who charges a large amount might write a poor quality Will that won't accomplish what you had wanted it to accomplish. When you meet the lawyer you are going to have to decide on what you think of that person's abilities, their desire to do a good job, and their interest in getting enough information from you to be able to do a good job.

A lawyer should spend enough time speaking with you before he writes your Will to know what types of assets you own and foresee owing in the future and to learn where those assets are situated and to whom you want to leave those assets; and to discuss the other points listed in this paper. If you want a more complicated Will the lawyer might have to spend many hours with you on different occasions to get all of the information needed to write your Will. The writing of a Will should be done by the lawyer and not by his assistant, because if it is being done by his assistant there is a high probability that the assistant is simply filling in your details on a Will form on the law office's computer, and the form could be out of date, missing portions that are needed for your situation, or have errors in it, all of

which an assistant may not discover. The lawyer should then go over each clause in the Will with you, by having you read it in his presence or by reading it to you; so that you will know exactly what your Will says. All of the foregoing could take anywhere from 2 hours to dozens of hours to much longer, depending on what you own, what you foresee owing, and what you want done with your assets after you die. In my opinion, the cheapest a Will should cost, at the lawyer's full rate, would be 2½ times his hourly charge. That would be the case for the simplest possible Will. Some lawyers have a low flat fee for a simple Will, which means that their charge would be less than their hourly rate multiplied by the time they spent on it, or they're getting their assistant to punch it out on a computer stored Will form. A complicated Will, which required long discussions, background research, legal research and/or tax/estate planning should cost many thousands of dollars.

Reviewing of Your Will:

If you decided to have your Will written with no tax, estate or succession planning, and your assets are of the same types and in the same locations as you had when you made your Will, and you still want your estate to be divided as set out in your Will, then there is nothing to review.

Obviously your Will has to be reviewed and changed if you want to change who gets what, or how and when your assets are distributed; or want something else changed. In addition to the foregoing, <u>some</u> examples of when you should get your Will reviewed are:

If you had certain types of distributions stated in your Will because it would save on the amount of tax or estate costs/expenses that came out of your estate, then you should have your Will reviewed once a year, as the tax and other laws can and do change from time to time.

If you bought real estate in a jurisdiction in which you did not own real estate at the time your Will was written, then you should have your Will reviewed to see how that new real estate will be disposed of through your Will.

If you bought assets that are remaining in a jurisdiction in which you did not own that type of asset at the time your Will was written, then you should have your Will reviewed to see how that new asset will be disposed of through your Will.

If some of your listed beneficiaries have died and your Will did not fully cover what should happen in that situation, then you should have your Will reviewed.

If you no longer own specific assets that you had left to specific beneficiaries, then you should have your Will reviewed.

If you acquired a type of property / asset that you had not owned when your Will was written, then you should have your Will reviewed.

If circumstances have changed which make some of the things written in your Will unworkable or impossible, then you should have your Will reviewed.

If there is any other reason that makes you think your Will should be reviewed, then you should have your Will reviewed.