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# Estate Planning & Executorship –

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**“Don’t worry - the Power of Dad still trumps  
the Power of Attorney.”**

SimpleSmart  
ADVICE



## Powers of Attorney

According to a recent Scotiabank poll, only half of Canadians have a will – even more surprising, only one-third had a power of attorney, according to the poll. Most Canadians use a lawyer to draft their wills and Powers of Attorney. Why don't more Canadians have these important documents?

Respondents cited three reasons. They:

1. hadn't given much thought to it
2. consider it too private
3. have put it off

## PA Types

What is a Power of Attorney or PA? A PA is a legal document giving someone the authority to act on your behalf, while you are alive (all PAs become void at death). PAs come in two general forms:

- **Power of Attorney for Property** – for financial decisions like paying bills, handling investments and dealing with property
- **Power of Attorney for Personal Care** – allows someone to make health care decisions such as medical care, diet, clothing, safety or housing

A PA for Property takes effect immediately, unless the document states otherwise. Most PAs are drafted to be “continuing or enduring”, which simply means they are valid even in the event of your physical or mental impairment. Due to possible abuse, most experts advise that you keep this document under lock and key (or with your lawyer) and inform your attorney that you have done so. Don't confuse the term “attorney” with lawyer. Your **attorney** is the person you have granted the PA to. The PA for Personal Care typically only takes effect when you are physically or mentally incapacitated.

Some qualities to look for in your attorney:

- Trustworthy
- Good at handling money and paperwork (for Property PA)
- Grace under pressure (for Personal Care PA)
- At least 18 yrs of age (16 for Personal Care)
- Lives locally and can spare time, when needed

## PA Tricks

Banks and other financial institutions will allow a PA for Property covering a specific account. This type of PA can also be for a specific time. Most Property PAs are broad and enduring, as mentioned previously. PA rules can differ by province. The Ontario Ministry of the Attorney General has produced a handy, free kit for drafting your own PA for Property and Health Care. The kit is available for download at <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf>.

## Powers of Attorney

This booklet contains forms for  
Continuing Power of Attorney for Property  
and  
Power of Attorney for Personal Care



Ministry of the Attorney General

NOT FOR SALE

If you have drafted your will recently, your lawyer has most likely included both Powers of Attorney. Without a valid PA, your loved ones must apply to the courts in order to handle your affairs. This can be costly, time consuming and stressful. For those who want to be more specific about their Personal Care PA, the U of T Centre for Bioethics has produced a detailed 27-page document specifying life sustaining and other end-of-life care that you would prefer. You can download it here [http://www.jcb.utoronto.ca/tools/lw\\_download.shtml](http://www.jcb.utoronto.ca/tools/lw_download.shtml)

## PA Traps

A Financial PA can be abused, especially if given under duress or during times of stress. As your financial advisors, we are on the look-out for a scenario like this:

*“Your son moves in. He claims to be taking over your financial affairs because you are no longer able to. He then begins to make unusual withdrawals and changes your portfolio from conservative to aggressive (treating it like his own)”.*

Red flags go up. We would make inquiries to ensure that the PA is not being abused.

Ways to protect yourself:

- Appoint more than one attorney
- Specify how disagreements among your attorneys will be resolved
- Require a 60-day “cooling off” notice period when you change attorneys (allowing family to vet the change)
- PA challenges usually come from family (especially if they are not getting along)

Your advisors have an obligation to report suspicious activity to the Public Guardian or Trustee (or equivalent in your province). Courts may have to decide in the event of a dispute. Most frequent areas of dispute over the PA:

1. Undue influence on parent when appointed
2. Grantor doesn't have capacity when appointing PA

To help avoid disputes, some lawyers recommend appointing only one person as your attorney (but this may open you up to potential abuse). Your PA is less likely to be challenged if another family member attends the meeting to sign the PA, if you have handwritten notes supporting your decision or if you have a capacity assessment done by a medical professional. This basically states that you are of sound mind when signing the PA.

These are some common mistakes surrounding the PA:

- a. choosing the wrong attorney without looking at financial capability or ability to get along
- b. assuming family is your best choice
- c. waiting too long (after you lose capacity to decide on your PA)
- d. not reviewing – changes to circumstances and laws make your PA out-of-date

*“In this world nothing can be said to be certain, except death and taxes.”*  
*Benjamin Franklin*

## RRIFs/RRSPs

Your RRSP/RRIFs are collapsed at death, subject to certain rollovers. The entire value of these accounts is added to your date-of-death tax return. This can push you up into the top marginal tax rate (53% in Ontario). Watch out for how taxes are paid on these accounts. RRIF/RRSP proceeds are paid to your beneficiaries without taxes withheld - the estate gets stuck with the tax bill! This could result in some of your heirs being treated unfairly.

If properly designated, your surviving spouse can add the value of your registered accounts to his or hers, without triggering any taxes. Alternatively, the value of these accounts can be used to purchase an annuity for a dependent child or grandchild under the age of 18. Dependents eligible for the Registered Disability Savings Plan may also receive your RRSP/RRIF proceeds tax-free, subject to certain limits.

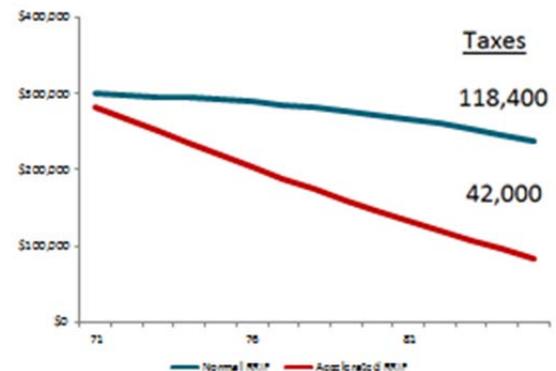
## Avoiding Taxes on RRIF

Some folks are surprised by the large tax bill due on their RRSP/RRIF accounts at death. Think about it, though. You have never paid taxes on any of this money! One strategy to reduce the final tax bill is to draw down your RRIF more quickly. Using the following example:

RRIF value	\$300,000
Drawdown period	age 71-85
Assumed growth	5%
Tax rate	50%

The blue line shows the estimated tax bill due at age 85, using the minimum withdrawal amount. The red line shows a vastly lower tax bill if you simply doubled your withdrawal rate. Don't forget, though, you have paid more taxes along the way on the larger withdrawals. You could have done so at a lower tax rate and had the added advantage of having more money to enjoy your retirement years!

## Avoiding Taxes on RRIF



## Real Estate and Investments

Unfortunately, the government is not content to simply tax your RRIF accounts. They want a piece of your cottage and other investments, as well. The difference between what you paid for your assets (including reinvested dividends, in the case of investments and improvements in the case of property) is calculated and taxed at your death (if no surviving spouse). Gains on your principal residence are not taxed. You can select either your cottage or your home as your principal residence but not both. The rules in this area are complex so you may want to contact a tax expert when dealing with a second property in an estate. Below is a chart, showing potential capital gains taxes on an estate:

## Real Estate & Investments

	<u>Market Value</u>	<u>Cost</u>	<u>Tax Gain</u>
Cottage	350,000	50,000	300,000
House	600,000	25,000	-
Mutual Funds	100,000	50,000	50,000
TFSAs	95,000	50,000	-
Total			350,000
1/2 Taxable			175,000
Taxes		50%	87,500

Note that we have chosen to show no gain on the house by claiming the principal residence exemption. TFSAs are shown here but without any taxable gains (that's what the "TF" stands for).

### Keeping The Cottage in Family

A family cottage is often a cherished possession that everyone tries to keep in the family. You have three options to do this:

1. **Personal trust** – you can transfer ownership of the cottage into a trust while you're alive. This will normally trigger tax. This option gives you continued use and control of the cottage and can avoid probate fees at death. The trust can only last a maximum of 21 years. For this reason, some choose to set up a testamentary trust at death to hold the cottage but this option will normally result in taxes payable at death.
2. **Sell to the kids or hold jointly** - this option normally results in tax triggered at the time of sale or transfer. These taxes can be spread out over 5 years if set up properly. It can also be relatively simple as most parents want their kids to carry on, enjoying the family cottage. Don't try to fool the Tax Man by charging a below market price for the cottage, CRA will still make you pay tax on the full gain and penalize your kids by charging tax on the same gain when they sell. Watch out for marital splits – it could result in your family losing control of the cottage!
3. **Life Insurance** –this option has the advantage of providing for the tax bill at the exact moment it is needed – at the death of the surviving spouse. Couples can purchase a joint-last-to-die (JLTD) life insurance policy and use the proceeds to pay their tax bill in the estate. Let's look at an example. A 65-year old couple could buy a \$100,000 JLTD life insurance policy for about \$2,000/year. If they pay premiums for 25 years then pass away, they have given the insurance company a total of \$50,000. The \$100,000 payout represents a \$50,000 or 4.5% after tax rate of return. Not a bad deal if you can afford to tie up the money!

### US Estate Taxes

If Canadian residents own US shares, real estate or business interests then they can be subject to US estate taxes. Tax rates range from 18% to 40% on estates worth over \$1 million. The Canada-US Tax

Treaty will eliminate US estate taxes for all but the ultra-wealthy. So, don't worry if you own a Florida condo unless the value of your estate exceeds \$5.45 million.

### Probate Fees

Ontario charges an estate administration fee, sometimes referred to as a probate fee on assets that end up in your estate. The rate is:

0.5% on the first \$50,000 and  
1.5% on the balance.

	<u>Market Value</u>
Cottage	350,000
House	600,000
Mutual Funds	100,000
TFSA	-
RRIF/RRSP	-
Bank Accounts	55,000
	<u>1,105,000</u>

Some estates, however, may avoid this fee if the estate is simple and no one requires probate. To the right is an example of a typical probate fee bill.

**Probate** **16,075**

As you can see, probate fees on a substantial estate are modest, so don't over plan for them. We have seen some folks create unintended tax bills or make ill-advised investments all to avoid a few thousand dollars in probate fees.

### How to Plan for Probate

If you really want to avoid probate taxes fees... give all of your money away before you die ... okay maybe just some of your money. Seriously, John's Great Aunt Deedie once said:

*"Don't expect anything from my estate. I want to give you all I can with a warm hand not a cold one"*

You have four basic options for avoiding probate:

1. Give away your money before you die (thanks Aunt Deedie)
2. Set up joint ownership (with right of survivorship) – watch out for pitfalls, discussed below
3. Designate beneficiaries – for assets like RRIFs, TFSAs and insurance, see below
4. Set up a trust while you're alive

Designating a beneficiary can sometimes lead to one heir receiving more than his fair share. This may also create an unintended tax bill for the estate. A trust established during your lifetime can result in immediate taxes and ongoing costs and complications. It's just not simple.

Joint ownership comes with its own set of pitfalls. Upon the death of the owner, the property passes to the surviving owner but the law distinguishes registered owner (having legal title) from beneficial owner (having intended ownership). To avoid probate fees, beneficial ownership must pass. This means two things: 1) a capital gain may be triggered on ½ of the transferred asset if you wish to avoid probate and 2) the asset belongs to the person who is joint with you and need not be shared with other heirs. This could result in estate disputes at the very least and assets not being equally shared at the worst. Watch out that holding accounts jointly doesn't create more trouble than it's worth!

## Joint Asset Planning Kit

The law firm Fish & Associates has produced the Joint Asset Planning Kit. It provides not only explanations and answers to FAQ's but also a step by step process to complete the actual documentation needed to ensure your intentions are clearly noted. You can order one of these kits directly from [www.jointasset.com](http://www.jointasset.com) for \$45+HST. Let us know if you are interested in this kit as we may be able to secure a discount by placing a bulk order.

## Dying Intestate (without a will)

Dying without a will is complicated. Just ask the estate of pop star Prince, who died recently without a valid will. If you die in Ontario without a will your estate gets split in an arbitrary way, depending on your family situation:

- |                         |                                  |
|-------------------------|----------------------------------|
| – Spouse only           | → surviving spouse               |
| – Spouse + child        | → \$200K spouse, split           |
| – Spouse + children     | → \$200K spouse +1/3, rest split |
| – No spouse             | → children                       |
| – No spouse or children | → surviving family               |
| – No heirs              | → the province                   |

Not having a will creates other problems. Your representatives can't do any income tax planning. A surviving spouse may not be able to decide how to split the estate among their children or at what ages to do so. A minor child's share is paid into the courts until the age of majority then dumped in their lap. Without a will, you can't appoint a guardian for your minor child. Your common law spouse will not be recognized without a valid will. In short, no will means your estate will be a costly mess that could take years for your heirs to clean up.

## Out of date Will

Don't forget to keep your will up-to-date! This list will help you to know when you should update your will:

- marital status changes – divorce revokes your will but separation has no effect
- acquiring foreign property or a new business
- change in residence either to out-of-province or out-of-country
- loss or addition of beneficiaries – does your will still reflect your wishes?
- change in health - for you, your representatives or your heirs
- change in law

Most experts recommend reviewing your will every five years, more often with any one of these changes.

## **(Holographic) Home-made Will**

A holographic will is a document written entirely in your own hand and signed by you. No witnesses are required. In Ontario a holographic will is considered valid, but not in all provinces. Holographic wills can create more problems than solutions as they often fail to:

- name an executor
- appreciate rights of a spouse and dependents
- dispose of all assets creating partial intestacy
- provide for minor children

In short, improper wording and/or invalid provisions can leave your heirs guessing about your intentions and create problems easily avoided by having a professionally drafted will.

## **Estate Disputes**

Sometimes a second will can appear and create a family dispute. This typically happens at the beginning of an estate wind-up. The executor can't assume one will is more valid just because it appears to be more recent. In the case of a dispute, the executor would be wise to put the matter before a judge. Other writings can have an effect on the will – things like a codicil or written note with testamentary intent. An executor should take account of these writings or face potential personal liability for mishandling the estate. An executor can be held personally liable for unpaid income taxes if he makes distributions, leaving income taxes unpaid. If an executor finds herself in this position, she must do all in her power to recover monies, including suing beneficiaries if they refuse to repay. The best protection for an executor is to have the will probated so that she can avoid these mistakes.

## **Processing Estates and Powers of Attorney at Aligned**

When a client dies we need certain documents from the executor:

1. **Non-registered account** - death certificate, probate (certificate of appointment of Estate Trustee with will), letter of direction (documents that executor has right of control over estate), personal identification
2. **RRIF, RRSP, TFSA (named beneficiary)** - death certificate, letter of direction, personal identification
3. **RRIF, RRSP, TFSA (no named beneficiary)** – as above plus probate
4. **Joint Account with right of survivorship** - death certificate, letter of direction, identification.

Other institutions may require different documentation. For an Attorney to act under a **Power of Attorney**, we require:

- original/notarized copy of PA
- 2nd Party Account Supplement
- valid ID and banking information for Attorney

## Executor's Responsibilities

Are you looking for an executor or have you been appointed one? Your list of responsibilities is long (and getting longer, as we will see). In general an executor must:

- ✓ Take care of funeral arrangements
- ✓ Secure and appraise assets
- ✓ Apply for probate
- ✓ File New Estate Information Return (discussed below)
- ✓ Pay debts and taxes
- ✓ Account to the beneficiaries
- ✓ Distribute the assets of the estate according to the will

In addition, an executor has to look after more mundane tasks like:

- locate the will
- open an estate bank account
- get a lawyer
- notify beneficiaries of their interest in the estate
- List assets and safeguard them until either distributed or sold
- collect income generated by the estate assets
- track down and collect life insurance
- cancel health insurance, driver's license, utilities, credit cards, automatic payments
- redirect mail
- clean out, house, contents and prepare for sale
- the list goes on...if you would like a more comprehensive checklist we can provide one at your request

## Taxes

As executor, you must organize and pay taxes owed by the deceased. Several different types of tax returns may be required. The deadline is shown next to the tax return description.

1. **The Date of Death Return** – later of April 30 or 6 months after death
2. **A Return to Cover Rights or Things** – later of 90 days after receipt of Notice of Assessment from Final Return or one year after death date
3. **Business Income Return** – can extend deadline to June 15 for unincorporated business
4. **Testamentary Trust Return** – 90 days after the calendar year end

## Clearance Certificate

What is a Clearance Certificate? It is a written notice that states all taxes, interest and penalties owing have been paid by the estate. An executor isn't legally required to get a clearance certificate, but we recommend it since an executor can be held personally liable for unpaid taxes in the estate. Executors can obtain an interim Clearance Certificate for more complicated estates but should still obtain a final Certificate. Count on it taking up to 6 months to receive it. Consider using an accountant to send in the request using CRA Form TX-19.

## **Executorship- What has Changed?**

Your executor must apply for a Certificate of Appointment of Estate Trustee. She then must submit an **Estate Information Return** within 90 days of receiving the Certificate of Appointment. This return is used to assess whether your executor has properly valued and included all of your assets in the probate calculation. If the executor makes a mistake, she has 30 days to correct it or face stiff penalties, even prison! The Minister of Revenue can audit the return up to four years after filing.

Specifically, the Estate Information Return includes detailed information about assets in your estate: their legal description, market values, units held, account numbers, and other bank and investment account details. You can download a copy of the return at

[http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955E~1/\\$File/9955E.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955E~1/$File/9955E.pdf)

and a guide here

[http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955E~2/\\$File/9955E\\_Guide.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955E~2/$File/9955E_Guide.pdf)

Why this new form and the increased scrutiny over probate calculations? Some in government believed that probate fees were being under reported by executors. The Ontario government decided to transfer responsibility for probate collection from the Ministry of the Attorney General to the Ministry of Finance – The Estate Information Return and the stiff penalties behind it give auditors the tools they need to hold executors more accountable.

## **Executor Fees**

As we have shown, being an executor is no easy task and requires hundreds of hours of time and energy. An executor's responsibilities can cut into their job and other commitments. Because of this, executor's often charge fees. Although, family and close friends may do it for free, fees shouldn't influence the final decision. Choose the person who will do the best job. It is generally accepted by courts that an executor gets 5% of the estate's value and an ongoing management fee of 2/5 of 1% of the average annual value of the estate assets during the settlement process.

## **21st Century Estate Planning**

Technology has resulted in many people creating a personal, professional and financial presence on-line. In fact, 86% of Canadian boomers have at least one on-line financial tool. Estate planning has not kept up - 58% of those with digital assets don't have formal estate plans to deal with them. We recommend that you keep up-to-date records of digital passwords and usernames for financial and social media accounts so they can be collected and closed out. Don't forget about music, books and digital photos.

If you are providing care to your parents, consider a contingency plan for your parents if they outlive you. An untimely death could impact the quality of their care. Don't just assume that you will outlive them. Talk with family members about who will look after your parents in the event of a premature death.

We don't often consider pets when creating a will. According to a BMO poll, 75% of pet owners' want to provide for the ongoing care of pets if something happens to them. After all some birds and reptiles can live for decades! Pets are expensive - food, supplies, and vet bills can add up. Consider providing for the care and expense of your pet in your will.

If you are interested in reading more about this topic and downloading a:

SAMPLE MEMORANDUM OF DIGITAL ASSETS  
WILL CLAUSE FOR DIGITAL ASSETS or  
POWER OF ATTORNEY CLAUSE FOR DIGITAL ASSETS,  
Go to this link:

<http://www.cwilson.com/publications/wealth-preservation/planning-for-and-administering-digital-assets.pdf>