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LAWYERS

Common Misconceptions about Estates

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Lawyers who practice in the area of estate administration often find ourselves dealing with clients who have mistaken beliefs about estates. These are some of the most common misconceptions:

1. If I don't have a will, the government will take everything when I die. *Wrong*. If there are any persons who are next of kin, the Ontario *Succession Law Reform Act* provides that the next of kin will inherit the estate (after debts are paid). The persons who will inherit are specified with precision in that Act. However, since you may want your estate to go to persons other than those specified in the Act, or in different proportions, you should make a will to ensure your wishes are carried out.

2. The lawyer for the estate will take a percentage of the estate for the legal work. *Wrong on two counts*. First, the lawyer is not the lawyer for the estate, but the lawyer for the estate trustees, and is retained to advise the estate trustees. Secondly, lawyers generally charge by the hour for the work done, not on a percentage basis.

3. There is always a reading of the will. *Maybe in the movies or cartoons, but very seldom in real life in Ontario*. The residuary beneficiaries are sent a copy of the will by the estate trustees; persons who get specific legacies are sent an excerpt of the will that deals with their legacy.

4. The next of kin gets to make the funeral arrangements. *Not necessarily*. The executors (estate trustees) named in the will have the legal right to make the funeral arrangements.

5. Directions for funeral arrangements in the will must be followed by the estate trustees. *No they don't.* Such directions are generally only considered to be the expression of a wish, and are not legally binding.

6. It is a good idea to put assets in joint names with a child for instance, to save on probate fees. *Often, no it isn't*. This exposes the assets to claims by the child's creditors, compromises the

control you have over the assets, and can undermine the balance established in your will, because the other joint owner ordinarily will become the owner of the assets on your death.

7. The estate trustees always have to probate the will and advertise for creditors. *No, and no*. Often an entire estate can be administered without the cost and delays of having to obtain "probate" or what is now known as a "certificate of appointment of estate trustee". As well, it is up to the estate trustees to determine if it is necessary to advertise for creditors, because they can be liable to the creditors if the debts aren't paid and the estate is distributed. However, often the estate trustees are sufficiently aware of what the debts of the estate are that they don't need to advertise.

8. If a person such as a child is named a joint owner on a property such as a cottage, then capital gains tax does not have to be paid when the other owner dies. *Doubtful*. Often the capital gains tax has to be paid, and the estate of the deceased would be liable to pay it. In some cases, the principal residence exemption from capital gains tax may be available to partially or completely eliminate any tax.

9. Children of a testator –ie where there is a will-- have the right to share equally in the estate. *No they don't, at least not in Ontario*. The testator can leave the property unequally or leave nothing to his or her children. However, where the children are financially dependent on the testator, and not adequately provided for in the will, they, or someone acting on their behalf, might claim against the estate under the dependent relief provisions of the *Succession Law Reform Act*.

10. Common law spouses have the right to share in an estate where there is no will. *Not really*. Common law spouses don't have the right to share in an estate under the *Succession Law Reform Act* although some common law spouses may be able to claim against an estate for dependent's relief. Common law spouses need wills even more than married spouses do.

If you are dealing with administration of an estate, see a lawyer. Estate administration can be complex and difficult. If you want to make sure your estate is distributed by the persons of your choosing and in the way you wish, make a will, in consultation with a lawyer and, if necessary, your accountant. At the same time, make a power of attorney for property and one for personal care. You will save time, money and heartache.