


Welcome to 2009

Although we are in the midst of some turbulent times, we hope that a new year brings positive change and new opportunities for you. We at Williams McEnery wish you all the best in 2009.

Since it is a new year, we thought it appropriate to provide you with some information about a task that far too many Canadians put off to some other day: making a will. We challenge you to put your estate in order this year, whether that is making a will and powers of attorney for the first time or updating your existing documents.

Our lawyers continue to provide our clients with successful outcomes. You can read about the latest victory in *Meeting the Threshold*. On page 4 you will find a brief overview of the new client identification rules that the Law Society of Upper Canada has put in place.

In the article, *Time is Limited*, we revisit limitation periods, an issue that cannot be overemphasized. Remember if time runs out on your legal claim, your claim may be lost forever.

Finally, we look forward to continuing to work with you during the coming year! 

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Home of One of The Best

Eric Williams has been recognized by his peers as one of the best lawyers in Canada, in the categories of

- Appellate Law,
- Corporate & Commercial Litigation, and
- Insurance Litigation.



Eric is one of only three lawyers in Ottawa to be recognized in the Appellate law category.

Best Lawyers compiles lists of outstanding lawyers by conducting exhaustive peer-review surveys in which thousands of leading lawyers confidentially evaluate their professional peers. 

Meeting the Threshold

The firm closed out 2008 with another important victory. Following the death of the lawyer who originally had carriage of this personal injuries case, our firm agreed to accept the file and to run the trial. Jaye Hooper represented the plaintiff and successfully argued that her client met the threshold set out in the *Insurance Act*, with respect to the gravity of her injuries.

The plaintiff suffered injuries when she was involved in a motor vehicle accident on October 13, 1999. The plaintiff was a passenger in her grandmother's car when the car was hit by the defendant who had failed to obey a stop sign.

Although the defendant admitted liability, one of the difficulties was whether the plaintiff's injuries were the result of this particular accident. Over a three year period, the plaintiff was in five car accidents, including this one.

Further, the defendant argued that even if the plaintiff did sustain injuries in this particular accident, they were not a permanent and serious impairment of an important physical, mental or psychological function.

Immediately following the accident, the then 16-year old plaintiff complained of pain in her knees. Also the medical treatment she received after the accident was for the most part for her knees. Almost 10 years later she continued to experience severe pain in both her knees. In addition, she had abandoned her plans to work as an education assistant, at least, in part because her knees could not withstand the physical demands of that career.

The trial judge found that the knee injury suffered by the plaintiff in the October 13, 1999 accident was the cause of her present impairment with the use of her knees. He also found that the pain experienced by the plaintiff was more than tolerable, frustrating and unpleasant pain and inconvenience. In fact her knee pain was causing her a serious impairment of an important bodily function namely the use of her knees to bend, squat and run. For this reason she met the *Insurance Act's* threshold.

The plaintiff's damages were assessed at \$85,000. 

Start the New Year Off Right

If a man dies and leaves his estate in an uncertain condition, the lawyers become his heirs.

Edgar Watson Howe

An astounding 50% of Canadian adults do not have a will. Those who do not have great wealth believe a will is not necessary. Others avoid the topic as too morbid. And then there are the numerous procrastinators who will get around to it some day!

Five Good Reasons

If you have not prepared your will (or it is out of date) here are five good reasons for making your eternal statement today.

Your Family - If you die without a will, your property will be divided according to a legal formula. The outcome may have nothing to do with your family's needs or your wishes.

Your Children - The court will appoint a guardian to care for your children if you do not.

Costly Delays - Your assets are immediately frozen if you die without a will. Before anything else can happen, the court must appoint someone to administer your estate. The result is delays and extra legal costs.

Taxes - To avoid the potentially heavy tax burden of death, proper estate planning, including a will, is essential.

Peace of Mind - When you have a will you can feel confident that your affairs are in order and that your family will be protected and will not endure needless work and expense following your death.

Type of Will

You should consider retaining a lawyer to draft your will. Although you can write your own, if you want to be sure that your

instructions are clear it is best to get the advice of someone with expertise. In addition, if the language is vague or the technical requirements of the law are not met your homemade will may not stand up to a court challenge. The same caveat applies to the do-it-yourself kits.

The Details


Before meeting with a lawyer you should prepare a list of what you own and what you owe. There are also a number of questions to which you should give some advance thought to, including:

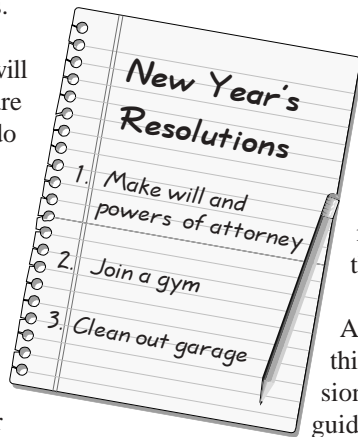
- Who are the people that depend on me for financial support?
- Do I have certain possessions that I want to go to particular people?
- Who should look after my children?
 - What will happen to my pet?
 - Who is going to be the executor of my will?
 - At what age should my children have control of their inheritance?

Although there is a lot to think about and many decisions to make, a lawyer will guide you through the process.

Reviewing Your Will

Once you have a will, you should review it periodically, every three to five years. Changes in your financial and family situations may require earlier revisions. For instance, marriage voids a will but separation does not. If you divorce your will is read as if your ex-spouse predeceased you. Although a move from one province to another does not nullify a will, practical changes, such as the executor, may be necessary.

Preparing a will should rank high among your financial and family priorities. 



Did You Know?

The Right of Survivorship

When purchasing a home, most couples will take title as joint tenants. This means that both parties are equally owners of the whole property. What you might not realize is that the key aspect of joint tenancy is the right of survivorship. When one half of the couple dies, the survivor automatically becomes of the owner of the entire property. Since the law deems that the property passes to the survivor the second before the death of the other joint tenant, it passes outside the estate and will not be subject to probate taxes.



Assets (except land)


With respect to all other assets that a couple may own, **the law presumes that they are owned jointly**, unless there is an indication to the contrary. These assets may include household goods, vehicles, bank accounts and investments. The surviving spouse will acquire everything because of the right of survivorship. Note that **land is not presumed to be owned jointly**, the legal paperwork must be in place to prove it.

Probate Fees

If a will must be probated, an estate administration tax will be charged based on the value of the estate. (Assets that pass outside the estate are not taken into consideration.) In Ontario, the estate administration tax is \$5 per \$1,000 on the first \$50,000, plus \$15 per \$1,000 of the estate's value over \$50,000. There is no maximum.

Further Information

It is important to do estate planning and to review it periodically. Your family will have enough to contend with, help make things easier at your death.

If you require assistance with your own planning or with the administration of a deceased's estate please contact Paul McEney. 

Choosing an Executor

Who is going to carry out your final wishes following your death? This challenging and time-consuming job can be more of a burden than an honour. Therefore, it is important that you choose the right person to act as your executor.

Type of Executors

The complexity of your estate and the dynamics of your family will often dictate the type of executor or combination of executors that you choose. There are three categories from which to choose an executor.

- A trusted friend or family member (the most common).
- A professional, such as a lawyer or an accountant.
- A corporate executor, usually a trust company.

When deciding who will administer your estate, there are a number of factors to keep in mind. The person you select should be someone you trust and who will get along with your family. It is also helpful if the person has some familiarity with your financial affairs. The person should have the time to devote to the job and be well organized since he or she will have to keep careful records. As a practical matter, he or she should live reasonably close to you. Finally, it is a good idea to select an alternate executor in case your first choice is unwilling or unable to do the job.

In the case of married couples the majority will name their spouse as executor. Most will name one or more of their children as an alternate executor. While this may be a good idea if you have many children you should think twice before making all of them

executors. When you do have more than one executor you should include a clause in your will to indicate how differences of opinion will be settled.


Once you have made your decision, be sure to discuss it with that person(s). This is not something you want sprung on him or her after your death.

The Responsibilities

An executor's responsibilities begin immediately following the death of the testator and may continue for more than a year. The job includes everything from finding the will, to cancelling the newspaper, to filing tax returns. In addition to the various duties, the executor may be personally responsible for financial mistakes he or she makes.

Compensation

The person, who undertakes this demanding job, is legally entitled to be compensated. As a general rule, an executor is paid 2.5% of various aspects of the estate. If you are using a professional or a trust company as your executor, they will probably have a standard fee schedule. If your executor is a friend or a family member you may set the amount of the compensation in your will, though it is not necessary.

Choosing who will manage and distribute your assets is a key decision when drafting your will. Think about it carefully and let your head, not your heart, guide you. For assistance with your estate planning, contact Paul McEnery. 

Time is Limited

The most highly skilled and knowledgeable lawyer can be of no assistance to the client who has not called him or her until after the limitation period has expired.

Daniel Simmons

Truer words were never spoken, particularly since the release of the Ontario Court of Appeal's decision in *Joseph v. Paramount Canada's Wonderland*. In that case the appellate court has made it clear that when a limitation period has expired there will be no reprieve.

An Overview

Limitation periods exist to allow for the introduction of certainty and finality to legal matters. Without limitation periods

the preservation and gathering of evidence, both documents and memories, becomes more difficult. Further, potential defendants are left in a state of flux.

In 2004, a revamped limitations law came into force in Ontario. The key feature of the *Limitations Act, 2002* is the introduction of a standard two year limitation period. Generally, the two years begins to run the day the injury, loss or damage occurs, although it can be extended if the loss is not discovered by the injured party until a later date.

The Facts

The plaintiff, Joseph, was injured at the defendant's theme park on September 5, 2004. Based on the limitation period, any

lawsuit would have to be commenced not later than September 5, 2006.

Less than three weeks after the accident, the defendant was notified that the plaintiff intended to sue for damages. The defendant proceeded to obtain a written statement from the plaintiff on November 29, 2004. In addition, substantial medical documentation concerning the plaintiff's injuries was forwarded to the defendant.

Prior to the expiration of the limitation, the plaintiff's lawyer dictated a statement of claim and instructed his assistant to have it issued prior to September 5, 2006. Unfortunately the assistant was under the mistaken impression that the old limita-

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tion period of six years was still the rule. She was away on vacation that week and never had the claim issued.

A claim was eventually issued on October 31, 2006, when the lawyer became aware of the situation. A copy of a draft statement of claim was sent to the defendant. The lawyer also informed the defendant that through inadvertence, the claim was issued after the due date and that he had always been under the impression that it had been issued on time.

The defendant unsuccessfully brought a motion for an order that the claim was statute barred since it was served out of time. The motion judge concluded that special circumstances existed since there was inadvertence on the part of the plaintiff's lawyer and the defendant had suffered no prejudice. He therefore exercised his discretion to extend the limitation period, thus allowing the litigation to continue.

The Court of Appeal

The Court of Appeal disagreed with the judgement of the motion judge and de-


clared that the plaintiff's case could not proceed since the claim was commenced outside the legal time limit.

The appellate court concluded that when the legislature passed the *Limitations Act*, 2002, it had not intended to preserve this notion of special circumstances in relation to the extension of limitation periods. The court further stated that:

"...if s. 20 were interpreted to include the extension of limitation periods generally by the common law doctrine of special circumstances under the Rules, the effect would be contrary to the purpose of the new Act by removing the certainty of its limitation scheme. Instead, we would continue with the procedure that developed under the former Act..."

The Bottom Line

If you think you have a claim in any area of the law, it is essential to seek legal advice as soon as possible. Once the limitation period expires there is no going back.

Williams McEnergy specializes in litigation of all types. If you would like to discuss your situation please contact us. 

New Client Identification Rules


As of January 1, 2009, lawyers in Ontario must comply with new client identification and verification requirements. The requirements are intended to assist lawyers in identifying potential fraudulent client activities.

The Law Society's Rules require that lawyers identify any individual who retains them to provide legal services. Lawyers are required to obtain a full name, business address and phone number, if any, home address and phone number as well as the occupation(s) of the client. In a similar way, lawyers must generally identify any third party beneficiary or principal for whom the client acts or represents.

In the case of corporations, partnerships or trusts, lawyers must obtain the organi-

zation's full name, business address and phone number, business identification number, type of business and the name, position and contact information of individuals who are authorized to provide instruction.

If a lawyer is receiving, paying or transferring funds on behalf of a client or third party, the lawyer is under an additional obligation to verify the identity of the client and third party by obtaining and reviewing original government issued identification.

The exceptions to the verification rule are if the other party is a financial institution, public body, public company, a trust account of another lawyer, a court ordered sum, or a legal settlement. 



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