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LAW OFFICES

# ESTATE PLANNING

A COMPREHENSIVE GUIDE



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Smith Neufeld Jodoin LLP is a full service law firm serving southeastern Manitoba with offices in Steinbach and Niverville. As a result of the firm's size and diversity, we are able to offer a wide range of legal services in English, French, High German and Low German. We utilize modern technology in order to provide our clients with up to date, fast and efficient information and services.

Smith Neufeld Jodoin LLP provides a wide range of legal services to its clients. Its lawyers practice with an emphasis in such areas of law as real estate, civil litigation, corporate and commercial law, agricultural law, wills and estate planning, and estates. Smith Neufeld Jodoin LLP prides itself on being able to handle any legal need that may arise, whether simple or complex.



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## TABLE OF CONTENTS

Estate Planning .....	4-5
Last Will and Testament .....	6-7
Power of Attorney .....	8-9
Health Care Directive .....	10-11



## WHAT IS ESTATE PLANNING?

Estate Planning is the development of a plan that allows you to transfer property during your lifetime, or on death, to maximize the benefits of government programs and to minimize tax when transferring your assets in accordance with your wishes.

## IS ESTATE PLANNING ONLY FOR THE WEALTHY?

No, the average Canadian will benefit from Estate Planning advice.

## I HAVE A CURRENT WILL AND POWER OF ATTORNEY. ISN'T THAT WHAT I NEED?

That is a great start, but comprehensive Estate Planning also considers:

1. How you should own property. There are many alternatives such as:
  - Your personal name;
  - Jointly with others;
  - Life interest / remainder interest;
  - Tenancy in common with others;
  - In a partnership or limited partnership;
  - In a corporation; or
  - In a Family Trust or Special Trust.
2. How to invest in or hold title to property in other countries.
3. Whether and when to gift or sell assets during your lifetime to your family or others, and how to minimize tax in doing so.
4. Maximizing government programs, including:
  - Registered Education Savings Plans;
  - Registered Disability Savings Plans;
  - Registered Retirement Savings Plans or Self-Administered Registered Retirement Savings Plans;
  - Individual Pension Plans;
  - Home owner rebates;
  - Deferred Profit Sharing Plans;
  - Group Pension through employment;
  - Canada Pension Plan and Old Age Security; and
  - Farm programs.
5. Deciding how you should receive your income or hold your business:
  - As an employee;
  - As an independent contractor;
  - Through a corporation, partnership or limited partnership; or
  - As a joint venture.
6. Planning for sickness and disability:
  - Power of Attorney and Disability Insurance;
  - Critical Illness Insurance;
  - Health Care Directive (Living Will); and
  - Canada Pension Plan Disability.
7. Planning for Retirement:
  - When to retire;
  - Where to retire;
  - How much money you will need;
  - How best to receive that money; and
  - When best to receive that money.
8. Planning for Death: when you die, you are treated as if you sold everything at fair market value, causing tax to be paid. Therefore, you need to plan for death, including:
  - Having a Will that considers tax implications; and
  - Considering the need for life insurance.
9. Protecting what you have by:
  - Creditor-proofing. This is not just in case of financial difficulty, but also anticipating potential liability issues, like being in a car accident in the U.S. or Ontario;
  - Liability insurance – vehicle and property. How much do you need?
  - Planning for:
    - a. Potential Family Property claims against you or your family's assets on family break-up or death;
    - b. Potential claims of dependants; or
    - c. Family members having special needs.
  - Securing any loans owing to you by your corporation, partnership, family members or others; and
  - Ensuring any loans or claims are not lost due to time limits.
10. Diversification – “Don't put all your eggs in one basket”.

11. Taking maximum advantage of tax “holidays”:
  - Tax free transfer to spouse;
  - Tax Free Savings Accounts;
  - Use of tax free transfer of farm property to family members; or
  - Availing yourself of potential Capital Gains Exemptions (smart planning could multiply use of these exemptions).
12. Paying less tax during your lifetime by:
  - Income splitting with family members;
  - Deferring tax to the next generation; or
  - Maximizing use of your tax deductions – consider what expenses you can deduct.
13. Planning to benefit your community, charities, church, or helping the less fortunate worldwide. Tax planning your gift could double its benefits.
14. Planning for digital assets:
  - Social assets (ie: Facebook account, etc.);
  - Sentimental assets (ie: Cloud photos, etc.); and/or
  - Financial assets (ie: domain names, online accounts with balances, Bitcoin, etc.).

All of these considerations are part of an Estate Plan.

## WHEN SHOULD I MAKE MY ESTATE PLAN?

Estate Planning is a continual process as the rules, your needs, and your family's needs change. The sooner you start planning, the richer and more secure you and your family will be. For maximum benefit, the Estate Plan should be reviewed and possibly revised regularly.

## WHO SHOULD I CONSULT TO HELP ME PLAN MY ESTATE?

Most people develop a team of trusted advisors with specialized knowledge. Your team should include a lawyer, accountant, insurance agent, and perhaps a financial planner.

We at Smith Neufeld Jodoin LLP would like to help you plan smart. Developing an Estate Plan will not only save you and your family taxes, it will prevent unnecessary losses and uncertainty and give you peace of mind. Read on in this brochure for more in-depth tips on Preparing Wills, Powers of Attorney and Health Care Directives.

Remember, the two certainties of life are **death** and **taxes**. Plan you reduce their impact on your loved ones. It's not about what you earn, it's what you keep.

At **SMITH NEUFELD JODOIN** LLP we are concerned about you and your family's future. We have prepared this booklet in order to assist you in thinking about Estate Planning and your goals. For in-depth discussions on issues raised in this booklet, or how they may affect you, please contact a lawyer in our office.





*Please be advised that if you are First Nations, your Will and estate may be governed by the Indian Act and not the provincial legislation. Therefore, the information on pages 6-7 may not be applicable to you. Please contact our office for further information.*

## WHAT IS A WILL?

A Will is a written document that directs what happens to a person's money and property after death, and who will administer the estate (the "Executor"). A person who makes a Will is known as a "Testator."

## WHEN DOES A WILL SPEAK?

A Will takes effect or "speaks" at the moment of death. However, signing a Will does not prevent the disposal of assets during a person's lifetime.

## REASONS FOR MAKING A WILL

Often people believe that they do not require a Will because they only hold joint property and they have named beneficiaries for their investments and insurance policies. **However, even in these circumstances, there are a number of good reasons for executing a Will:**

1. Wills set out a person's personal wishes as to what should happen to their estate on death;
2. There could be unexpected costs related to not having a Will in place;
3. Wills are a valuable tool for Estate Planning;
4. Personal effects can be distributed in accordance with your wishes – without a Will, problems can arise if promises were made by a Testator before death;
5. Trusts can be established for any number of purposes, such as infant or disabled beneficiaries;
6. Without a Will, a person who may administer your estate may not be the person you would have chosen otherwise;
7. Wills can provide for guardianship of infant children – although a Court has the ultimate decision, an appointment in a Will is often very persuasive to a Court;
8. Certain charitable gifts and the forgiveness of debt can only be done by a Will;
9. Wills can avoid problems of certain survivorship situations – for instance, often Wills provide what is to happen if all immediate beneficiaries die or if all die in what is known as a "common disaster situation;"

10. If administration of the estate is required where a Will is not made, administrators of the estate, unlike executors, must often provide some form of financial security or bond – this could result in problems for the applicant administrators;
11. Administrators of an estate where a Will has not been made have restricted powers, which come into effect only after the Court has appointed them. Executors named in a Will have authority after a Testator's death and the Grant of Probate merely confirms these powers;
12. Wills can be used to minimize tax by establishing Trusts and by allowing executors to make certain elections under the *Income Tax Act*; and
13. Wills provide a means of benefitting non-blood relations, such as close family friends, which would not be the case should intestacy rules apply.

## LEGAL REQUIREMENTS OF A WILL

A person making a Will must be at least the age of majority and must be competent to make the Will. A Will must be in writing, and prior to signing, the person making a Will should initial any written changes and initial the bottom of every page of the Will to confirm they understand the intentions of the document. For a formal Will to be valid, it must be signed by the Testator in the presence of two witnesses, who must each sign the Will in the presence of the other witness and the maker of the Will. The witnesses should not be beneficiaries or the spouse or common-law partner of a beneficiary.

One of the witnesses to the Will is required to swear an affidavit that the Court will consider upon an Application for Probate. The affidavit contains certain statements relating to the belief that the person making the Will was competent to understand the terms of their Will, that both witnesses to the Will were not a beneficiary or the spouse or common-law partner of a beneficiary, and that the person making the Will was at least 18 years of age.

In order for a Will to be valid, a Testator must have testamentary capacity. Testamentary capacity will be found if the Testator understood the nature and extent of the acts and its effects, understood the extent of the property which was being disposed of, and understood, comprehended and appreciated their natural heirs. Further, the Testator must not be under any undue pressure, threat, or coercion.

If any one of the legal requirements for making a formal Will is not met, a possible challenge to the validity of the Will can be made.



## DISTRIBUTION OF AN ESTATE WHERE THERE IS NO WILL

If there is no Will (or if the Will has caused an intestacy because a beneficiary has predeceased a Testator) then the distribution will be governed by the provincial *Intestate Succession Act*. A deceased person's wishes are not considered.

Usual distribution is firstly to a spouse or common-law partner (as defined in *The Intestate Succession Act*), children and their descendants, then to the parents of the deceased and their descendants, then grandparents and their descendants.

## PROVIDING WILL INSTRUCTIONS

Assistance from a lawyer in Will preparation is very beneficial and will help prevent problems relating to a person's estate after death. Lawyers have the responsibility to ensure that all requirements of the various legislations have been satisfied at the time of execution of the Will. **We suggest that you ask your lawyer for our Estate Planning Instructions checklist and complete as much information as may be applicable to your specific situation.**

The following is a brief overview of typical information that is required in order for a lawyer to adequately prepare your Will:

1. Your full legal name;
2. Your address and occupation;
3. The full legal name of your spouse or common-law partner (if applicable);
4. The full legal names and ages of any children;
5. The full legal names of any other person named in your Will and, if applicable, alternate names that any person may be known by (this can avoid later problems of attempting to prove who the named person is intended to be);
6. The relationships of all people in your Will;
7. Your marital status – and whether you will be contemplating marriage, or divorce or separation at the time of making your Will;
8. The location of any assets or property that you own – specifically if they are located in another jurisdiction;
9. A list of all personal property and real property that you own;
10. A list of all jointly owned assets that you own and the name of the person with whom you own them and whether that person is intended to benefit from those assets upon your death or to be a trustee of those assets for the benefit of another person;
11. The full legal name of your Executor(s) and any alternates;
12. The full legal name and address of any charity you wish to benefit;
13. Whether any of your children or grandchildren are adopted or are step-children or are born outside of marriage;
14. Whether any of your children or grandchildren are mentally or physically disabled;
15. Whether you have any liabilities and the names of such creditors;
16. Whether any person owes you money and whether this debt (if remaining at the time of your death) will be required to be repaid to your estate upon your death;
17. A consideration of the types of powers that you wish to give to your Executor(s) such as: the power of sale, the power of investment, the appointment of agents, the postponement of sale, the power to carry on business, the power to mortgage property to raise funds, the power to exercise voting rights, the power to distribute a portion of the estate without the item being required to be converted into cash, and any other powers you wish to give to your Executor(s);
18. Whether or not you wish your Executor(s) to be paid compensation for their services;
19. Whether or not minor beneficiaries are to receive any portion of the estate prior to reaching the age of majority, or whether distribution of their portion is to be delayed until the beneficiary reaches a certain age or ages.

*Please note that this is a bare minimum, and special circumstances will dictate that additional information may be required.*

## CHANGES TO A WILL

Your Will should be reviewed every few years. If you want to make changes to your Will, you currently have two options available. First, a new Will can be drafted incorporating the changes and revoking all previous Wills and Codicils. This is preferred if the changes contemplated are extensive. Second, a Codicil can be drafted to your original Will which would make changes and/or additions to the Will, or revoke particular gifts or appointments in a Will. The Codicil would also affirm the remainder of the Will. The formal Codicil must be executed like a Will, with two witnesses to your signature.

You should **not** cross out sections of your Will or write changes directly on your signed Will, as this could create problems. If you must make changes to your Will, these changes must be signed and dated by you before two witnesses. If this is not correctly done, then the change may have no effect. However, we recommend having a new Will or Codicil prepared to prevent future issues.

You should also review the terms of your Will upon certain circumstances, including marriage, separation, and contemplation of divorce, birth of a new child, and living with an individual after marriage. For example, marriage nullifies any prior Will, while divorce does not. You should consult with a lawyer to learn more about such circumstances.



## WHAT IS A POWER OF ATTORNEY?

A Power of Attorney is a legal document which gives authority to another person to make decisions on your behalf regarding some or all of your financial and legal affairs. Powers of Attorney are only in effect during a person's lifetime (called the "Donor"). There is no authority after death. Practically, what this means is that the person appointed (called the "Donee" or "Attorney") can do anything for the living Donor which is permitted in the Power of Attorney. Common examples of powers which are given in a Power of Attorney document would be banking decisions, ability to sign contracts and agreements, transfer land and execute mortgages and dispose of homestead rights.

## TYPES OF POWER OF ATTORNEYS

Generally there are two basic types of Powers of Attorney: the Enduring Power of Attorney and the Springing Power of Attorney.

Which Power of Attorney is chosen depends upon the circumstances of each individual Donor. It is important to note that, so long as the Donor is mentally competent, either Power of Attorney may be revoked and pronounced null and void. This is an important protection.

One of the main benefits of a Power of Attorney is that it circumvents the family having to make costly applications to the Court to appoint someone to be in charge of the assets of an incompetent person (committeeship). A Power of Attorney has the practical advantage of allowing a Donor to feel secure that he or she has appointed an Attorney that they know and can trust to manage their affairs.

### *Enduring Power of Attorney*

An Enduring Power of Attorney is a document which comes into full force and effect upon being signed by the Donor. As with all Powers of Attorney, the powers set out in an Enduring Power of Attorney may be either narrow or wide. An Enduring Power of Attorney offers the practical benefit of the person appointed being able to immediately look after the affairs of the Donor.

### *Springing Power of Attorney*

A Springing Power of Attorney is a document which only comes into force and effect upon the occurrence of a certain event (for example, the incapacity of a Donor).

## LEGAL REQUIREMENTS

### *Enduring Power of Attorney*

First and foremost, for an Enduring Power of Attorney to be valid, the Donor must be mentally capable of understanding the nature and effect of the document. In addition, the Enduring Power of Attorney must be in writing, be duly executed and witnessed, and provide that it continues despite the mental incompetence of the Donor. If the Donor cannot read or sign the document, another individual on behalf of the Donor can sign it.

### *Springing Power of Attorney*

A Springing Power of Attorney has the same requirements as described above, and additionally does not come into effect until the Donor has been declared mentally incompetent by qualified medical practitioners.

## REASONS FOR MAKING A POWER OF ATTORNEY

Preparing a Power of Attorney document will allow you to choose who will manage your property and financial affairs for a specific or extended period of time. They help to plan for a time when you may not be able to take care of your own financial affairs. This often provides peace of mind for yourself and those you care about. Powers of Attorney avoid the time and substantial expense of Committeeship applications. A Power of Attorney is a document of trust and faith in the individual who is being named the Attorney. It is also a document of great power. Therefore, it is very important that you fully trust the person you are appointing.



## IMPORTANT CONSIDERATIONS WHEN MAKING POWERS OF ATTORNEY

In order for someone to act as an Attorney, the Attorney must be an adult, with mental capacity, and not an undischarged bankrupt. *The Powers of Attorney Act* allows for the appointment of any number of Attorneys to act jointly, or successively. If the document is silent as to the type of appointment, then the Attorney will act successively in the order in which they are named in the Power of Attorney document. In addition, *The Powers of Attorney Act* sets out that unless the Power of Attorney provides otherwise:

1. When the Attorneys are appointed to act jointly, the decision of the majority is deemed to be the decision of all;
2. If a majority decision cannot be reached, then the first named Attorney will make the decision for the group; and
3. If one of the Attorneys disagree with the decision of the group, they will not be liable for the consequences of the decision if they do not consent to it, and if they provide a written objection to each of the other Attorneys as soon as reasonably possible after learning of the decision.

**When making your Power of Attorney, you should consider at the very least the following:**

1. Whether you will name one or more Attorneys, and whether they should act jointly or successively, together with their full legal names and relationship to you;
2. Whether there will be an alternate Attorney(s);
3. Whether or not your Attorney will be paid for acting on your behalf;
4. Whether or not your Attorney will be given broad or limited powers;
5. Whether you will provide another named individual the ability to request and receive an accounting from the Attorney by naming this person as the Recipient of Accounts in your Power of Attorney;
6. Consideration as to an alternate Attorney in the case that you name your spouse or common-law partner as your principal Attorney. Although a spouse or common-law partner may be named as an Attorney, he or she **cannot** act as your Attorney with respect to the disposition of homestead property;
7. A Power of Attorney has inherent risks, so a Power of Attorney should only be granted to someone you have complete confidence in. You may consider appointing more than one Attorney, to reduce the risk of abuse.

## ACCOUNTABILITY OF THE ATTORNEY

*The Powers of Attorney Act* sets out the duties and accountability of an Attorney. All Attorneys are required to act in the best interest of the Donor. The standard of care of the Attorney changes depending on whether there is compensation payable or not.

An Attorney who does not receive compensation for acting as an Attorney shall exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in the conduct of their own affairs.

However, an Attorney who receives compensation for acting as an Attorney shall exercise the judgment and care that a person of prudence, discretion and intelligence in the business of managing the property of others is required to exercise.

*The Powers of Attorney Act* also allows a Donor to appoint a person to whom the Attorney must account on demand, called a "Recipient of Accounts." If no such person is named, then the Attorney must account annually to the nearest relative as defined in *The Powers of Attorney Act*.

## TERMINATION

### *Enduring Power of Attorney*

**A Power of Attorney may be expressed to be irrevocable if it is granted for consideration, but otherwise it will be terminated by:**

1. The appointment of a substitute decision maker for property appointed for the Donor pursuant to other legislation;
2. The appointment of a committee of the estate;
3. The bankruptcy of the Donor, unless the Power of Attorney provides otherwise;
4. The bankruptcy, mental incompetence, or death of the Attorney;
5. The death of the Donor;
6. The renunciation of the appointment by the Attorney in accordance with *The Powers of Attorney Act*; or
7. The court terminates the powers granted to the Attorney.





## WHAT IS A HEALTH CARE DIRECTIVE?

Health Care Directives are often referred to as “Living Wills.”

Health Care Directives permit the maker to set out their wishes concerning the medical treatment which they do or do not want administered at some future time when they no longer have mental capacity. The maker can appoint another person, called a Health Care Proxy, to make health care decisions on their behalf.

Wishes as to medical care or treatment can include instructions about therapeutic, preventative, palliative, diagnostic, cosmetic, or other health-related purposes, and includes any course of treatment. In addition, you can turn down life-prolonging treatment, palliative care, nutrition, or hydration.

## WHO CAN MAKE A HEALTH CARE DIRECTIVE?

To make a Health Care Directive, a person must be competent to give or refuse consent to their current medical treatment. An individual is presumed to have capacity if they are over the age of 16, but this presumption is rebuttable. A person is competent to make a Health Care Directive if they are able to understand the information that is relevant to a medical decision, and is able to appreciate the reasonable foreseeable consequences of a medical decision or lack of same. If evidence to disprove capacity can be provided, then the Health Care Directive may be overturned and held to be invalid.

## WHEN IS A HEALTH CARE DIRECTIVE IN EFFECT?

A Health Care Directive comes into effect when the maker does not have capacity to make decisions with respect to their health and medical decisions. This is usually decided by a medical doctor. In addition, a maker may be unable to communicate their wishes. A Health Care Directive will continue in effect for the duration of the incapacity or inability to communicate.

## REQUIREMENTS FOR A VALID HEALTH CARE DIRECTIVE

Health Care Directives must be written, dated, clear and concise, and signed by the maker of the Health Care Directive. The Health Care Directive need not be witnessed. Oral Health Care Directives are not permitted due to the unreliability associated with one person recalling the oral instructions of another.

Health Care Directives must be brought to the attention of Health Care providers. We suggest that upon making a Health Care Directive, you have several copies to ensure it is easily accessible when it is needed. You should keep one at home, give one to your proxy, one to your family doctor's office, take one with you when you travel and bring a copy when being admitted to hospital or prior to a surgery.

## REQUIREMENTS AND CONSIDERATIONS WHEN NAMING A PROXY

The only requirements to naming a Proxy are that a person must be at least 18 years old and be mentally competent. Otherwise, you are free to choose whoever you feel comfortable with and who will make appropriate decisions. The Proxy must know your wishes, values and beliefs. The Proxy should also consent to act in advance of being named. This will avoid undue complications in times of medical emergency.

### *Authority and Responsibility of Proxy*

If the maker sets out treatment instructions, the Proxy must comply with those treatment wishes unless the Proxy knows that those instructions have changed since the Health Care Directive was made. In that case, the Proxy may follow the most recent instructions.

If no specific instructions are expressed or made in the Health Care Directive, then the Proxy must act in the best interests of the maker or based upon their knowledge of the wishes of the maker prior to their incapacity. This can include making decisions in accordance with:

- Any verbal wishes expressed while the maker was still competent and that the maker would still act upon;
- Recent decisions while still competent;
- If the proxy has no knowledge of the wishes, then the decision must be in accordance with the maker's best interests.

The maker of a Health Care Directive can also limit what decisions can be made by a Proxy. Further, unless it is set out in the Health Care Directive, the Proxy cannot agree to non-therapeutic procedures (i.e. tissue donations, research procedures, sterilization). These procedures do not benefit the maker of the Health Care Directive and cannot be made by anyone but the individual.

The Health Care Directive allows the Proxy access to your medical information so that they can make an informed decision. You should discuss your medical information with your Proxy at the time of making your Health Care Directive so that they clearly understand why you have chosen certain medical treatments or rejected others.

Some may want to appoint more than one Proxy. If more than one Proxy is appointed, they act successively in the order they are named if the first person is unable or unwilling to act, unless the Health Care Directive provides that they must act jointly. If the Proxies act jointly, then the majority decision is the decision of the group unless unanimity is required under the Health Care Directive. In the event of a tie, the first named Proxy should be required to break the tie. If one or more is unwilling or unable to act, then the remainder can act and the majority of the remainder is the decision of the group. You should carefully consider the advantages and disadvantages of these scenarios in determining whether you wish to appoint more than one Proxy.

***Removal of Proxy and the Immunity of the Proxy***

No action lies against a Proxy if they fail to make a decision or for making treatment decisions made in good faith. However, if the decisions are not in good faith, then the Court can prevent the Proxy from making decisions. The Court can even rescind any improper decisions and suspend or revoke the Proxy's position. If no other substitute was named, the Court can make the decision in the place of a Proxy.

**REVOCATION OF A HEALTH CARE DIRECTIVE**

You can change your Health Care Directive at any time as long as you are still competent to do so.

**You can cancel or revoke a previous Health Care Directive in one of three ways:**

1. If you destroy all original signed copies with the intent to revoke either personally, or by giving instructions to another person on your behalf;
2. If you make a new Health Care Directive which is dated after your original Health Care Directive; or
3. If you declare in writing your intention to revoke the directive and such declaration is executed in a similar fashion to a Health Care Directive.

**ESTATE PLANNING FOR YOUR FUTURE**

Professionals practicing in the area of Wills and Estates will advise you on what is involved in Estate Planning and how to get started. For instance, everyone needs a valid, updated Will, a Power of Attorney and a Health Care Directive.

**10 REASONS TO PLAN FOR YOUR FUTURE**

1. Give the gift of peace of mind to yourself and those you love.
2. By planning for your future, you prevent your Estate from bearing extra expenses.
3. An estate plan will reflect your wishes for how to distribute your Estate.
4. An estate plan allows you to name a guardian for your dependants.
5. Reduce the likelihood that your beneficiaries will fight over your Estate.
6. You can choose to support a favorite registered charity or local community foundation through your Will.
7. Relieve your family from some of the emotional stress they may face if you lose competence.
8. Plan for the possibility before it happens by naming a trusted person in a Power of Attorney and a Health Care Directive.
9. Making health care decisions (especially life and death decisions) is a monumental responsibility for loved ones. Share your wishes and lessen their burden with a Health Care Directive.
10. Don't wait until it's too late...take control and **PLAN FOR YOUR FUTURE!**

**Professional legal advice will ensure your last wishes are achievable**



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