Preparing Your Last Will and Testament

John Grisham's book, *The Testament* (1999), is a riveting tale of family feuds and legal wrangling that arise following the death of a family patriarch. In typical Grisham style, the intrigue and suspense is intensely engaging. The storyline is rooted in true to life legal principles (based on Virginia, USA, law), and is a healthy reminder that without proper planning the results can be devastating.

In *The Testament*, a wealthy man passes away having executed "... a valid Will that, in a few hasty paragraphs, transferred one of the world's great fortunes to an unknown heiress, without the slightest hint of estate planning. The inheritance taxes would be brutal."[1] This article explores opportunities to create a very different storyline for your family.

A Will is a written document that directs how your assets are to be distributed at the time of your death. It should appoint an executor (liquidator in Quebec), and provide instructions regarding the distribution of all your assets, including your business holdings and your personal effects. To be valid, a Will should be dated and signed in the presence of witnesses who are not beneficiaries. Witnesses are not required for a holograph Will, a Will written entirely in your own handwriting. However, holographic Wills are not generally recommended for estate planning and should only be resorted to as a last minute "stop gap" measure in very narrow and special circumstances. In Quebec, the most common form of a Will is a notarial Will made before a notary in the presence of a witness or, in certain cases, two witnesses.

There is an order of priority prescribed by law for the distribution of assets from your estate. Once the estate's debts and taxes have been paid, legacies and bequests are distributed. The balance that remains in your estate is called the residue, the distribution of which must be specified in your Will precisely and clearly. Because it is difficult to predict the exact net value of the residue, the residue is usually divided into shares or percentages and distributed in that form. Distributions can be made outright or held in a trust or several trusts for named beneficiaries, with terms of distribution of income and capital, over a finite period of time.

A Codicil is a written amendment to a Will, and requires the same formalities as a Will to be legally binding. For example, if you wish to add a donation to a charity, change a beneficiary or choose another executor, you can do so by way of a Codicil. A Memorandum of Instruction may be used to provide detailed instructions for personal effects such as art and jewelry.

Executors and Guardians

Your Will names your appointed executor(s) – the individual(s) or the professional or Corporate Trustee – who will administer the distribution of your estate. Choosing your executor is an important decision that should depend on the nature of your estate, the complexity of your Will and the dynamics of your family situation. Consequently, many people choose to take advantage of the expertise of BMO Trust Company in the administration of their estate by appointing BMO Trust Company as executor or co-executor in their Will. The administration of an estate can give rise to complex legal, income tax and investment issues and the details of administration can be overwhelming in a period of grief. In addition, the accounting, banking and record-keeping responsibilities can be time-consuming, especially if the executor is unfamiliar with legal forms and procedures.

The appointment of a Guardian or Guardians (Tutor in Quebec) is recommended if you have minor children. In addition, you may want to provide some compensation for the Guardian(s) in recognition of their responsibilities.

Regular review of your Will

If you have a Will, when did you last review it with your lawyer? If any of the following has occurred after you signed your Last Will and Testament, consider making a new Will:

- **Life cycle events** – Birth, death, incapacity, retirement, marriage or divorce are all events that change the family scene in which succession is contemplated. Specifically, in some provinces, marriage revokes a Will. In Canada, divorce cancels appointments of, and gifts to, a former spouse.
- **Change in residency** – Legal requirements regarding validity of documents differ among jurisdictions, as does the law regarding ownership, succession and taxation.
- **A windfall resulting in sudden wealth** – Winning a lottery or receiving an inheritance can tip the succession balance in unexpected directions.
- **Significant increase or decrease in wealth** – Gifting intentions may have to change with respect to potential beneficiaries.
- **Passage of time** – Laws evolve by way of changes in legislation and by way of court findings, all of which affect the manner in which succession goals can be met.
- **Sale of a business** – Planning tools used in the context of a family business are different from those used in a cash-rich context. Implementing an estate freeze or creating a family trust modifies the estate holdings, and, ownership structure.

Chances are that if your Will is older than five years, it is time for a review. One potential problem with an old Will is that the executor choice may no longer be appropriate. In addition, you may have recently purchased valuable personal effects, such as jewelry or art, which you intend to gift to specific loved ones.

Testamentary trusts

You may wish to establish a trust at your death to benefit your spouse, children or others. Typically, a trust is structured so that the trustee(s) of the trust hold(s) specified assets during the lifetime of a beneficiary, until a defined time or event. The Will directs the trustee(s) to pay or accumulate the annual income of the trust, and usually gives them the power to distribute portions of the capital, if needed, to the beneficiary. Upon either the death of the beneficiary, the expiration of a certain length of time specified in the Will, or the occurrence of a defined event, the capital remaining in the trust is distributed to the remaindermen capital beneficiaries named in the Will, in whatever manner you specify.

The 2014 federal budget implemented several changes that impact the tax efficiency of testamentary trusts. Effective January 1, 2016, testamentary trusts (other than for persons with disabilities) are no longer taxed at graduated tax rates, do not benefit from the basic $40,000 Alternative Minimum Tax Exemption and are required to have a calendar year end (i.e., December 31). For purposes of the 2014 federal budget changes, testamentary trusts include life insurance proceeds at death left in a trust, and any capital transferred by an executor of an estate to a trustee of a trust created in the deceased's Will. The residue of an estate not yet transferred to the trustee remains a Graduated Rate Estate (if so designated), and for 36 months following the date of death may be taxed at the graduated rates of tax, depending on direction drafted in the Will. Although testamentary trusts no longer benefit from graduated tax rates, they are still useful estate planning vehicles which can be created in Wills, and by way of beneficiary designations on life insurance policies. Often, the reasons for creating testamentary trusts are non-tax related. Regardless of the rate of taxation of the trusts, these structures provide excellent opportunities for protection of assets and guidance (or control) from the grave.

Consider the scenario where a deceased is survived by her spouse and her children from a previous marriage. A Will incorporating a spousal trust with respect to some assets, and outright distributions with respect to other assets, can ensure that both her surviving spouse and her children from the previous marriage are appropriately provided for. For example, her Will may direct that the matrimonial home is to be transferred outright to the surviving spouse; 25% of the residue is to be paid outright to the surviving spouse; and 75% of the residue is to be held in a spousal trust. The income generated in the spousal trust would be paid annually to the surviving spouse during his lifetime; and upon his death, would be transferred outright to her children.

Intestacy

Wealth brings opportunities for you and your loved ones, but it also adds complexity to your estate plan. Without a Will, you are said to die intestate and provincial law dictates who

will receive the assets of your estate. The provincial formula (which differs from province to province) for distribution on an intestacy provides for a preferential share to a surviving spouse, and the balance to be divided between the surviving spouse and children, whether they are minors or adults.[2] For example, according to recent changes in succession law in British Columbia, the distribution of assets has changed from a mandatory preferential (spousal) share of the first $65,000 and a share of the residue, to a preferential (spousal) share of the first $300,000 (or $150,000 if the deceased's children are from a prior relationship), and a significant share of the balance of the residue. Also, due to changes in British Columbia's family law, there can be more than one spouse who is entitled to a share of a deceased's estate. For example, if a deceased is not divorced yet from an estranged spouse, but had been living common-law with another person for at least two years immediately prior to date of death, there are two spouses and each will have to apply to court to receive a share of the residue as a spouse, under the new rules of intestacy.

If you die intestate, there is no executor to administer your estate and someone must apply to the court to get permission to administer your estate. The application to court is costly and time consuming. The applicant may have to post a bond equal to perhaps as high as twice the value of your estate as security. Distribution of your assets to your heirs cannot take place until the court grants authority to the applicant, and the court proceeding is time consuming and costly. All legal fees will have to be paid by the estate, leaving less funds available for your heirs.

Further delays occur if you die intestate and there are minor children or if there is a dispute among family members, or others, as to who should be appointed to administer your estate, or who should receive certain assets. Where there are minor children, the provincial government would have to be involved and once the estate is distributed, the share of a minor will be invested and supervised by the provincial government, and paid in full to the child when he/she reaches the age of majority, whether the child is mature enough to manage the money or not. Testamentary trusts cannot be created if you die intestate. Where there is no surviving spouse, no children or grandchildren, remote relatives may be entitled to a distribution from your estate. If, after an exhaustive search, no surviving blood relatives can be found, your estate will go to the government. All of this can be prevented by having a valid Will in place.

Having a Will can save your estate money and save your family a lot of anguish and frustration. Having a Will is the only way you can have control over who will administer your estate, the manner in which your estate will be distributed and to whom.

Get your affairs in order

It is estimated that one third of Canadians do not have a Will. Many of those who do, have Wills which are inadequate to give effect to current wishes and intentions. The nasty estate litigation which has plagued celebrity or otherwise famous estates, such as those of Walt Disney, James Brown and Howard Marshall (the Anna Nicole Smith story), is precisely what you can minimize, or even eliminate, by having a Will in place that properly addresses your estate planning needs.

For more information, speak with your BMO financial professional.

BMO Wealth Management

[1] John Grisham, The Testament, Tupelo, MS, Belfry Holdings Inc., 1999, page 29.
[2] Dying without a Will in Quebec has different consequences.

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