

# Estate Planning and the Modern Family

In the past, the focus of family estate planning was to ensure property would be passed on to a spouse and/or children in the context of a traditional family. However, today's family comes in many different shapes and sizes, including blended families, common-law spouses, single households, one-parent families, divorced/separated couples, same-sex relationships, and multiple-spouse family structures.

## The makings of an estate plan

These family structures warrant new and different estate planning strategies that may have to address the needs of multiple camps of beneficiaries or heirs-at-law with conflicting interests. Our global lifestyle adds to the complexity, as families may straddle several geographical jurisdictions.

While a well thought out estate plan should include a Will, a continuing Power of Attorney for Property, an End of Life Directive and Power of Attorney for Personal Care (in Quebec, a "Mandate in case of incapacity" includes the continuing Power of Attorney for Property, End of Life Directive and Power of Attorney for Personal Care), you may also want to consider trusts for children and spouses, domestic contracts, and beneficiary designations on registered plans and life insurance policies. It's important to review your estate plan regularly to ensure it continues to meet the evolving needs of you and your family.

Following are some common estate planning objectives that you may want to incorporate into your estate plan, depending on your situation and circumstances:

- Providing adequate provisions for surviving family members to be able to maintain their current standard of living;
- Providing sufficient capital to fund future life events, such as a child's post-secondary education, a wedding or the birth of grandchildren;
- Ensuring the smooth succession of the family business;
- Passing on valuable and treasured family heirlooms, art, and recreational real estate without causing resentment and dispute among family members;
- Philanthropic endeavours and charitable bequests;

- Minimization and deferral of taxation upon death;
- Reducing probate fees;
- Planning for future incapacity (mental or physical);
- Gifting to children or grandchildren during your lifetime and after death, either equally or equitably; and
- Recognizing and accommodating for the special needs of certain beneficiaries.

## Estate planning considerations

In addition to the estate planning goals listed above, there are additional planning considerations that will be relevant for a variety of family structures.<sup>1</sup>

### Married and divorced couples

In any marriage, spouses' respective property rights, financial arrangements and obligations toward each other and their common children are intertwined. This makes drafting a Will for each spouse paramount. The nature of estate planning by spouses is such that each spouse's Will affects the other's financial status and subsequent flow of assets to the next generation or other intended beneficiaries, and thus affects the other spouse's succession plan.

Regardless of age, there are many reasons why spouses-to-be may want to enter into a marriage contract. In most provinces, provincial family law regimes equalize the difference in net worth acquired or accumulated by each spouse during the marriage. For those marrying for the second or third time, particularly where children from previous relationships are involved, a marriage contract can help to limit future sharing of wealth. In Quebec, the effect of a marriage contract is to engage the regime which the spouses have elected (e.g., separation of property, partnership of acquests) to govern the

division of their property in the event of marriage termination. In all other provinces, a marriage contract is used to override the terms of provincial family law in the event of divorce.

In all provinces (other than Alberta, British Columbia, and Quebec), marriage revokes the existing Wills of spouses, but not powers of attorney or beneficiary designations. Whereas divorce does not revoke a Will, it does void all appointments and gifts written in the Will which are in favour of the former spouse. Beneficiary designations on plans and policies, and appointments of powers of attorney which are in favour of the former spouse, are not revoked by the divorce. Consequently, in order to establish your current intentions, estate planning documents such as Wills, powers of attorney, and beneficiary designations (for registered plans and life insurance policies) should be updated after marriage breakdown.

### Common-law couples

In Canada, common law status generally commences after three years of consecutive cohabitation (two years in British Columbia), or after a shorter period if the partners are the parents of a child. While common-law couples are treated by the Income Tax Act like legally married spouses for taxation purposes, the same is not necessarily true with respect to provincial statutes governing family and succession law. There are some key points to remember:

- Common-law partners are not always recognized under provincial property or succession laws regarding property rights. A common-law partner may not have an automatic right to any portion of their partner's estate.
- Depending on circumstances, a common-law partner may apply to the courts for continued support from a deceased spouse's estate under provincial dependants' relief legislation, or for a share in the value of property in the deceased spouse's estate under a constructive trust claim (the law of equity).
- Common-law partners are recognized under the Income Tax Act for tax purposes, and thus assets of a deceased partner may be rolled over to the surviving partner or to a qualified partner trust on a tax-deferred basis.

Common-law couples can make a cohabitation agreement, similar to a marriage contract in order to limit property entitlement and financial rights and obligations between the spouses. While a common-law spouse does not share in the value of property owned by the other spouse in most provincial

regimes, the non-owning spouse may be able to make a claim for a share in the value under a constructive trust claim. Most cohabitation agreements restrict this right. A restriction on spousal support; however, depending on circumstances, may not be enforceable.

### Blended families

Blended families generally consist of reconstituted family groupings of spouses/partners and their respective children. Typically, these family groupings have little in common with one another beyond the relationship of the spouses. The management of property and estate planning of blended families can involve complicated family dynamics, such as reluctance of the groups to communicate openly with each other, and a potentially mutually exclusive possessive and protective approach by each group toward its members, especially the children.

Stepchildren do not automatically share in the estate of their deceased step parent under provincial intestacy legislation, or at separation or divorce under family law. Spouses of the marriage that formed the blended family; however, do have such rights, which may be seen to encroach on expected inheritances or support of children from a previous relationship. It is often in the blended family context that marriage contracts or cohabitation agreements are used to divide wealth in a manner that adequately provides for all dependants within the family groupings.

### Single households

An individual without family (i.e., no spouse, children, parents, grandparents, siblings, nieces or nephews) needs estate planning as much as anyone, and perhaps even more so. Without an adequate estate plan their entire estate may go to the government (unless there is a successful claim by a remote relative) when he or she dies. To avoid this possibility, an unattached person must prepare an estate plan, including a valid Will, to indicate how his or her estate is to be distributed upon death.

If an individual has no relatives, he or she may have trouble choosing an executor for their Will. While many people are comfortable placing this burden on family members, they may be less inclined to place that same burden on a friend. If the individual does not wish to burden them with this responsibility, he or she might choose to appoint a professional, such as a personal lawyer or accountant, or alternatively, an independent

entity such as a corporate trustee or a trust company as executor of their estate. Without organized records, some assets may not be fully accounted and be overlooked upon death. Thus, an individual with no close ties must maintain an up-to-date list of assets and ensure that his or her chosen executor knows where to find that list.

To limit their tax liability upon death, some individuals may gift growth assets to a friend or a charity prior to death, or the assets could be transferred to an inter vivos trust established for those beneficiaries.

### Single unattached parents

All parents need to prepare an estate plan that describes how their parental role is to be filled in the event of their death, but this is especially important for single parents. Appointment of a guardian for minor children is done in a Will. The guardian will receive immediate temporary custody of the child(ren) upon the parent's death. Within 90 days of the date of death, the guardian must apply to the courts for permanent custody. While the courts are not obliged to honour the appointment specified in the Will, they will normally do so unless there is an obvious reason to deny the request.

A single parent has limited opportunities to defer taxes upon death because spousal rollover provisions are not available. Thus, whether assets are left in trust for the child(ren), or are bequeathed to some other beneficiary, the assets are deemed to be disposed of at fair market value, resulting in a tax liability for the parent in the year of death. However, tax-sheltered savings such as Registered Retirement Savings Plans ("RRSPs"), may be rolled over to the registered plan of a financially dependent child(ren) on a tax deferred basis.

### Seek professional advice

Whatever the structure of your family, it's important to seek professional advice to ensure the needs of all are addressed in your estate plan. You are encouraged to consult with your trusts and estates lawyer, and a tax accountant before implementing your estate plan.



Contact your BMO financial professional to learn more about estate planning strategies that may be appropriate for you and your family.

<sup>1</sup> The Civil Code of Quebec differs from the common law regime in other provinces, so some of the discussion in this article does not apply in Quebec.



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