

BMO NESBITT BURNS

Wills That Work



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Overview

Estate planning is an essential component of a successful wealth management program. A good estate plan will provide you with the peace of mind that comes from knowing your family and financial affairs will be taken care of according to your wishes. One key element of an estate plan is a Will. This brochure provides an overview of why a Will is important and what you need to consider when drafting your Will.

Laws Differ By Province And Are Subject To Change

In Canada the law of the province of residence applies to Wills, trusts, and estates. In Quebec for example, the term “Liquidator” is used to describe the person who administrates an estate; whereas, in other provinces (and in this brochure) the terms “Executor” or “Administrator” are used. In addition, laws are always subject to change, and estate law is no exception. For example, the rights of common law and same sex partners are currently evolving. The information given here is general in nature, and it is necessary, particularly because of provincial differences and on-going changes, to seek personalized professional advice to assist you with your estate planning and Will preparation.

What Is A Will?

A Will is a written document that directs how your assets are to be distributed at the time of your death. It should provide instructions for all your assets, including your business holdings and your personal effects. To be valid a Will must be signed, dated, and witnessed by two people. In some provinces witnesses are

not required for a "holograph will" - one entirely in your own handwriting. In Quebec, the most common form is a notarial Will made before a notary in the presence of a witness or, in certain cases, two witnesses.

A Will can also include Codicils and Memoranda of Instruction. A Codicil is a written amendment to a Will and requires the same formalities to be legally binding.

For example, if you wish to add a donation to a charity or change a beneficiary, or choose another Executor, you can do so by a Codicil. A Memorandum of Instruction, although not necessarily legally binding, can provide your detailed instructions, say, for the distribution of your personal effects.

The Benefits Of A Will

A properly drafted Will provides peace of mind through greater choice, control, and simplicity.

Peace of Mind

Above all, a Will gives you the comfort of knowing that your wishes will be respected after your death. You may have family members, dependants, or charities that you wish to support – a clear Will is the best way to ensure this occurs. You will also be reassured to know that you have done your best to minimize the taxes and the probate fees payable out of your estate.

Control

A thorough Will gives you control over the details of the distribution of your estate including:

- Choice of beneficiaries;
- Their respective shares of your estate;
- The type of asset(s) each will receive.

Ease of Administration

A clear and valid Will makes it easier and often less expensive to administer your estate. It can reduce the strain on your family at a difficult time and it will make the job of your Executor(s) more straightforward.

Investment and Asset Management Powers

Your Will may provide for investment and management powers that will allow your Executor(s) freedom to maximize income and growth of your assets, consistent with what is prudent and in the best interests of the beneficiaries of your estate. Depending on provincial law, your Will may also permit or direct your Executor to use an investment manager.

The Consequences Of Dying Without A Will

If you die without a Will, you lose your opportunity to decide and control how your assets are distributed.

Many people avoid making a Will because it makes them uncomfortable to think about the prospect of death, or they recoil from making decisions about beneficiaries. While it is true that the process can bring forward some challenging issues, it is far more beneficial to all involved to have a clear Will in place. The consequences of dying without one can be serious.

“My wife died years ago. After her death, I met Sheila, who has been a blessing for me and my children. We’ve lived together for several years, and are so happy. We may marry at some point but, for now, we’re happy the way we are.” – Pat

Because Pat and Sheila are not married, Sheila is not one of Pat's heirs-at-law. She may be entitled to support from his estate, or to a share of his property under common law or applicable provincial matrimonial property legislation but asserting these rights on Pat's death will almost certainly involve a court application.

Loss Of Control Over The Distribution Of Your Assets

If you die without a valid Will, your estate will be administered and your property distributed under the appropriate provincial-legislation. If you die with no surviving family, however remote, your assets will go to the government. If you have surviving family members, your assets are divided and distributed to them according to provincial rules.

It is dangerous to make assumptions such as "I don't need a Will, my spouse gets everything." This is not necessarily the case. The portion of the estate a spouse is entitled to depends on provincial law and whether you also have surviving children or grandchildren. It can become even more complicated if you have had a previous marriage.

Loss Of Investment And Management Powers

In the absence of a Will, the Administrator will have only those powers of investment and management provided by applicable legislation and the common law. In Quebec the provisions of the Civil Code will apply. These can be excessively restrictive in many situations. When the court holds funds on behalf of a minor heir, those funds are not actively managed by the court. When the Public Trustee holds such

funds, typically, he or she has limited powers of investment. This can mean that the return earned during the heir's minority can be quite modest.

Higher Cost And Greater Delay

Without a valid Will in place, it is likely there will be extra cost and time involved in settling your estate – especially if your dependants launch court challenges to the distributions.

No Trust Options

There are many situations in which the establishment of a trust may be the best way for your assets to be managed after your death – for example, to provide for minor or young adult beneficiaries. These arrangements must be made in the context of a valid Will, preferably with the assistance of a professional.

Making Or Updating Your Will

When To Make Or Update Your Will

You should always have a valid Will in place that reflects your current situation and wishes.

If you do not have a Will, now is the time to make one. If you do, your Will and any Codicils or Memoranda of Instruction should be reviewed periodically to ensure they continue to reflect your wishes. Some events which should trigger a Will review include:

- Your financial circumstances change or the nature of your assets changes significantly.
- You move to another province or country.
- You acquire assets (especially real property) which are located outside the province where you reside or outside Canada.

- You marry or separate from or divorce your spouse (marriage revokes a Will).
- An Executor named in your Will dies, becomes ill or mentally infirm, moves from the province or Canada, or it is no longer appropriate for any other reason.
- A beneficiary marries, has children, dies, moves from Canada, becomes incompetent, or you want to exclude that beneficiary from your Will.
- You want to add beneficiaries.
- There are legislative changes in the jurisdiction in which you live since you signed your Will, which affect your estate.

“My Will states that all my property will go to my spouse or, if he does not survive me, to my children.” – Sandra

Sandra, who has children from a prior marriage, is trusting her spouse to make appropriate provision in his Will for her children.

The Elements To Consider

When making your Will, consider all your options. There are several elements to a Will, each of which should be carefully considered. Your BMO Nesbitt Burns Investment Advisor can assist you to find a legal professional who knows the right questions to ask to help you deal with each of the elements. They include:

Beneficiaries

Your Will can specify any beneficiaries that you wish. Experience shows, however, that the more specific you are, the better, and the more complicated your family structure, the greater the need for specific directions.

If your spouse remarries after your death, your spouse: (i) may not sign a new Will (the

existing Will is revoked and the new spouse will be entitled to a share of the estate under the provincial formula for those dying without a Will); (ii) may choose to leave a substantial portion of your property to a new spouse or children from a subsequent marriage; or (iii) may have a new spouse who could acquire rights to some of your property under provincial legislation. In such a situation, leaving all your estate outright to your spouse may not have been the best decision.

Legacies, Bequests, and Personal Effects

Your Will can include precise directions for cash payments from your estate to individuals or organizations. These are referred to as legacies. You can also specify the distribution of items including artwork, family heirlooms, or personal effects to named individuals. The distribution of personal effects can also be set out in a Memorandum of Instruction.

“I’m going to leave \$50,000 to my favourite charity, \$2,000 for each of my god-children and all of my jewellery is to go to my daughter. I’ve also made a list of who should get which paintings from our collection.”

– Jane

A valid Will is necessary to give effect to Jane’s wishes.

Business Concerns

If you own or manage a business, your Will may include instructions for how your interest in the business should be dealt with after your death. Whether it should be reorganized, wound up, sold, or maintained as an ongoing business, it is wise to have appropriate provisions in your Will.

Distribution of Residue

There is an order of priority for the distribution of assets from your estate. Once debts, legacies, bequests, expenses, and taxes have been paid, the balance left in your estate is the residue, the distribution of which should be specified in your Will.

Because it is difficult to predict the exact amount of the residue, these distributions are usually specified as shares and can be distributed outright to beneficiaries or held in trust to provide for them until a specified event (such as the death of a spouse or the 25th birthday of a child) or for a fixed period of time.

“I would like the residue of my estate to be held in trust for my children, but the income from the trust is to be provided to my second wife during her lifetime.” – Tony

A Will incorporating a spousal trust will ensure Tony’s wife and children are appropriately provided for.

Trusts

In your Will you may wish to establish an ongoing trust or trusts for your assets to benefit your spouse, children or others. Typically a trust is structured so that the Executor(s) of your Will hold(s) all or a portion of your estate during the lifetime of a beneficiary (the income beneficiary) of the trust, or until a defined time or event. The Will directs the Executor(s) to pay or accumulate the annual income from the trust, and usually gives them the power to distribute portions of the capital, if needed, to the income beneficiary. Upon the death of the income 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 capital beneficiaries named in the Will, in whatever manner you specify.

The possibilities for trusts are almost endless and the benefits will vary. Most importantly, you can choose the manner in which your beneficiaries are to be provided for and who will make decisions for their benefit.

“I have always looked after our financial affairs. As Bill says, he’s just not good with money. He’s also getting on in years. I worry that, if I die first, he’ll have a hard time coping with things.” – Annette

By setting up a trust for Bill in her Will, Annette can free Bill from concerns about managing the assets of her estate.

Specifying Executors and Guardians

Your Will must specify your Executor(s) of choice – the individual(s) or institution(s) who will oversee and be responsible for the distribution of your estate after your death. This 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. Many people choose to take advantage of the expertise of BMO Trust Company in the administration of estates by appointing it Executor or Co-Executor in their Will. The administration of an estate can give rise to complex legal, income tax, and investment issues. 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 accepted forms and procedures.

The appointment of a Guardian(s), known as a “Tutor” in Quebec, is recommended if you have minor children, in the event of the death of you and your spouse. As well, you may want to provide some compensation for the Guardian(s) in recognition of their efforts.

Minimizing Probate Fees

Court fees, or estate administration taxes (commonly referred to as “probate fees”) are payable, generally speaking, to the provincial government based on the value of property which forms part of the estate (except in Quebec). It is possible to take steps to minimize such fees or taxes.

First, we recommend that you review your assets with a professional to determine the range of such fees or taxes you can expect your estate to have to pay and what methods are available to minimize them. These may include joint registration of title to property, beneficiary designations in favour of individuals rather than your estate, and/or the establishment of a trust during your lifetime. However, depending upon the circumstances, these techniques can give rise to competing concerns. It is quite possible, in a particular situation, that the advantages of a proposed planning technique may be outweighed by the disadvantages.

Special Situations

Minor and Younger Adult Beneficiaries

A minor is a person who has not yet reached the age of majority in his/her province of residence. In Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Prince Edward Island, this means people who are under the age of eighteen. In British Columbia, Nova Scotia, New Brunswick and Newfoundland, this means people who are under the age of nineteen.

Your Will can establish an ongoing trust for the benefit of your minor and young adult beneficiaries. You can specify the age at which the capital of the trust is to be distributed to them or you can stagger the distributions of

capital at different ages, so that they are introduced to financial responsibility gradually. Where such a trust is established in your Will, the Executor(s) may be given the power to pay income and/or capital to the beneficiary until the capital is distributable.

Children Who Predecease You

You may wish to provide that if a child predeceases you, that child's share of your estate will go to his or her children. Your Will may make appropriate trust arrangements for grandchildren, in the event they become entitled to a portion of your estate.

Beneficiaries in Need of Assistance or Protection

Some beneficiaries may have difficulty handling a substantial sum of money. Others could be spendthrifts in chronic debt; have drug, alcohol or gambling dependencies; or be developmentally challenged. Older people may be unwilling or unable to assume financial management responsibilities. Younger adults may be inexperienced in financial matters or involved in unstable relationships.

“Our son, Ted, is emotionally fragile. He has had a drug problem off and on. We’ve bailed him out of financial difficulty on a number of occasions. We wonder who’ll look after him and his family when we’re gone.”

- Wendy and Tom

Trusts in Wendy’s and Tom’s Wills can permit income and capital of their estates to be used for the benefit of Ted and his family, while protecting their assets from his creditors.

By establishing an ongoing trust for such a beneficiary’s portion of the estate, you can ensure prudent investment and management of the monies for their benefit.

You may give your Executor(s) the power to decide to whom and how much income and/or capital is to be distributed from time to time. In this way, you can ensure the monies are applied for the benefit of the beneficiary and, if you choose, for the beneficiary's family. Where mentally and/or physically challenged beneficiaries are concerned, you may be able to structure the trust in such a manner that it does not interfere with the beneficiary's entitlement to other benefits. The trust can be destined to last for the lifetime of the beneficiary. Upon the beneficiary's death, the capital remaining will go to whomever you name in your Will.

Preparing Or Updating Your Will

The benefits of professional assistance

We recommend that you complete your Will with the assistance of a professional rather than purchasing a "form Will" and completing it on your own. In many cases, far more of an estate has been spent in legal fees and court costs in order to sort out the proper interpretation of a "form Will" or other homemade Will, than would be spent to employ a professional to assist in the preparation of this important document. Great harm can be done to family relationships when family members argue over an unclear Will. It is vital that you provide complete information about your assets, family, and financial circumstances when you visit your professional advisor. Otherwise, the professional will be unable to provide effective advice concerning the terms of the proposed Will and other estate planning opportunities.

How BMO Nesbitt Burns Can Help

Your BMO Nesbitt Burns Investment Advisor is familiar with your financial circumstances and will help you identify the need for estate planning services. Your Investment Advisor can assist you to locate an estate planning specialist to review your current Will or to meet with you to assist in arranging for the preparation of a new Will. You may also be referred to one of our Estate and Insurance Advisors or to another specialist within the BMO Financial Group, including BMO Trust Company for Executor services.

BMO Nesbitt Burns – A Profile

As one of Canada's leading investment firms, BMO Nesbitt Burns Inc. has an established reputations within financial services. Since its origins in 1912, the firm has been committed to providing clients with advice and services of the highest standards.

The Private Client Division of BMO Nesbitt Burns is focused on meeting the needs of individual investors through a customized approach to investing. Our Investment Advisors provide clients with personal advice and services, drawing upon some of the best knowledge and expertise in the industry including our firm's top ranked research.*

As a member of BMO Financial Group, BMO Nesbitt Burns can provide clients with access to one of the broadest selections of investment solutions and products available today, both in Canada and the United States.

* Brendan Wood International Survey. Institutional Equity Research, Sales and Trading Performance in Canada, 2007 Report.

If you would like information on other products and services available from BMO Nesbitt Burns, or more information about our educational publications, simply contact your Investment Advisor or the BMO Nesbitt Burns office nearest you.

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Glossary Of Terms

Administrator (Liquidator in Quebec). The person or trust company appointed by the court to administer the deceased's estate where there is no Will or no validly appointed Executor of a Will.

Beneficiary. A person or organization that is entitled to receive a benefit from the estate under the terms of the Will.

Bequest. A gift by Will; usually refers to gifts of personal property such as furniture, jewellery, Canada Savings Bonds, etc.

Codicil. A document that amends some of the provisions of a Will.

Executor (Liquidator in Quebec). The person or trust company named in the deceased's Will to administer the deceased's estate (sometimes called an Estate Trustee). One or more Executors can be appointed in a Will.

Heirs-at-law. Those who inherit the estate pursuant to the laws which govern if there is no valid Will.

Legacy. A form of bequest, by Will; usually refers to cash gifts.

Memorandum of Instruction. Memorandum outlining wishes which is not legally binding unless incorporated in Will by reference.

Probate. The process whereby a court confirms a document to be the last valid Will of the deceased and confirms the authority of the Executors named therein to carry out its terms. In Quebec, a notarial Will does not require probate.

Trust. An arrangement whereby legal title to property is held by one or more persons (the trustee(s)) for the benefit of one or more persons (the beneficiary or beneficiaries).

Will. A document containing directions for the distribution of a person's property after his/her death.

The information contained in this publication is based on sources that we believe to be reliable and is believed to be accurate as at the date of publication; however this is not guaranteed by us and the information may be incomplete. The contents are general in nature and are not intended to provide legal or tax advice. Any examples provided are for illustration purposes only. Readers are cautioned that they must obtain independent professional advice to properly assess their specific circumstances.

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