

Wills That Work

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 laws of the province of residence of the testator apply to Wills, trusts and estates. These laws differ provincially, and continue to evolve. In Quebec for example, the term “Liquidator” is used to describe the person who administers an estate whereas, in other provinces (and in this brochure) the terms “Executor” or “Estate Trustee” 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 have been expanded in most jurisdictions. The information given here is general in nature, and it is necessary, particularly because of provincial differences and on-going changes, to seek professional legal 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 appoint an Executor, and 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 who are not beneficiaries. Witnesses are not required for a “holograph Will”, written entirely in your own handwriting. 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.

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, change a beneficiary or choose another Executor, you can do so by a Codicil. A Memorandum of Instruction which, depending on the language used in the drafting may or may not be legally binding, can provide detailed instructions 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. If you 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 that you have done your best to minimize income taxes and probate fees and taxes payable out of your estate.

Control

A well drafted 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, and the timing of distribution.

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.

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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

In the absence of 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.

Scenario

“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 a valid Will is not in place, your estate will be administered and your property distributed under the appropriate provincial legislation. If you pass away 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, it 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 can 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 remarry (marriage revokes a Will in most provinces).
- You divorce your spouse (divorce nullifies Executor appointments and gifts to a former spouse, resulting in a vacancy of the Executor's office, and partial intestacy).
- An Executor named in your Will dies, becomes ill or mentally infirm, moves from the province or Canada, or the appointment 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.

Scenario

"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 provisions 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 financial professional can help you 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 decide to not make a new Will, or may be unable to do so. His or her existing Will would be revoked by the new marriage, 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.

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Legacies, bequests and personal effects

Your Will can include directions for fixed 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 other personal effects to named individuals. The distribution of personal effects can also be set out in a Memorandum of Instruction.

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. Ensure that the Will instructions do not contradict existing contracts such as Shareholders' Agreements, Loan Agreements and Promissory Notes.

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 must be specified in your Will.

Because it is difficult to predict the exact net value of the residue, the residue is usually divided into shares. Distributions can be made outright or held in trust for named beneficiaries, upon specified terms.

Scenario

"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

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 (the income 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 lifetime beneficiary. Upon the death of the lifetime 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 testamentary trusts are almost endless, because trusts can provide many tax and other benefits. For example, testamentary trusts provide an opportunity for income splitting and creditor protection for your beneficiaries, in addition to the tax deferral where a spousal trust is created. Most importantly, you can choose the timing and the manner in which your beneficiaries are to be provided for and who will make decisions for their benefit.

Specifying Executors and Guardians

Your Will must name your appointed Executor(s) – the individual(s) or the professional or Corporate Trustee, who will administer the distribution of your estate. 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 as 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 legal 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 while any one of your children is under the age of majority. As well, you may

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want to provide some compensation for the Guardian(s) in recognition of their efforts.

Minimizing probate fees and taxes

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.

Firstly, we recommend that you review your assets with a professional to determine the range of fees or taxes you can expect your estate to have to pay and what methods may be available to reduce them. Depending on the circumstances, 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 and legal complications. It is quite possible, in a particular situation, that the advantages of a proposed planning technique may be outweighed by the disadvantages.

One possible probate planning option available in some provinces (such as Ontario and British Columbia) involving the use of Multiple Wills, can be an effective way of avoiding probate on the shares of private corporations of significant value.

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 entire capital of the trust is to be distributed to them or you can stagger the distribution of capital at different ages, to assist at important milestones. Where such a trust is established in your Will, the trustee

may be given the power to pay income and/or capital to the beneficiary until the entire 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.

Scenario

“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 the trustee 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 government 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 financial professional. Otherwise, the professional will be unable to provide effective advice concerning the terms of the proposed Will and other estate planning opportunities.

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

Memorandum of Instruction: 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.

Testator: A testator has testamentary freedom to do as he or she wishes with assets owned at date of death, subject to contractual and moral obligations.

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.

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