

Wills That Work

May 2021

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 will be taken care of, and your financial affairs will be in order and administered according to your wishes. An important key element of any estate plan is a Will.

Laws differ by province and are subject to change

The laws of the province of domicile (typically the province of residence) of the testator (i.e., the individual making the Will) apply to Wills and estates. These laws differ provincially, and are continuously evolving. For example, the laws governing the expansion of rights of common-law and same sex partners in many jurisdictions¹. In Quebec, the term “liquidator” is used to describe the person who administers an estate, whereas in other provinces (and in this article) the terms “executor” or “Estate Trustee” are used.

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 (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. This type of Will is presumed to be valid at death, with no necessity of a probate procedure (called Verification procedure in Quebec).

There is an order of priority prescribed by law for the distribution of assets from your estate. Once the estate’s debts, taxes and expenses 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.

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 a Codicil. A “Memorandum of Instruction” or “Letter of Wishes,” which may or may not be legally binding depending on the language used, 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 and that you have done your best to minimize income taxes and probate fees payable out of your estate. If you have family members, dependants or charities that you wish to support, a Will is the best way to ensure this occurs.

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; and
- 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 manageable.

Investment and asset management powers

Your Will may provide for investment and management powers that will allow your executor(s) the freedom to maximize income and asset growth, 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.

Elements to consider

When preparing your Will, consider all your options

There are several elements to a Will, each of which should be carefully considered. Your BMO financial professional may be able to introduce you to a legal professional who can help you deal with each of the elements, including:

1. Specifying an executor

Your Will must name your appointed executor(s) – the individual(s) or the professional or Corporate Trustee who will administer 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. 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. Many people choose to take advantage of the expertise of the **BMO Trust Company** in the administration of their estate by appointing it as executor or co-executor in their Will.

2. Beneficiaries

Your Will may specify any beneficiaries that you wish, subject to any obligations you may have under provincial legislation to provide for certain family members under certain circumstances. Experience shows that the more complicated your family structure, the greater the need for comprehensive advance planning. For example, if your spouse remarries after your death, your spouse:

(i) may decide not to make a new Will. Their existing Will may then be revoked by a subsequent marriage and the new spouse may be entitled to a share of the estate under the provincial formula for those dying without a Will;

(ii) may prepare a new Will and 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 family law legislation. In such a situation, leaving all your estate outright to your spouse may not have been the best decision.

For more information on this topic, ask your BMO financial professional for our publication, *United We Stand: Planning by Spouses*.

3. 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 or Letter of Wishes.

4. Business concerns

For business owners, a Will may include instructions on 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. It is important that the Will instructions do not contradict existing contracts such as Shareholders' or Partnership Agreements, Loan Agreements and Promissory Notes. For more information on this topic, ask your BMO financial professional for a copy of our publication, *Stress-testing Your Estate Plan with Special Considerations for Business Owners*.

5. Distribution of residue

In the law of Wills, the residue of the estate is the portion of the estate that is left after the payment of debts, taxes, funeral expenses and executor fees and that is not otherwise disposed of by the terms of the Will. It is difficult to predict the exact net value of the residue and 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 period of time.

6. 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 (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 is specified.

A minor is a person who has not yet reached the age of majority in their province of residence. Your Will can establish an ongoing trust for the benefit of the 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, the trustee may be given the power to pay income and/or capital to the beneficiary until the entire capital is distributable.

Changes to the Income Tax Act in January 1, 2016 resulted in the following:

- Testamentary trusts (other than for certain persons with disabilities) are no longer taxed at graduated tax rates, do not benefit from the basic Alternative Minimum Tax Exemption and are required to have a calendar year end (i.e., December 31).
- For these purposes, testamentary trusts include life insurance proceeds at death left in a trust (life insurance 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.
- 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 for management and distribution. For more information on this topic, ask your BMO financial professional for our publications, *Estate Planning for Spouses and Children using Testamentary Trusts and Life Insurance Trusts*.

7. Specifying guardian

The appointment of a Guardian (known as a "Dative Tutor" in Quebec) is recommended for minor children, in the event of the death of you and your spouse while children are under the age of majority. You may wish to provide some compensation for the Guardian(s) in recognition of their efforts.

Special situations

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 their 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.

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.

For more information on this topic, ask your BMO financial professional for our publication, *Special Needs Beneficiaries Require Special Estate Planning*.

Minimizing probate fees and taxes

Generally speaking, court fees or estate administration taxes (commonly referred to as "probate fees") are payable, to the provincial government based on the value of property which forms part of the estate (except in Quebec and Manitoba). 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 registration of title to property as joint tenants with right of survivorship (except in Quebec), 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 certain situations, 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), involves the use of multiple Wills as an effective way to avoid probate on certain assets, including the shares of private corporations of significant value.

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, a large portion 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. In such cases, it would have likely been cheaper to employ a professional to assist in the preparation of this important document in the first place. 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 estate planning professional. Otherwise, the professional will be unable to provide effective advice concerning the terms of the proposed Will and other estate planning opportunities.

Regular review of your Will

Ensure your Will is current and up to date. If your Will is older than five years, it is time for a review. If you do not have a Will, now is the time to make one.

Your Will and any Codicils or Memoranda of Instruction (Letter of Wishes) should be reviewed with a lawyer periodically to ensure they continue to reflect your wishes.

Some events which should trigger a Will review include:

- Birth, death, incapacity, retirement, marriage or divorce. Depending on the province of residence, marriage may revoke a Will and divorce may cancel appointment of, or 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.

Seek professional advice

With proper planning you can ensure that your estate is managed according to your objectives. An up to date Will is a key element of any estate plan to efficiently and effectively administer an estate.

There are several elements and provincial differences with respect to a Will that should be carefully considered. Your BMO financial professional may be able to introduce you to an appropriate legal professional who knows the right questions to ask, can help you deal with each of the elements and assist you with your estate planning and Will preparation.

For more information, speak with your BMO financial professional.



¹ For ease of reference, spouse, common-law partner and same sex partner will be referred to as “spouse” in this article.

BMO Private Wealth provides this publication for informational purposes only and it is not and should not be construed as professional advice to any individual. The information contained in this publication is based on material believed to be reliable at the time of publication, but BMO Private Wealth cannot guarantee the information is accurate or complete. Individuals should contact their BMO representative for professional advice regarding their personal circumstances and/or financial position. The comments included in this publication are not intended to be a definitive analysis of tax applicability or trust and estates law. The comments are general in nature and professional advice regarding an individual’s particular tax position should be obtained in respect of any person’s specific circumstances.

BMO Private Wealth is a brand name for a business group consisting of Bank of Montreal and certain of its affiliates in providing private wealth management products and services. Not all products and services are offered by all legal entities within BMO Private Wealth. Banking services are offered through Bank of Montreal. Investment management, wealth planning, tax planning, philanthropy planning services are offered through BMO Nesbitt Burns Inc. and BMO Private Investment Counsel Inc. If you are already a client of BMO Nesbitt Burns Inc., please contact your Investment Advisor for more information. Estate, trust, and custodial services are offered through BMO Trust Company. BMO Private Wealth legal entities do not offer tax advice. BMO Trust Company and BMO Bank of Montreal are Members of CDIC.

© Registered trademark of Bank of Montreal, used under license.

All rights are reserved. No part of this publication may be reproduced in any form, or referred to in any other publication, without the express written permission of BMO Private Wealth.