

structuring an effective will

TAX & ESTATE BULLETIN



You work hard all your life to provide for the future and those you care about. Why leave it to chance when you die?

Many Canadians intend to pass their lifetime savings on to their heirs. Once retirement needs are met, the assets remaining will be distributed most effectively if they have a will to detail their wishes. Estate planning ensures that assets are shared according to the wishes of the individual for the maximum benefit of the heirs. Although many people may think this issue is far in the future, preparing a will and its related estate planning considerations should be a basic step that is taken and repeated whenever there is a change in circumstances such as marriage, divorce, children or relocation. Preparing a will connects the various pieces that comprise a good estate plan.

What does a will accomplish?

Although everyone has good intentions, far too many people die intestate, that is, without having made a valid will. A will is the legal document that details the process for distributing one's assets (the estate) in a timely, orderly and tax-efficient manner. Perhaps most importantly, a will documents the manner in which the individual intended to have the estate administered.

There are two main purposes of making a will. The first is to document the intentions of the testator, the person making the will, as to the choice of beneficiaries, recipients of his/her assets. The second is to appoint the executor (also known as a liquidator in Quebec and an estate trustee in Ontario), whose role is to ensure creditors of the deceased are paid and to disperse the deceased's assets according to his/her will.

QUEBEC RESIDENTS

The province of Quebec follows laws set out under the *Civil Code of Quebec*. This differs from the other provinces in Canada, which are governed by common law principles. Generally, the principles of estate planning (called successoral planning in Quebec) are similar in all provinces; however, there are some aspects in which both the method of implementation and the terms used differ greatly.

Why do I need a will?

Anyone who has a spouse or children, or is simply concerned with how his/her property will be distributed after his/her death should make a will. There are "do-it-yourself" kits and software packages available in most office supply stores; however, we recommend getting the help of a legal advisor if your estate is anything other than simple. Bear in mind that what you may assume is a simple estate may have legal complexities that cannot be properly addressed without legal advice.

The estate of someone who has sizeable assets and dies intestate can be complicated, and may demand going to court before the assets can be distributed. Without a will, personal property (anything other than real estate) will be distributed according to the intestacy laws of the province in which the testator was domiciled when he/she died. Real property will be dealt with based on the intestacy rules of the province in which the property is located. Minor children will be placed under the care of a guardian appointed by the courts. If some family members have special needs, they may not receive the same priority by the courts as the testator might wish.

Without a will, you cannot appoint the person who will take care of your estate – the court will make the choice for you.

The time taken by the court to appoint an administrator to act on behalf of your estate will cause a delay that could trigger cash-flow problems for your heirs. Keep in mind that until an appointment is made, no one has the legal authority to touch your estate.

Dying intestate can result in needless taxation and possibly estate administration fees, especially if you neglected to do any estate planning. This results in less of your estate going to your beneficiaries, and more to the federal and provincial governments.

EXAMPLE

John was 42 when he was killed in a fatal automobile accident. He left a wife and two children and an estate valued at \$500,000. John and his wife Sara were joint tenant owners of their home in Calgary. John had neglected to make a will. After John and Sara had married, John had thought about naming Sara as the beneficiary on his Registered Retirement Savings Plan (RRSP) and changing the beneficiary on his life insurance policy from "Estate" to Sara, but had never followed up.

Because of the joint ownership, Sara becomes the sole owner of the family home, worth \$275,000. For the same reason, Sara also becomes sole owner of the joint bank account (which has a balance of \$2,000). Instead of John's RRSP being rolled into an RRSP for Sara as the surviving spouse, a special election would have to be filed to permit the RRSP to be transferred tax-free to her. The life insurance policy is redeemed and the \$50,000 forms part of John's estate. Although the \$50,000 is not subject to income tax, the RRSP and the proceeds of the life insurance policy are included with John's bank accounts, and other personal assets (totalling \$73,000) in the calculation of probate fees.

Additional court costs for naming an administrator to handle the estate further reduced its value. If John had done some estate planning and prepared a will, Sara would have inherited everything directly and avoided the additional court costs, as well as probate fees.

What if I die without a will (intestate)?

The following chart outlines the current distribution rules. The *preferential share* is the amount that would be distributed to the spouse before any other calculations are made.

PROVINCIAL INTESTACY RULES (CURRENT AS AT FEBRUARY 1, 2000)

Province	Preferential Share (after debts are paid)	Spouse + 1 Child Remaining Assets	Spouse + 2 Children Remaining Assets
British Columbia	\$ 65,000	1/2 to spouse 1/2 to child	1/3 to spouse 1/3 to each child
Alberta	\$ 40,000	1/2 to spouse 1/2 to child	1/3 to spouse 1/3 to each child
Saskatchewan	\$100,000	1/2 to spouse 1/2 to child	1/3 to spouse 1/3 to each child
Manitoba	\$ 50,000	1/2 to spouse 1/2 to child	1/2 to spouse 1/4 to each child
Ontario	\$200,000	1/3 to spouse 2/3 to child	1/3 to spouse 1/3 to each child
Quebec	\$ Nil	1/3 to spouse 2/3 to child	1/3 to spouse 1/3 to each child
New Brunswick	\$ Nil	1/2 to spouse 1/2 to child	1/3 to spouse 1/3 to each child
Prince Edward Island	\$ 50,000	1/2 to spouse 1/2 to child	1/3 to spouse 1/3 to each child
Nova Scotia	\$ 50,000	1/2 to spouse 1/2 to child	1/3 to spouse 1/3 to each child
Newfoundland	\$ Nil	1/2 to spouse 1/2 to child	1/3 to spouse 1/3 to each child
Northwest Territories	\$ 50,000	1/2 to spouse 1/2 to child	1/3 to spouse 1/3 to each child
Yukon	\$ Nil	1/2 to spouse 1/2 to child	1/3 to spouse 1/3 to each child

* At this time common-law spouses are not entitled to preferential share under an intestacy.

What should be in a will?

A will must clearly state the intentions of the testator in language that is easily understood by those responsible for administering the estate. A confusing will can be as ineffective as no will at all. Even simple instructions can take a number of pages to be expressed in correct legal terms.

It's impossible to describe here the clauses that could be relevant in every case since every individual's situation is unique and requires "custom" advice. For information purposes only, here are some commonly used will clauses.

IDENTIFICATION AND REVOCATION

- Identifies you and often your domicile. (Your usual residence called "domicile" by the court decides under which provincial laws your estate will be administered.)
- Declares that this document is your last will and that all prior wills and codicils are revoked (may not be included in situations of multiple wills).

APPOINTMENT OF EXECUTOR(S)

- Designates the individual(s) or institution(s) you appoint as your executor, either individually or as co-executors (co-trustees).
- A successor or alternate executor may also be designated to act if your original choice of executor is unable or unwilling to accept the responsibility.

PAYMENT OF DEBTS, TAXES AND FEES

- Instructs your executor to pay all debts (mortgages, loans, funeral and estate administration expenses) out of the estate.
- Authorizes your executor to pay income taxes or probate fees that may be payable. *Not applicable in Quebec (called estate administration tax in Ontario)

SPECIFIC BEQUESTS

- Details the distribution of specific personal property to specific beneficiaries.

LEGACIES

- Details the distribution of specific cash amounts.

LIFE INTEREST CLAUSE

- Leaves someone the income or the use and enjoyment of an asset, but not the ownership of the asset itself. On the death of the person holding the life interest (called the life tenant), the asset would pass to another beneficiary, chosen by you, and identified in your will. In Quebec, this would be an "usufruct."

TRUSTS

- Sets out the terms of any testamentary trust(s) (i.e., a trust created on the death of the testator) created by your will.

ENCROACHMENT CLAUSE

- Used in a trust if you want the trustee to be able to give the beneficiary of the trust additional funds for special circumstances or needs.

RESIDUAL ESTATE

- Details the distribution of your remaining property after all of the specific bequests have been made and all legacies have been paid.

COMMON DISASTER / SURVIVOR CLAUSES

- Details the distribution of the assets if intended beneficiaries die at the same time you do, or do not survive you beyond a set period of time (often 30 days). Also details the dispersal of assets if intended beneficiaries die before all trusts are terminated.

GUARDIAN APPOINTMENT

- Names the individual(s) whom you appoint as guardian(s) (called a tutor in Quebec) for your minor children. (In Ontario, this is an appointment valid for 90 days, after which the court determines what is in the best interests of the children.)

POWER CLAUSES

- Empowers your executor(s) to exercise various powers (choice of investments, decision-making powers, etc.) in the management of your estate without having to obtain court approval.

TESTIMONIUM AND ATTESTATION

- Formally confirms that you have read and understood the contents in the will, records when and where the will was signed and that witnesses were present at the time you signed the will.

What makes a will valid?

There are certain requirements to ensure that a will is valid. Generally the testator cannot be under the age of majority and must have the mental capability to understand what he/she is doing (“of sound mind”). The testator must sign the will in the presence of two witnesses who are neither beneficiaries of the will nor spouses of beneficiaries. These two witnesses must sign the will in the presence of each other and in the presence of the testator.

A will may also be valid if written entirely in the handwriting of the testator (not on a computer). This type of will (called a holograph will) requires only the signature of the testator. No witnesses are required. This type of will is not recognized in all provinces.

NEED TO MAKE A MINOR CHANGE TO YOUR WILL?

A codicil is a document that is executed and validated like a will. It can amend a will by revoking or changing an existing clause, or adding a new clause. Just like a will, a codicil is dated and must be in the testator’s handwriting, or must be signed by the testator in front of two witnesses.

If many changes are being made, one should draw up a new will rather than repeatedly amend the old one.

Special rules for Quebec

In Quebec, the succession or estate of an individual begins upon an individual’s death, at the last place where he/she lived. The succession includes the deceased’s assets and liabilities, called the patrimony. The patrimony of the deceased person is passed to his/her heirs or legatees (known as beneficiaries in common-law provinces). In instances where there is no will, the succession is distributed according to the rules in the Civil Code.

Purpose of a will

Just as in common-law provinces, a will in Quebec documents the wishes of the testator about whom he/she wants his/her property to go to and what property each person will receive. The will also names the liquidator of the succession (called the executor or estate trustee in other provinces), whose duties will include identifying the heirs and legatees and distributing the property of the deceased according to the will. The will may also name a tutor to a minor child (known as a guardian in other provinces).

Intestacy in Quebec

If a Quebec resident dies intestate, his/her property is divided between family members according to the Civil Code. The heirs will act as liquidators of the succession. If no family members survive the deceased, as in all other provinces, the government will take over the assets.

Under Quebec laws, an individual may only control the distribution of his/her property upon death through a will or a marriage contract. A will is an essential part of successoral planning in Quebec because various provisions acceptable in other provinces are not valid in Quebec. For example, beneficiary designations on retirement savings plans or other types of investment contracts that govern the transmission of the rights in those investments on death, unless they can be linked to life insurance contracts, are not accepted in Quebec. Moreover, Quebec does not generally have the common-law concept of joint ownership of assets with a right of survivorship.

The typical clauses in a will drawn in Quebec are the same as those outlined previously.

Forms of wills accepted in Quebec

A valid will may take one of three forms in Quebec:

- A Notarial Will is the most common. The will is made before a notary (a notary in Quebec, unlike in common-law provinces, has the authority to draw wills). It is then drafted and signed by the notary and then signed by the testator and by a witness.
- A will may also be made in the presence of witnesses. In this case, the will is written by the testator or a third party (a lawyer, for example) and signed by the testator before two witnesses of legal age, who also sign it in the presence of the testator.
- A holograph will, prepared and signed in the writing of the testator.

Beware of family law issues

In some circumstances, your estate or the succession may not be divided exactly as you wanted. All provinces have family law legislation (family patrimony in Quebec) that deals with the division of assets acquired during a marriage in the event of its breakdown. The legislation may also extend to the division of assets on the death of one spouse. In Ontario, for example, the surviving spouse is entitled, broadly speaking, to one-half of the increase in value of assets accumulated during the marriage (with some exceptions). If the deceased spouse's will provides less than this to the surviving spouse, he/she may, by law,

demand an equalizing payment from the estate. Other provincial laws may allow a spouse, child or other close family member who was financially dependent on you during your lifetime continued support from your estate, even if you intentionally omitted that person from your will. Your lawyer or notary should be able to explain your rights and obligations under the applicable legislation and recent court decisions that may affect such legislation. In the case of common-law or same-sex relationships, provincial legislation should always be reviewed with your lawyer or notary.

GETTING ADVICE

A will requires careful planning to ensure all essential matters are covered. It should also be reviewed periodically and discussed with a qualified advisor or team of advisors to incorporate any changes in your personal circumstances.

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