



## Wills – If you don't think you need one, think again

For many Canadians, writing a will is far from the top of a busy to-do list. After all, contemplating and planning for your own demise is never a pleasant exercise. Yet it's one all of us must face at some time in our lives, and there are a number of good reasons why Canadians shouldn't procrastinate when it comes to writing their will – especially when you consider how little it costs and the benefits that result from what can be a relatively simple task.

A will is an essential part of an estate plan, but what many people don't understand is why. In a nutshell, a will is what speaks for you after you pass away. It communicates your intentions and allows you – and

not the government – to determine how the assets you have worked hard to accumulate will be distributed upon your death.

A will facilitates the administration of your estate, can help you save taxes and avoids the potentially undesirable consequences of dying "intestate" – which means dying without a will. Nevertheless, despite the importance of having a will, it has been estimated that about half of all Canadians have not taken the time to create one.<sup>1</sup> You put a lot of effort into acquiring wealth, so doesn't it make sense to ensure your interests are preserved after you pass away?

### WHAT IS A WILL?

A will is a formal document that sets out your intentions on how your assets are to be distributed after your death. It also allows you to designate the person(s) you wish to take care of your children should both you and your spouse pass away.

<sup>1</sup> "Where there's a will, there's a way... to ensure the people you care for are looked after, according to RBC survey." CNW Group, 4 January 2007

More specifically, the will designates the person or institution known as the “executor,” who will administer your financial affairs after death, specifies beneficiaries to whom the assets are to be distributed, and articulates when and how the distributions are to be made. A will can also include special provisions for your children or disabled beneficiaries, and can specify whether certain debts owed to an individual are to be repaid or forgiven.

Generally, a will can be updated either through the use of a codicil (a testamentary document that makes one or more changes to a will) or a new will. In addition, a will is revocable – that is, the testator (the person making the will) always has the ability to amend or revoke the will, while mentally competent, if he or she chooses to do so.

Having a well-drafted will can minimize the cost and delays of administering your estate, decrease or postpone taxes, and reduce the complex and time-consuming financial issues your friends and family would otherwise have to deal with after your demise. For these reasons, it is prudent to establish a will early in life – after purchasing your first home, for example, or immediately upon marriage or the birth of your first child.

### **WHAT IF I DON'T HAVE A WILL?**

If you don't have a will or your will is deemed to be invalid, you will be deemed to have died intestate. Ultimately, the court will appoint someone to administer and distribute your estate according to the intestacy laws of the province in which you reside, regardless of what your wishes are. This means that your assets may not be distributed to your beneficiaries as you intended.

Under intestacy laws, your spouse will usually receive a certain amount of your estate, often known as the “preferential share,” and the remainder will be divided

among your children. In Quebec, the spouse is guaranteed to receive a portion of the estate. This may not seem problematic, but in some situations it can lead to undesirable results. Take a case in which spouses are separated and estranged. Because they haven't divorced they are still technically spouses, which means the intestacy rules require that all or part of the estate be distributed to the surviving, separated spouse.

Also consider situations in which there are minor children. Portions of an estate payable to a minor child are usually paid into court (administered by the surviving parent or a court-appointed tutor) until the child reaches the age of majority. This means that at the age of 18 (this varies from province to province), a child could take charge of his or her full entitlement. For many people, leaving significant sums of money to young adults is a concern since many teenagers are not mature enough to ensure that a sudden windfall will be put to prudent use.

Intestacy may also result in more taxes being paid, resulting in less money for your family. What's more, the distribution of assets is often much slower and more expensive with intestacies, which can make the whole process frustrating for your loved ones at a time when they are already grieving your loss.

### **PREPARING YOUR WILL**

It is generally recommended that you retain the services of an experienced lawyer when preparing a will. Wills must satisfy certain technical requirements and it is very important to anticipate and provide for all possibilities. If a court does not agree with the way you have prepared your will, or if parts of it are unclear, it may be declared invalid. Each province has its own laws regarding wills and your legal advisor will ensure that yours meets these requirements.

Preparing a will involves several steps:

**1. Make a list of your assets.** Include your home, car, cottage, business interests, life insurance, investments, etc. You'll need to review the ownership of these assets. Do you own them solely or jointly? For life insurance policies or registered plans (such as RRSPs or RRIFs), is there a beneficiary named within the contract?

**2. Consider how your estate will be divided and who will get what.** If done properly, this should include an estimate as to the size of your estate and the taxes owing on your death.

**3. Choose an administrator (executor) of your estate.** The executor has to protect and administer your estate in a prudent and responsible manner. This person should be trustworthy, familiar with tax, estate, accounting and investment issues, and willing and able to assume such a responsibility. Naming an alternative executor in case the first one is unable or unwilling to do the job is usually a good idea.

**4. Decide who you want to take care of your children should you and your spouse pass away.** When deciding whom to select, keep in mind the age of the guardian(s), their health and their ability to care for your children. It is recommended that you speak to those you are considering to confirm they are willing to accept this responsibility. It's also a good idea to name back-ups in case your first choice(s) can't or won't take on the responsibility when the time comes. Note that ultimately it is up to the courts to decide what is in the best interest of the child(ren); however, the parents' wishes usually play a significant part in the courts' decision.

**5. Consider signing a notarial will if you are a Quebec resident.** Unlike other forms (holograph or made before witnesses), a notarial will doesn't have to be verified by the courts, avoiding future costs and delays.

## OTHER TYPES OF WILLS

**Holograph will:** A holograph will is simply an entirely handwritten will that is signed only by you. Holograph wills can be problematic if the instructions are not absolutely clear. Furthermore, some provinces don't recognize holograph wills or have different signing requirements.

**Stationary will:** Wills that are referred to in some jurisdictions as "stationary wills" are available through various retail outlets. Here, a pre-set form provides paragraphs with blanks that the writer of the will completes to provide directions after his or her death. While stationary wills have grown in popularity in recent years, you should be aware that problems with interpretation and non-compliance with provincial statutory requirements have been associated with these types of documents. Such issues cost the estate fees and delay distributions out of the estate.

It is advisable to avoid both holograph and stationary wills, especially if you have family members you wish to protect or significant assets you wish to allocate after you are gone.



## **YOUR WILL HAS BEEN PREPARED – NOW WHAT?**

Once you have prepared your will, you must remember to keep it updated. You should review your will regularly and amend it whenever there is a significant event in your life or the lives of your heirs, such as a marriage, divorce, birth, death, disability or new business. Keep in mind that in most provinces other than Quebec, marriage revokes an existing will unless the will specifically contemplates the marriage. A will should also be reviewed after a change to income tax, family or successor laws.

Ideally, a will should be reviewed every year or two even if there haven't been any significant changes to ensure that it continues to reflect your intentions. Keeping a will current is also your best insurance against potential changes in legislation.

## **DO COMMON-LAW PARTNERS HAVE THE SAME RIGHTS AS SPOUSES?**

Although common-law partners are treated in the same way as spouses for tax purposes, their rights under certain provincial estate laws may be limited, and this varies from province to province. If you are currently in a common-law relationship, it is very important to consult with a lawyer to become more familiar with the laws in the province where you reside. For instance, under the Quebec Civil Code, common-law partners have no rights. Without a valid will, a common-law partner could be left with nothing. This could be

particularly detrimental if there are minor children involved. The common-law partner may not have other assets to adequately provide for him or herself and the children, and it may be that they cannot easily access any money inherited by the children.

## **PROTECTION FOR YOU AND YOUR FAMILY**

A will is the foundation of an estate plan. The goal of having a properly drafted will is to ensure your assets will be distributed according to your wishes and that your loved ones will be properly provided for in a tax-efficient manner. By creating a will, you can avoid unnecessary costs, delays and the undesirable results of intestacy, while gaining the ability to choose the executor of your estate and the guardian(s) of your children. When you consider that most wills can be prepared for a few hundred dollars, and also take into account the potential consequences of not having one, it is clear that everyone should have a will.

Note: There may be certain situations in which a will is properly drafted, but a dependant who is left out can make a dependant's relief claim. If successful, this may change the distribution of assets contemplated by the will.

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