Structuring an effective will

You work hard all your life to provide for yourself and for 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 an individual has a will to detail his/her wishes. Estate planning ensures that assets will be 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 important, 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 that creditors of the deceased are paid and to disburse the deceased's assets according to his/her will.

Why do I need a will?

Anyone who has a spouse, partner or children, or is simply concerned with how his/her property will be distributed after 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 sizable assets and dies intestate can be complicated, and may require 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 where the testator was domiciled when he/she died. Real property will be dealt with based on the intestacy rules of the province where the property is located. If the deceased is a single parent of minor children, those children will be placed under the care of a guardian appointed by the courts. If some family members have special needs, they may not be given the same priority by the courts as the testator might wish.

Without a will, your survivors will need to apply to a court to take care of your estate – and the court may not appoint the person you would have chosen. The time taken by the court to appoint an administrator to act on behalf of your estate may lead to cash-flow problems for your heirs. Keep in mind, that until an appointment is made, no one has the legal authority to deal with 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.

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, in certain aspects both the method of implementation and the terms used differ greatly. Aspects of Quebec will planning are discussed later in this document.

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.

What if I die without a will (intestate)?

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

Provincial Intestacy Rules (current as at January 2008)

Province	Preferential share (after debts are paid)	Spouse + 1 child Remaining assets	Spouse + more than 1 child Remaining assets
British Columbia	$65,000	1/2 to spouse 1/2 to child	1/3 to spouse 2/3 to children
Alberta	$40,000	1/2 to spouse 1/2 to child	1/3 to spouse 2/3 to children
Saskatchewan	$100,000	1/2 to spouse 1/2 to child	1/3 to spouse 2/3 to children
Manitoba	$50,000 or 1/2 (whichever is greater)	All to spouse[1]	All to spouse[1]
Ontario	$200,000	1/2 to spouse 1/2 to child	1/3 to spouse 2/3 to children
Quebec	$Nil	1/3 to spouse 2/3 to child	1/3 to spouse 2/3 to children
New Brunswick	Marital Property	1/2 to spouse 1/2 to child	1/3 to spouse 2/3 to children
Prince Edward Island	$Nil	1/2 to spouse 1/2 to child	1/3 to spouse 2/3 to children
Nova Scotia	$50,000	1/2 to spouse 1/2 to child	1/3 to spouse 2/3 to children
Newfoundland and Labrador	$Nil	1/2 to spouse 1/2 to child	1/3 to spouse 2/3 to children
Northwest Territories	$50,000	1/2 to spouse 1/2 to child	1/3 to spouse 2/3 to children
Yukon	$75,000	1/2 to spouse 1/2 to child	1/3 to spouse 2/3 to children
Nunavut	$50,000	1/2 to spouse 1/2 to child	1/3 to spouse 2/3 to children

[1] If all of the children are also children of the surviving spouse.

Example of intestacy

John was 42 when he was killed in an 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-deferred 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 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

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 a "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 many provinces, 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

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 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.

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 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 or partner, child or other close family member who was financially dependent on the deceased during his/her lifetime continued support from the estate, even if he/she intentionally omitted that person from the 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.

For more information about this topic, contact your advisor, call us at 1.800.874.6275 or visit our website at www.invescotrimark.com.

Getting advice

A will requires careful planning to ensure that 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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