

Wills 101¹

Preparing a will is not something most Canadians look forward to. Yet there are a number of good reasons why you shouldn't procrastinate in getting your will prepared – especially when you consider how little it costs and the benefits that come with it.

Having a will helps facilitate the administration of your estate and can help you save taxes. A will communicates your intentions and can allow you – and not the government – to determine how your assets will be distributed upon your death. 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 IF I DON'T HAVE A WILL?

If you don't have a will or your will is determined 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 the provincial intestacy laws your spouse will usually receive a certain amount of your estate, commonly known as the "preferential share," and the remainder will be divided between your spouse and your children. 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 guardian) 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.

¹ This Wealth Transfer Strategy applies to all provinces other than Quebec. For Quebec residents refer to Wills 101 (Quebec edition) MK2263

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.

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 RRIAs), 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 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. Set out any instructions or wishes for your funeral arrangements.** You can outline how your funeral arrangements are to be handled or any other special instructions.

YOUR WILL HAS BEEN PREPARED – NOW WHAT?

Once you have prepared your will, you must remember to keep it updated to ensure it continues to reflect your intentions. You should review your will regularly, perhaps every few years or 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 a 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.

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.

DO COMMON-LAW OR SAME SEX PARTNERS HAVE THE SAME RIGHTS AS SPOUSES?

Although common-law and same sex 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 or same sex relationship, it is very important to consult with a lawyer to become more familiar with the laws in the province where you reside. Without a valid will, a common-law or same sex partner could be left with very little. This could be particularly detrimental if there are minor children involved. A common-law or same sex 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 or inadequately provided for can make a dependant's relief claim. If successful, this may change the distribution of assets contemplated by the will.

IDEAL CANDIDATES

Investors who want to:

- Ensure their assets are distributed according to their wishes
- Facilitate the administration of their estate and minimize taxes
- Select the executor(s) of their estate and guardian(s) of their children
- Set out specific instructions on certain matters such as their funeral arrangements

TAKE ACTION

If this applies to you, then:

- If you don't have a will, have one prepared by your lawyer
- If you do have a will, review it regularly to make sure it still reflects your wishes and amend or update it if need be

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 may invalidate the will or add costs to the administration of the estate and delay distributions out of the estate.

Having a will prepared by a lawyer is always preferable to 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.



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