Wills and Will Planning

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1 › The importance of your Will

A valid Will is an important document that all adults should be encouraged to maintain throughout their lifetime. Unfortunately, while the need for this document is widely accepted, its creation is commonly overlooked. The aim of this publication is to assist you in gaining a better understanding of the issues and opportunities that should be considered when preparing a Will. Your Will should be prepared within the context of an overall estate plan. This may include alternate methods of passing assets to your beneficiaries, for example by designating a beneficiary on a registered plan or holding assets in joint names with a right of survivorship (except in Quebec). An estate plan can help ensure that all elements of your current situation are addressed and your estate objectives are met. This publication is not intended to replace the professional advice provided by your professional legal advisor, but rather to assist you in the preparation of your Will plan. Once you have read this publication, use the checklists at the end of this guide (in the appendices) to outline the basic terms that you wish to include in your Will. Upon completion, review them with your professional legal advisor, who will help you to prepare your Will.

2 › Passing away without a Will (intestacy)

A Will is a vital tool that enables you to leave your assets to the beneficiaries you choose.

WHAT HAPPENS TO THE ESTATE IF YOU DO NOT HAVE A WILL OR THE WILL IS CONSIDERED INVALID?

If you die without a valid Will or if your Will cannot be located, you are considered to have died "intestate." Similarly, if you do not dispose of all of your assets in your Will or by alternate methods (e.g. by designating a beneficiary or through a joint account, except in Quebec) you are considered to have died "partially intestate." In either case, your estate is to be administered under the provincial or territorial intestate succession legislation for the province or territory where you live.

All provinces and territories have laws that govern the distribution of your property if you die without a Will. If you die leaving surviving family members, no matter how distant the relationship, your assets will be divided among those family members who are most closely related to you.

In the unlikely event that you do not leave a Will and have no living relatives, those assets that would have been distributed according to the terms of the Will go to the province or territory in which you lived. This is referred to as property that is "escheated" to the government.

Estate assets that pass to beneficiaries who have not reached the age of majority may be held in trust by the court until the minor reaches the age of majority or until the minor's guardian is granted custody of the assets.

ADMINISTRATION OF THE ESTATE

If you leave a Will you have the opportunity to appoint an executor (liquidator in Quebec) to administer your assets. If you do not leave a valid Will, the court must appoint someone (commonly referred to as an "administrator") to manage your affairs after your death. There is no one with authority to act on behalf of your estate until this appointment has been made.

When an administrator has been appointed, that person performs duties similar to those of an executor (liquidator in Quebec) appointed under a Will.

The administrator will pay your debts and testamentary expenses from your assets and then distribute the rest of your estate in accordance with the laws of the province or territory where you lived.

In Quebec, if you have not left a valid Will or if a liquidator is not named in your Will, your heirs will become the liquidators.

RULES OF DISTRIBUTION OF THE ESTATE

There is a common belief that your spouse will inherit everything upon your death if you die without a Will. In most provinces or territories, if you die leaving a spouse and children, your spouse will receive a preferential share of the estate. The definition of spouse for intestacy purposes varies from province to province. However, in some provinces and territories (for example Saskatchewan and British Columbia), "spouse" includes common-law partners of the same or opposite sex. Most provinces and territories initially provide the spouse with a "preferential share" — a predetermined amount of the deceased's assets that is awarded to the spouse. If your estate is greater than the preferential share, the balance is then divided between your spouse and children. Table 1 sets out the provinces and territories in which the law provides for a preferential share together with the preferential shares for each jurisdiction.

If the value of your estate is greater than the preferential share, or if you do not have a surviving spouse and/or surviving children, the residue of your estate will be distributed as shown in Table 2 on the next page.

TABLE 1

Spouse's preferential share of the estate[1]

Province or territory	Preferential share (after debts are paid)
Alberta	$40,000
British Columbia	$65,000[2]
Manitoba	The spouse receives the entirety of the estate if all children of the deceased are also children of the spouse; if not, the spouse gets the greater of $50,000 or half of the deceased's estate as his or her preferential share and half the remainder of the intestate estate (if any) after payment of the above share.
New Brunswick	Marital property (generally all estate assets excluding business assets and gifts or any inheritance received by the deceased)
Northwest Territories/Nunavut	The greater of $50,000 or the principal residence of the deceased
Nova Scotia	The greater of $50,000 or the principal residence of the deceased
Ontario	$200,000
Saskatchewan	$100,000
Yukon Territory	$75,000

[1] The provinces of Quebec, Prince Edward Island and Newfoundland & Labrador do not provide for a preferential share for the spouse of the deceased.
[2] The preferential share of the estate is subject to change under proposed legislation that may come into effect in 2011.

TABLE 2

Estate distribution

Province or territory	Spouse only	Spouse and one child[1]	Spouse and more than one child[1]	Children only	No spouse and no children
Alberta	All to spouse	Split equally	1/3 to spouse and 2/3 to children	All to children	Generally in the following order: › Parents › If neither survive, then brothers and sisters › If none survive, then nieces and nephews › If none survive, then next of kin › If none survive, then estate assets are left to the provincial or territorial government
British Columbia[3]	All to spouse	Split equally	1/3 to spouse and 2/3 to children	All to children	
Manitoba	All to spouse	All to spouse[2]	All to spouse[2]	All to children	
New Brunswick	All to spouse	Split equally	1/3 to spouse and 2/3 to children	All to children	
Newfoundland & Labrador	All to spouse	Split equally	1/3 to spouse and 2/3 to children	All to children	
Nova Scotia	All to spouse	Split equally	1/3 to spouse and 2/3 to children	All to children	
Northwest Territories/Nunavut	All to spouse	Split equally	1/3 to spouse and 2/3 to children	All to children	
Ontario	All to spouse	Split equally	1/3 to spouse and 2/3 to children	All to children	
Prince Edward Island	All to spouse	Split equally	1/3 to spouse and 2/3 to children	All to children	
Quebec	All to spouse	1/3 to spouse and 2/3 to child	1/3 to spouse and 2/3 to children	All to children	
Saskatchewan	All to spouse	Split equally	1/3 to spouse and 2/3 to children	All to children	
Yukon Territory	All to spouse	Split equally	1/3 to spouse and 2/3 to children	All to children	

[1] In all provinces and territories except Manitoba, the surviving issues (i.e. children and grandchildren) of a deceased child will take that child's share.
[2] Where there is at least one surviving child of the deceased who is not a child of the surviving spouse, then the surviving spouse will share half of the estate with that child.
[3] The estate distribution for British Columbia is subject to change under proposed legislation that may come into effect in 2011.

3 › Planning your Will

A Will is a legal document that can help ensure that your assets pass according to your wishes after your death. Your Will only becomes effective, and public, after your death, when it is probated. Until then, you can change the terms or revoke your Will as long as you are mentally competent.

PURPOSE OF HAVING A WILL

A Will is one way to ensure that your property will be distributed according to your wishes after your death. Alternate methods include naming beneficiaries of registered plans and holding assets in joint names with the right of survivorship (except in Quebec). If you die without a Will, those assets that would have passed under the terms of the Will will be distributed according to the laws of the province or territory in which you reside (as discussed on pages 2–4).

Your Will should name your executor(s) (liquidators in Quebec) and the individual(s) and/or institution (e.g. trust company) that will act on your behalf to carry out your wishes. Without a Will, the courts may appoint an administrator for your estate, who will probably not be the individual or institution you would have chosen.

You can also designate in your Will the individual(s) you want to be the guardian(s) of your children in the event of the death of both you and your spouse. Although this will not be legally binding, your wishes will be carefully considered by the courts in deciding who will look after your children.

An estate plan that incorporates a Will can help you ensure that you have provided sufficient income for your spouse and children. A Will may also help you determine if there are appropriate tax savings or deferral strategies that can be implemented by your executor.

TYPES OF WILLS

Holograph Will

A holograph Will is a Will that is written entirely in your own handwriting and signed by you. No witness is necessary. This type of Will is generally not recommended as it may be difficult for your beneficiaries to interpret your wishes if any portion of the Will is unclear. Some provinces do not recognize holograph Wills.

Formal Will

A formal Will is prepared and signed by you in the presence of at least two witnesses. These witnesses cannot be your beneficiaries or their spouses. Many formal Wills are drafted by lawyers or notaries. The advice of an experienced legal professional can ensure that your Will accurately represents your wishes and provides for the distribution of your estate according to your circumstances.

Notarial Will (Quebec only)

A notarial Will is prepared by a notary and signed before a witness. This Will must state the date and place where it was executed. In certain cases, the presence of two witnesses may be required; for instance, when a testator is blind.

Unlike the other two forms of Wills, the notarial Will does not need to be probated by a court in the province of Quebec. The probate process is not required because, under Quebec law, the notary is seen as an officer of the court able to authenticate Wills.

EFFECT OF A CHANGE IN MARITAL STATUS

In most provinces and territories, a valid Will is revoked if you marry after signing it and have not specifically referred to your impending marriage in the Will.

Divorce does not invalidate your Will, but, in some provinces and territories, divorce will revoke the benefits for your former spouse unless the Will provides otherwise.

In these same provinces and territories, if your former spouse is appointed as executor, this appointment will also be revoked, unless there is a contrary provision in your Will.

4 › Issues to consider when planning your Will

A Will requires careful planning to ensure that all aspects of your estate plan are covered. The following paragraphs describe some of the common clauses required in a Will. (Note: not all of the following clauses will be contained in every Will.)

IDENTIFICATION AND REVOCATION CLAUSE

This clause contains your name and address. It declares that this is your last Will and revokes all prior Wills. The revocation clause is always advisable to avoid confusion or any questions at the time of death. It is worth noting that if more than one Will exists at the date of death, the Will with the latest date of execution will generally govern the distribution of your estate.

APPOINTMENT OF AN EXECUTOR

The executor (also called an "estate trustee with a Will" in Ontario and a "liquidator" in Quebec) is the person, institution or trust company you name in your Will to be responsible for administering your estate in accordance with your Will and the relevant law. In essence, the executor takes control of your assets upon your death and distributes them in accordance with your intentions as stated in your Will.

Your executor derives his or her authority from your Will. Probate confirms the Will's validity to the individuals and organizations with which your executor must deal. The probate process does not grant the power to the executor. This power is granted in the Will itself.

The duties of an executor include, but are not limited to, the following:

- Making funeral and burial arrangements
- Preparing an inventory of the assets of the estate
- Probating your Will if necessary
- Gathering the assets of the estate
- Paying debts and other expenses of the estate (e.g. the funeral bill, credit card accounts, income tax)
- Obtaining a clearance certificate(s) from Canada Revenue Agency (CRA); in Quebec a clearance certificate is also obtained from Revenu Quebec
- Distributing the remaining assets in accordance with the directions in your Will

Your executor has a duty to administer your estate according to the applicable provincial or territorial laws and in the best interests of your beneficiaries. The executor also has a responsibility to provide a financial record of his or her management of your estate and payments to your beneficiaries. If your children or grandchildren are to share in your estate, your Will may direct your executor to hold their distributions in trust and invest the funds until they attain the age(s) specified in your Will. As a result, the selection of an executor is not always an easy task.

The clause appointing an executor designates the individual(s) or institution that you wish to appoint as your executor. The clause may also provide for the payment of compensation to the executor for services the executor performs while administering your estate.

You should consider appointing an executor who lives in close proximity to you. In some jurisdictions, such as Ontario, an out-of-country executor may be required to post a bond before the court will allow the executor to administer the estate.

When choosing an executor, you should also take into consideration the assets that he or she will have to administer and the way in which you wish your estate to be managed. If you have complex business affairs that will need to be wound up, or if you wish to have assets managed in trust for an extended period of time, your spouse alone may not be the appropriate choice.

In these circumstances, you may wish to include younger family members or trusted advisors or friends who have financial or business experience. If there is family friction or an overly complex estate, you may wish to name an independent executor such as a trust company.

Corporate executors are experts in estate, trust and taxation matters. They are equipped to handle complex estates and can ensure that your beneficiaries are treated fairly and impartially.

You should always name one or more alternates to any primary executor you appoint in case the executor you choose is unable or unwilling to act at the time of your death or is unable to continue to act before all of your estate is administered.

Ask the person you wish to appoint if he or she is willing to act as executor. This way the person is informed in advance and can tell you whether or not he or she is prepared to act in this role.

Business partners often choose to appoint their business associate as an executor of their estate. In some cases this places the business associate in a conflict-of-interest position in regard to the business assets of the deceased. If this is likely, it is best to include a specific clause in the Will to deal with this matter.

You may want to appoint RBC Estate and Trust Services* as a sole executor (if you want someone to act independently), co-executor (if you wish to include input from a friend or family member) or an alternative executor (in case your initial executor is unwilling or unable to act). Ask your advisor at RBC® for information regarding executor services offered by RBC Estate and Trust Services.

*Naming or appointing Estate and Trust Services refers to appointing either Royal Trust Corporation of Canada or, in Quebec, The Royal Trust Company.

PAYMENT OF DEBTS, TAXES AND FEES

This clause directs your executor to pay all debts such as mortgages, loans, funeral expenses, estate administration expenses, probate taxes and income taxes that may be due.

The executor of the estate is generally obliged to pay all required taxes and debts of the deceased before distributing the assets of the estate to the named beneficiaries.

This is one of the main reasons why executors usually wait to obtain a clearance certificate from the CRA before distributing large amounts of the deceased's assets. In Quebec, a clearance certificate is obtained from Revenu Quebec. If a clearance certificate is not obtained from the CRA or Revenu Quebec, then the executor can be held personally liable for outstanding amounts owed by the deceased. This liability is limited to the assets of the deceased.

A clearance certificate certifies that all amounts for which the deceased is liable have been paid to the CRA (or Revenu Quebec), or the CRA (or Revenu Quebec) has accepted security for the payment.

SPECIFIC BEQUESTS

You may have specific items, such as jewelry, artwork, antiques, family heirlooms or other personal property, that you would like to go to named individuals. Specific items of personal property that you wish to transfer to your beneficiaries are commonly referred to as "bequests." If you wish your executor to be legally bound to transfer them as you have instructed, you should include them in your Will.

Registered retirement savings plans (RRSPs), registered retirement income funds (RRIFs) and pensions are not normally considered to be bequests. These registered assets are commonly dealt with under a separate clause in the Will, or specific beneficiaries are designated on the plan documents. In Quebec, beneficiary designations are not permitted on registered plans and tax free savings accounts (TFSA) and must be made in your Will.

A binding memorandum, which must be signed prior to the date of your Will and referred to in your Will, may also be used to achieve this objective. Alternatively, you may wish to leave an informal non-binding memorandum concerning these items and rely upon your family members to carry out your wishes without imposing a legal obligation to do so.

LEGACIES

You should consider whether there are any individuals or organizations to which you would like to leave a lasting legacy through a specific cash gift from your estate. Perhaps you would like legacies to be paid to your grandchildren or to a church, university or cultural organization with which you have been involved during your lifetime, either for general purposes or for a specific purpose that is important to you.

A Will may contain as many legacies as you desire. These represent an outright distribution from your estate. For example, you might wish to give $50,000 to a favourite charity. There may be tax benefits to making gifts to charities depending on the circumstances. For additional information on making charitable gifts in your Will, ask your advisor for a copy of the RBC publication "Charitable Giving."

Legacies are paid before any other bequests in your Will. The balance of your estate, called your "residual estate," is distributed after the payment of liabilities.

RESIDUAL ESTATE

The clause that outlines the distribution of your remaining estate after paying bequests, debts, testamentary expenses, taxes and legacies is commonly referred to as the "residue clause." In some cases you may wish to set up a testamentary trust (see page 11) with part or all the residue of your estate. This may be to benefit your spouse and/or children or grandchildren. However, you should also consider that an outright gift might be more appropriate.

You may want to use a portion of the residue of your estate for other purposes. For example, you may wish to make gifts to more distant family and friends, particularly if you do not have a spouse, children or grandchildren or if your estate is more than sufficient to provide adequately for your immediate family's needs.

TESTAMENTARY TRUSTS

A trust that is created by a Will is called a "testamentary trust" and can have numerous uses. These could include providing benefits to spouses, disabled children, spendthrift children, or achieving family income-splitting.

Testamentary trusts can be discretionary or non-discretionary. The terms of the trust are set out in the Will. A discretionary trust gives the trustee the power to decide when to distribute income and/or capital to the beneficiaries. Non-discretionary trusts generally set out the specific circumstances in which the trustee can distribute income and capital. In some cases it may be possible for the testator to achieve estate planning objectives and implement wealth planning strategies through the use of a discretionary trust.

The Henson Trust is an example of a discretionary trust that may be used to benefit beneficiaries with disabilities. The trustee has absolute discretion to make payments to or for the benefit of the disabled beneficiary. As the beneficiary has no entitlement to the funds, the assets held in the trust may not be considered to be the beneficiary's assets. In a number of provinces and territories, individuals receiving disability benefits can still receive discretionary benefits of this kind without affecting their eligibility for disability payments.

You may wish to designate a trust company to provide trustee services. Ask your advisor at RBC for information regarding trustee services provided by RBC Estate and Trust Services.

GIFTS TO MINORS

A testator should know that if funds are left to a minor in the Will, the executor cannot pay the funds directly to the minor or expect to receive a legally binding release until the child reaches the age of majority. Unless there are other provisions in the Will that deal specifically with this question, the executor has to pay the money into court in order to be discharged with respect to the gift. To prevent this, the testator could permit the executor to hold such a gift in trust until the child reaches the age of majority.

It is a good idea for the testator to be very specific about how he or she wants the trustee to deal with assets that are left to a child. Many testators provide powers of encroachment (see "Encroachment clause" on page 10) to the trustee to enable the trustee to use the assets in

the best interests of the child. Alternatively, if the testator does not wish to prolong the administration of the estate, he or she may direct the executor to pay the child's inheritance directly to the child's guardian.

If a testator is uncomfortable with the child obtaining the funds at the age of majority, he or she could include a "gift-over" clause — a condition that must be met (e.g. the child must attain the age of 25) before the child can obtain the funds. If the condition is not met, then the funds will be forfeited (or gifted-over) to the other beneficiaries.

In the case of an insurance policy that has a minor as the designated beneficiary, unless a trustee is designated, once the proceeds are distributed, these sums will generally have to be paid into court. An application will then have to be made by a concerned individual, usually a legal guardian, to act as the guardian of the child's assets.

Obtaining access to funds from the court is often a time-consuming process. A possible solution is to create an insurance trust. Basically, an insurance trust is set up when the trustee receives the insurance proceeds to be held for the benefit of the beneficiaries. As the trust is created due to the death of the testator, the insurance trust created is a testamentary trust.

POWER CLAUSES

These clauses enable your executor to exercise various powers in the management of your estate without obtaining court approval. A common power clause relates to the investment powers of an executor and trustee.

Depending on the terms of your Will, it may be necessary for the executor and/or trustee to invest money held in the estate or any trust you set up in your Will. If the Will does not confer additional powers for the investment of estate or trust assets, then the executor will be bound by the investment requirements of provincial trust legislation, called the "Trustee Act" in many provinces. The Trustee Act may be restrictive in terms of the investments permitted or in the ability to invest in mutual funds or to delegate investment decisions.

In the past few years, all the provincial and territorial bodies (except Quebec) have adopted the "prudent investor rule" for their provincial trust legislation. Basically, the prudent investor rule requires the trustee to consider the purposes, terms and other circumstances of the trust and pursue an overall investment strategy that is appropriate to the trust.

Another common power is the power to make certain elections on the deceased's final tax return. For example, in many cases on the death of a spouse, the surviving spouse will receive the assets of the deceased spouse. Canadian tax rules provide that when the assets are transferred to a surviving spouse, this transfer occurs on a tax-deferred rollover basis. However, this may not be the most tax-efficient way to transfer these assets in all circumstances. If, for example, the deceased had unused capital gains exemption room or unused capital losses in the year of his or her death, the executor can be given the power to elect to trigger capital gains or losses instead of applying the rollover rules to those assets.

Other power clauses could include specific powers to deal with real estate, interests in corporations and borrowing and lending.

LIFE INTEREST

A life interest can be used when you choose to give a beneficiary income from or the enjoyment of the use of an asset (such as real property), rather than giving him or her the asset outright in the Will. A beneficiary who receives this kind of interest under a Will is known as a "life tenant." Upon the life tenant's death, the asset usually passes on to another beneficiary or to the estate.

This kind of clause can enable you to control an asset after your death and ensure that the assets provide adequate support for the beneficiary or beneficiaries you choose.

Finally, unless the Will states otherwise, the trustee must maintain a balance between the rights of the life tenant and the rights of the capital beneficiaries. This is known as "the even-hand rule."

ENCROACHMENT CLAUSE

This clause is included in a trust when you want to give the trustee power to provide funds to the life tenant or capital beneficiaries from the trust capital in special circumstances (e.g. for education or the start of a business) during the term of the trust.

FAMILY DISASTER CLAUSE

This clause provides directions for the distribution of your assets if all immediate family beneficiaries die with you in a common accident or within a short time period. This can be particularly relevant for young families who often live and travel together.

You may wish to name alternate beneficiaries to receive the residue of your estate in the unlikely event that you and your immediate family members perish together.

This can be the most difficult aspect of planning a Will, but it should not prevent you from making preparations to provide for your immediate family members and other beneficiaries in this unlikely scenario.

SURVIVAL CLAUSE

This clause provides that a beneficiary must survive the testator for a set period of time (often 30 days) before he or she can benefit from the estate. This clause is quite common between spouses to prevent the estate from being administered twice (and possibly from being subjected to probate taxes twice) in a short time period.

BUSINESS INTERESTS

If you are the owner or operator of a business, you may require special provisions in your Will to deal with how the business should be managed or disposed of following your death. You will probably require provisions that are unique to your individual situation, and these will need careful consideration.

GUARDIANS

If you have children who have not reached the age of majority, you may wish to appoint custodial guardians in your Will in the event that you and your spouse both die.

You may also wish to compensate the guardians for their out-of-pocket expenses and/or their time and efforts in caring for your children.

Each province and territory has specific legislation that deals with the issues of guardianship. However, the courts usually have the final say on what is in the best interests of the child.

In Quebec, the Civil Code allows the father or the mother to appoint a tutor for their children in their Wills. The right to appoint a tutor belongs to the last surviving parent.

FAMILY LAW CONSIDERATIONS

In some provinces and territories, such as Ontario, certain inheritances received by a beneficiary during his or her marriage are not subject to spousal division should the beneficiary's marriage break down. However, the income derived from the inheritance will be subject to spousal division, unless a clause is specifically inserted into the Will to exclude the income from division.

BURIAL INSTRUCTIONS OR ORGAN DONATIONS

It is not advisable to stipulate specific funeral instructions in your Will only. At the time of death, your Will may not be readily accessible. Consider also giving specific instructions to family and friends or putting these instructions in a document that will be readily available upon your death. The same would apply to organ donations. It is advisable to inform those who will be in a position to carry out your wishes in the event of your death. Donor cards are also an excellent way to ensure that your wishes are respected.

TESTIMONIUM AND ATTESTATION CLAUSES

The testimonium and attestation clauses are found at the end of your Will. These clauses ensure that the legal requirements for a validly executed Will are met and provide the space for the testator and two witnesses to sign the Will.

5 › Testamentary trusts

A testamentary trust is a trust usually established under the terms of a Will. It only becomes effective after your death. In a trust, you identify a sum of money or other property as trust assets to be held for a specified period for beneficiaries you have named in the terms set out by you in the Will. For example, you may wish to bequeath a portion of your estate to your grandchildren, but feel that they should not receive their inheritance until they are old enough to manage it responsibly. In this case, you direct your trustees to hold and invest the inheritance in trust for your grandchildren until they reach an age you consider appropriate.

It is common practice (but not mandatory) to name the executor of your estate as the trustee of any testamentary trust that may have been created. Testamentary trusts may have a life span of a few years or may continue for many years after the initial administration of your estate has been completed.

When drafting a testamentary trust clause, you should identify the trust's income and capital beneficiaries, the nature of the assets (or a dollar value) to be set aside and held in trust and the details of how the assets are to be managed and distributed.

You may wish to provide your trustees with the discretionary power to advance trust income to the beneficiaries for education or other purposes. You can also give them the discretion to encroach upon capital if income is insufficient to provide for the beneficiaries' needs.

REASONS FOR CREATING TESTAMENTARY TRUSTS

Testamentary trusts are frequently created to benefit spouses, children, grandchildren, or to hold real estate (e.g. the family cottage) for the use of a spouse or other family members.

CHILDREN'S AND GRANDCHILDREN'S TRUSTS

Trusts for children and grandchildren can be established for a variety of purposes including:

- Trusts for young children who have not attained the age of majority and cannot hold assets directly
- Trusts for children with disabilities
- Trusts for education
- Trusts to protect an adult child who has poor money management skills or marital or creditor problems

Such trusts may also provide a mechanism for splitting income among your children or between a child and his or her family members to minimize the overall tax burden on the family. This could represent an income-splitting opportunity since the income earned by your child and the child's trust would be taxed separately at each child's own marginal tax rate.

Children's trusts often provide a share of the estate to be held and invested for the child, with access to income and/or capital for the child's support and education at the trustee's discretion. The trustee is directed to pay a portion of the capital to the child at specified ages.

SPOUSAL TRUSTS

Spousal trusts are usually established to hold all or a portion of your estate for your spouse during his or her lifetime. On the death of your spouse, the assets are distributed in accordance with the directions contained in your Will and not pursuant to your spouse's Will.

There are several reasons for setting up spousal trusts:

- To provide support for your spouse and ensure that, in the event that your spouse remarries, your children will receive your remaining assets on your spouse's death
- To ensure that your assets go to your children in situations where you are in a second marriage

› To defer income tax — if your assets have large accrued (unrealized) capital gains, provided your spousal trust meets the requirements of the Income Tax Act, the income tax payable at the time of your death can be deferred by rolling the assets into a spousal trust (a spouse for income tax purposes includes a common-law partner of the same or opposite sex with whom you have cohabitated for a continuous period of at least one year). The tax that would otherwise be payable on the capital gains is deferred until the asset is actually sold or until the surviving spouse's death.

You may choose to utilize the services of a professional trust company such as RBC Estate and Trust Services* to act as trustee for your testamentary trust. One of the key benefits of using a trust company is the security of knowing you are engaging experienced professionals to protect the interests and requirements of your testamentary trust. If you would like the input of a family member or friend on personal matters related to your trust, you can name RBC Estate and Trust Services as your trustee, and appoint a family member or a friend as co-trustee. This will relieve the co-trustee of worries about managing the trust assets alone, and they will have access to sound financial insights of the trustee. Speak to your advisor at RBC regarding the trustee services available at RBC Estate and Trust services.

*Naming or appointing Estate and Trust Services refers to appointing either Royal Trust Corporation of Canada or, in Quebec, The Royal Trust Company.

COTTAGE TRUSTS

You may have a cottage or other seasonal residence that you wish to retain in your family after you and your spouse are gone. Although shared use with members of the next generation does not always work well, holding the cottage in a trust for a period of time enables your children and grandchildren to determine among themselves if and how shared use of the property can be managed.

If ongoing shared use of the property is not practical, there is time for your trustees, with knowledge of the wishes of your children and grandchildren, to decide which of them will become the owner(s) of the property and on what terms.

In addition, consider setting up a trust with funds to be used for the maintenance of the property if it is to be held in trust.

6 › Preparing your Will

Before you sit down with a lawyer or notary to draft your Will, ensure you have considered all elements of your estate plan and addressed all components of the Will (e.g. your selection of executor(s) and trustee(s)). You may wish to use the checklists at the end of this publication to summarize the key components of your Will to ensure that you have not overlooked any major issues.

Provide your lawyer or notary with a list of assets and liabilities, copies of relevant title documents (e.g. deed to house) and documents concerning any trusts or estates in which you have an interest. Finally, any documents concerning obligations or rights arising out of your marriage or former marriage (e.g. separation agreement or marriage contract) should also be provided. You may also wish to consider the use of the RBC publication called "The Family Inventory" to assist you in gathering all the relevant information.

USE OF A PREPRINTED FORM OR COMPUTER PROGRAM TO PREPARE A WILL

It is important that your Will is properly drafted to ensure that your wishes are carried out and your family does not bear the burden of extra expenses or problems concerning the legal interpretation of your Will following your death.

Preprinted forms and computer programs may seem like a valid way of saving money on legal fees. However, there is a risk that these forms could be completed incorrectly or that ambiguous wording could cost your beneficiaries more money in court and legal fees than the amount that you would have originally paid to have the Will properly drafted by a lawyer or notary.

Most stationery Wills cannot adequately express what the testator actually means because they contain generic clauses in an attempt to cater to all possible scenarios.

Your Will is an important document that governs the passing of your estate on your death and the provisions you have made to support your family. In view of this, you may be able to justify the expense of having this Will professionally prepared.

7 › Reviewing your Will

Often Wills are created and then filed away, never again to see the light of day until someone's death. This can be a mistake! In some situations, an out-of-date Will is worse than no Will at all. You should review your Will at least every two to three years to ensure that it continues to accurately reflect your wishes.

More frequent reviews may be necessary when significant changes in your financial or personal situation occur (e.g. the birth of a child). Make sure you revise your Will when any of the following events occur:

- You move to another province or territory
- There is a change in legislation that affects your current Will
- You or one of your beneficiaries separates, divorces or marries
- The designated executor, beneficiary or guardian of your minor children dies or becomes incapacitated
- You change your name, or someone mentioned in your Will changes his or her name
- You or a beneficiary experiences the birth or adoption of a child

After your Will has been prepared, you may decide that you need to make a change. If the changes are considered major, it is usually advisable to draft a new Will. However, if the changes are minor, it may be sufficient to prepare a codicil.

8 › International and multiple Wills

A testator who has assets in numerous jurisdictions should consider having an international Will.

The formalities of drafting and executing an international Will are set out in the "Convention Providing a Uniform Law on the Form of an International Will."

Another option for the testator is to have multiple Wills. In this strategy, a Will is drafted for each jurisdiction in which the testator maintains assets.

Multiple Wills can also be used in certain jurisdictions to help reduce possible probate taxes.

9 › Probating a Will

Probate is a legal process used to confirm that a Will is valid. It also confirms the appointment of your executor. Normally your executor, in conjunction with a lawyer, will file for probate with your provincial court. For Quebec residents who have a notarial Will, the probate process is not required.

When your Will has been probated, the court will issue an official probate document that confirms this (i.e. the name of this official probate document varies according to the province or territory where you live). A probate tax will have to be paid by the estate before the official probate document is issued. The tax is based on the total value of the assets that are part of your estate. The rate charged varies among the provinces and territories as indicated in **Table 3**.

Table 3		
Probate taxes for provinces and territories[1]		
Province or territory	**Estate value**	**Rates**
Alberta	First $10,000 $10,001–$25,000 $25,001–$125,000 $125,001–250,000 Over $250,000	$25 $100 $200 $300 $400
British Columbia	First $25,000 $25,001–$50,000 Over $50,000	Nil $6 per $1,000 $150 plus $14 per $1,000
Ontario	First $50,000 Over $50,000	$5 per $1,000 $250 plus $15 per $1,000
Manitoba	First $10,000 Over $10,000	$70 $70 plus $7 per $1,000
New Brunswick	First $5,000 $5,001–$10,000 $10,001–$15,000 $15,001–$20,000 Over $20,000	$25 $50 $75 $100 $5 per $1,000 of value of estate
Newfoundland & Labrador	First $1,000 Over $1,000	$60 $60 plus $.50 per $100
Nova Scotia	First $10,000 $10,001–$25,000 $25,001–$50,000 $50,001–$100,000 Over $100,000	$77 $193.61 $322.31 $902.03 $902.03 plus $15.23 per $1,000
Prince Edward Island	First $10,000 $10,001–$25,000 $25,001–$50,000 $50,001–$100,000 Over $100,000	$50 $100 $200 $400 $400 plus $4 per $1,000
Quebec	Any	NIL (if notarial Will, otherwise, nominal)
Saskatchewan	Any	$7 per $1,000
Northwest Territories	First $10,000 $10,001–$25,000 $25,001–$125,000 $125,001–$250,000 Over $250,000	$25 $100 $200 $300 $400
Nunavut	First $10,000 $10,001–$25,000 $25,001–$125,000 $125,001–$250,000 Over $250,000	$25 $100 $200 $300 $400
Yukon	First $25,000 Over $25,000	No fee $140

[1] Probate taxes for provinces and territories as at November 17, 2010.

Often financial institutions will not release the assets of an estate to an executor unless they have received an official probate document. This general requirement by third parties is the main reason that executors obtain probate. Probate offers third parties a form of guarantee that they are transferring the deceased's assets to the correct party.

10 › Challenging a Will

A Will is challenged when someone seeks to overturn the last Will and testament of a deceased person through the courts.

You can challenge a Will on several grounds. The most common grounds are the following:

- The testator did not have the mental capacity at the time that he or she signed the Will. This is usually called "lack of testamentary capacity on behalf of the testator."
- The testator was under "undue influence" from a third party at the time that he or she made the Will.
- The Will does not comply with certain legal formalities (e.g. the Will was not properly signed or witnessed).

To avoid these types of challenges to your Will, we recommend that you give careful thought to your Will to ensure that it clearly reflects your wishes and provides for your family.

Wills are most likely to be challenged when you prepare your Will in the final stages of a fatal illness or when you decide to make unusual dispositions of your estate. In addition, many provinces and territories have enacted laws that allow financially dependent family members to receive appropriate support from your estate if you fail to provide for them adequately in your Will.

11 › Conclusion

We hope that this document has been helpful in demonstrating how a Will can be an integral component of your estate plan. A Will is not something that you should put off for a later day. Draft it as soon as possible to ensure that your estate is distributed in accordance with your wishes and not under provincial or territorial intestacy rules. If you do not presently have a Will, or have not reviewed it recently, consider taking steps to draft one soon.

Appendix I — Will-planning checklist

The following checklist is intended to assist you in the preparation of your Will plan.This checklist should be reviewed if you are currently preparing your first Will. Note that this list reviews major items and is not an exhaustive list.

YES	NO	
☐	☐	Have you identified, listed and located all of your assets and liabilities?
☐	☐	Have you identified an executor or co-executors who can effectively act on your behalf? Have you also identified an alternate executor(s)?
☐	☐	Have you asked your chosen executor if he or she wishes to fulfill this responsibility? (The executor's duties can be significant. Therefore, it is important that he or she understands the potential scope of the responsibilities and length of time required.)
☐	☐	Does your executor know where your Will is kept?
☐	☐	Have you decided what degree of discretion you will allow the executor (e.g. a broader range of investment options or the ability to liquidate assets at his or her discretion)?
☐	☐	Have you identified any specific legacies for family members, charities or others?
☐	☐	Have you identified a specific beneficiary for your registered assets (e.g. RRSP, RRIF or pension)? Registered assets left to a surviving spouse or, in certain circumstances, to a financially dependent child or grandchild can be transferred on a rollover basis, deferring a significant tax liability.

YES	NO	
☐	☐	If you are making reference in your Will to beneficiaries of registered plans or life insurance policies, are these beneficiary designations in your Will consistent with the specific beneficiary designations on the plans (except in Quebec) or policies?
☐	☐	Have you considered the use of testamentary trusts for your spouse or for adult or minor children?
☐	☐	Have you considered staggering the distribution of inheritance to children? (This will depend on the size of inheritance and the child, but you may wish to pro-rate the distribution over several years.)
☐	☐	Have you named a guardian and alternate guardian for any minor children?
☐	☐	Are there any loans or debts owed to you by family members that you wish to forgive at death?
☐	☐	Are there any special circumstances that must be considered within your Will (e.g. children from a previous marriage, a common-law spouse, a pending divorce or bankruptcy of a beneficiary)?
☐	☐	Have you prepared a memorandum outlining the distribution of your personal effects?
☐	☐	Have you considered the implications of your provincial or territorial family or marital property laws if applicable?
☐	☐	Is a common disaster clause necessary?

Appendix II — Will-review checklist

In addition to the questions in Appendix I, individuals with a Will currently in place should answer the following questions. Note that this is not an exhaustive list. If you answer "yes" to any of the following questions, you should review your Will with your legal advisor to determine if changes are necessary.

YES	NO	
☐	☐	Since your Will was created, have you been married, divorced, separated, or have you started a relationship with a new partner?
☐	☐	Has a spouse or significant beneficiary died since your last Will was created?
☐	☐	Have you had any additions to the family, such as a child or grandchild, since your last Will?
☐	☐	Has your net worth significantly increased (e.g. with an inheritance) or decreased (e.g. because of bankruptcy) since you prepared your last Will?
☐	☐	Have you moved to a different province or territory since you prepared your last Will?
☐	☐	Have you acquired significant new assets, such as a cottage, business or farm, since you prepared your last Will?
☐	☐	Are your chosen executors or trustees still appropriate?
☐	☐	Do you wish to add or remove any beneficiaries?
☐	☐	Do you wish to change the terms of distribution to any of the beneficiaries?
☐	☐	Have there been any changes to relevant legislation since your Will was created (e.g. changes to the Income Tax Act or provincial or territorial Family Law Act)?

Glossary

Administrator — An individual or company formally appointed by a court to administer the estate of an intestate individual. (Terms vary by province or territory.)

Beneficiary — The recipient, such as an individual or a charity, who receives a benefit under a Will or a trust.

Bequest — A gift of personal property in a Will.

Codicil — A legal document that adds, deletes or modifies terms of an existing Will.

Discretionary trust — A trust that permits the trustee to use his or her discretion in determining how much income from and/or capital of the trust is to be paid to a beneficiary of the trust.

Estate — All property (real or personal) of a living or deceased person.

Executor (liquidator in Quebec) — The person or company appointed in the Will to carry out the wishes of the testator and to distribute and administer the property of the deceased. The term executor in this guide refers to both male and female executors.

Henson trust — A fully discretionary trust commonly associated with physically or mentally challenged beneficiaries. Properly structured, this trust may in certain jurisdictions enable the beneficiary to benefit from the trust while preserving their entitlement to provincial or territorial governmental assistance.

Holograph Will — A Will entirely handwritten and signed by the testator, which is not witnessed.

Intestate — Dying without leaving a valid Will. Partial intestacy occurs when there are estate assets that are not disposed of after giving effect to the Will.

Legacy — A gift of a specific sum of cash in the Will.

Official probate document — A court document confirming that a Will is the last and valid Will and that the named executor is the proper representative of the estate. The name of this document varies depending on the province or territory where you live.

Probate — The process of applying to the court to obtain an official probate document. (Terms vary by province or territory.)

Residue — Assets of the estate that remain after all debts, bequests and legacies have been paid.

Spouse — A married person. Depending on the province or territory, it can also include common-law partners of the same or opposite sex for purposes of intestacy and dependant relief legislation.

Testamentary trust — A trust created in a Will. A testamentary trust is taxed as a separate taxpayer at graduated marginal tax rates.

Testator — The person who makes the Will. The term testator in this guide refers to both male and female testators.

Trust — A legal relationship between the settlor, trustee and beneficiary.

Trustee — The person or company who is appointed to maintain and administer the assets of a trust for the benefit of the beneficiaries of the trust in accordance with the terms of the trust.

Will — A legally binding document that outlines the administration and distribution of the assets of the testator upon his or her death in accordance with his or her wishes.

Notes

For more information,
speak with an Investment Advisor
from RBC Dominion Securities Inc.

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