Wills and Will Planning

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1 › The importance of your Will

There are few who would dispute the fact that a valid Will is an essential document that all adults should maintain throughout their lifetimes. 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 will 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 assist you to prepare your Will.

2 › Passing away without a Will (intestacy)

A Will is the cornerstone of every estate plan. At the time of your death, it can mean the difference between leaving your assets to the beneficiaries of your choice and putting them in the hands of the provincial or territorial government to distribute them on your behalf.

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

When you die without a valid Will, or when it cannot be located, you are considered to have died “intestate.” Similarly, if your Will fails to dispose of all of your assets, you are considered to have died “partially intestate.” In either case, your estate shall be administered under the relevant provincial or territorial intestate succession legislation.

All provinces and territories have laws that govern the distribution of your property should you die without a Will. Should you die leaving surviving family members, no matter how distant the relationship, the government will not take your assets. Instead, they will be divided among your family members most closely related to you.

If you have no Will and no living relatives, your estate will go to the province or territory in which you reside. This is referred to as property that is "escheated" to to the government.

If you die intestate, the government-appointed person who will administer your assets following your death will determine who will share in your estate, the proportions that will go to each of them and the age at which your minor beneficiaries will inherit your assets based on the laws of the province or territory in which you reside.

Also, assets of the estate left 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 have not left a valid Will, the court must appoint someone (commonly referred to as an “administrator”) to manage your affairs after your death. Until this appointment has been made, no one has any authority to act on behalf of your estate.

Once the administrator has been appointed, that person must perform duties similar to those of an executor (liquidator in Quebec) appointed under a Will.

The administrator must pay your debts and testamentary expenses from your assets and then distribute the balance of your estate in accordance with provincial laws.

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

RULES OF DISTRIBUTION OF THE ESTATE

Contrary to the common belief that your spouse will inherit everything upon your death, in most provinces or territories, your spouse will not receive all of your assets should you die leaving a spouse and children. The definition of spouse for intestacy purposes varies from province to province. However, in some provinces and territories (including 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. The provinces and territories in which the law provides for a preferential share and the relevant preferential shares are set out in **Table 1**.

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
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.
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.

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	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 › Planning your Will

A Will is a legal document that is essential to ensuring that your testamentary wishes are carried out with minimal expenses and delays. Your Will won't become effective or public (and even then only if it is probated) until after your death. 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 the only way that you have of ensuring that your property will be distributed according to your wishes after your death. If you die without a Will, your assets 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) and the individual(s) and/or institution that will act on your behalf to carry out your wishes. Without a Will, the courts may appoint an administrator of your estate who is not the exact individual you would have chosen.

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

A Will can help you plan for the sufficient provision of income for your spouse and children.

A Will also helps you determine 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 leave your intended beneficiaries with difficulties trying to interpret your wishes if any portion of the Will is unclear. In fact, some provincesand territories do not even recognize holograph Wills.

Formal Will

A formal Will is typed and signed by you in the presence of at least two witnesses. These witnesses cannot be your beneficiaries or their spouses. Lawyers or notaries draft most formal Wills because they are qualified and trained to ensure that the legal drafting of your Will meets your wishes and your beneficiaries' needs.

Notarial Will (Quebec only)

A notarial Will is prepared by a notary and signed before a witness. This Will must bear mention of the date and place where it was made. 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

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

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

In these same provinces and territories, if your former spouse is appointed the executor, this appointment is also 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 are covered. The following is a description of some of the common clauses contained in a Will. (Note: not all of the following clauses will be contained in every Will.)

IDENTIFICATION AND REVOCATION CLAUSE

This clause identifies you and your residence. 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 the Will that bears the latest date of execution will generally govern the distribution of your estate.

APPOINTMENT OF AN EXECUTOR

Before explaining the purpose of appointing an executor, it may be helpful to explain the role that this person plays in the management and distribution of your estate.

The executor (also called an "estate trustee with a Will" in Ontario and a "liquidator" in Quebec) is the person 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 will take control of your assets upon your death and distribute these assets in accordance with your intentions as outlined in your Will.

Your executor derives his or her authority from your Will. The "probate" is the confirmation of the Will's validity to the individuals and organizations your executor must deal with. The probate process does not grant the power to the executor as 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 Revenue 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 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 the "testator" (the person who creates the Will). This is because executors must carry out their duties in person. Also, 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 they 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 unwound, 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 appointed in case such executor is unable or unwilling to act at the time of your death or subsequently before all of your estate is administered.

You should seek the permission of the person you wish to appoint as the executor. This way the person is informed in advance and can advise you if they are prepared to act or if they will be unable to act in this role.

A common inclination for business partners is to appoint their business associate as an executor of their estate. However, this can often place the business associate in a conflict-of-interest position in regard to the business assets of the deceased. If this is a likely occurrence, it is best to include a specific clause in the Will to deal with this matter.

PAYMENTS 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.

It is generally the obligation of the executor of the estate 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 the amounts the deceased owes. 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 the CRA 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 these items to be the subject of a legally binding obligation to transfer them as you have instructed, you should include them in your Will.

Registered retirement savings plans (RSPs), retirement income funds (RIFs) 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. Specific rules in Quebec may limit the types of bequests you may make. In addition, you are not able to make a beneficiary designation on a registered plan in Quebec.

A binding memorandum, which must be signed prior to 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 as these represent an outright distribution from your estate. For example, you might state that you wish to give $50,000 to a favourite charity — there might even be some tax benefits to making gifts to charities. For additional information on making gifts to charities from your Will, ask your advisor for a copy of the RBC publication called *Charitable Giving*.

Stated legacies are paid before any other requests in your Will with the balance of your estate after the payment of liabilities (i.e. your "residual estate").

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." You may wish to establish a testamentary trust (see page 11) with some or the entire residue of your estate for the benefit of your spouse and/or children or grandchildren. However, you should also consider that it might be more appropriate to leave your entire estate to your spouse, any adult children and/or grandchildren.

You may want to provide some portion of your estate's residue for other purposes. For example, you may wish to gift more distant family and friends with funds, 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.

TRUSTS

The trust clause sets out the terms of any trust created by your Will. There are numerous uses for trusts, which can be implemented in a Will. Trusts can be created for spouses, disabled (minor or adult) children (commonly referred to as Henson trusts), spendthrift children or for income-splitting purposes.

Trusts can also be discretionary or non-discretionary. A discretionary trust empowers the trustee to decide when they will distribute income and/or capital to the beneficiary. For a non-discretionary trust, the payments that the trustee will make to the beneficiaries are specified in the Will. These payments can be a combination of income and/or capital.

The discretionary powers offered to a trustee enable the testator to implement certain wealth preservation strategies that could be advantageous to the testator's beneficiaries.

The Henson trust is a case in point. The Henson trust is a commonly used structure for children with disabilities. The Henson trust allows the trustee to make payments to or for the benefit of a child who has a disability. The payments are made strictly via the discretionary powers that have been given to the trustee. The beneficiary has no outright entitlement to the funds. These funds will be payable to other beneficiaries upon the disabled person's death. Assets held in such a trust for the benefit of a beneficiary with a disability are not considered as part of the beneficiary's assets in some provinces and territories, and therefore, will not impact the beneficiary's entitlement to financial assistance from his or her provincial government.

GIFTS TO MINORS

A testator must be aware that if funds are left for 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 attains the age of majority. Absent other provisions in the Will, in order to be discharged with respect to the gift, the executor has to pay the money into court. To prevent this, the testator should permit the executor to hold such a gift in trust until the child attains the age of majority.

Therefore, the testator should be very specific about how they want the trustee to deal with the child's assets. The testator should give encroachment powers (see "Encroachment clause" on page 10) to the trustee to enable the trustee to utilize the child's assets in the best interest 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's obtaining the funds at the age of majority, this can be addressed with the inclusion of 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 of the policy, unless a trustee is designated, once the proceeds are disbursed, 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 to this problem is the creation of 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. Also, since 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 the approval of the court. 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 a trust. 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, often called the *Trustee Act*. The *Trustee Act* may be restrictive in terms of the investments permitted.

In provinces and territories that have a legal list of investments, the qualifying investments will often be high quality, but the return yielded may be unacceptably low and the choices available too limited. In this case, you may wish to give your executor a broader range of acceptable investments.

However, in the past few years, numerous provincial bodies have adopted the "prudent investor rule" for their provincial trust legislation. This legislation is less restrictive than the legal list of investments. Basically, the prudent investor rule forces the trustee to consider the purposes, terms and other circumstances of the trust and pursue an overall investment strategy reasonably suited to the trust.

Not all provinces and territories have adopted the "prudent investor rule," but there seems to be a very strong propensity toward all provinces and territories eventually adopting this new rule.

Another common power is the power to make certain elections on the deceased's final tax returns. For example, on the death of a spouse, the surviving spouse will receive all of the assets of the deceased spouse. Canadian tax rules state that, when the assets are transferred to a surviving spouse, this transfer automatically occurs on a tax-deferred "rollover" basis. However, this may not be the most tax-efficient way to transfer these assets if 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 have the rollover rules not apply to some or all assets.

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

LIFE INTEREST

A life interest is used when you want to give income from or the enjoyment of the use of an asset (such as real property) to a person, rather than give the asset to the person in the Will. Upon the life tenant's death, the asset would pass on to another beneficiary or, in that person's absence, to the estate.

A key aspect of this clause is that it enables you to control an asset after your death and to ensure that the assets will provide adequate support for the beneficiary or beneficiaries you choose.

By including a life interest clause, consideration should be given by the testator in regard to the rights of the life tenant. Finally, unless otherwise stipulated in the Will, the trustee must also maintain a balance between the rights of the life tenant and the rights of the capital beneficiary who receives the bequest upon the distribution of the trust assets. This is known as "the even-hand rule."

ENCROACHMENT CLAUSE

This clause is used in a trust when you want the trustee to be able to give the life tenant or capital beneficiary additional funds for special circumstances or needs (e.g. an education or start of a business) during the term of the trust.

FAMILY DISASTER CLAUSE

This clause outlines the distribution of your assets if all immediate family beneficiaries die at or close to the same time as you do. This is 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 rare event that you and your immediate family members perish together.

Often this is the most difficult aspect of planning a Will, but it should not prevent you from proceeding with its preparation to provide for your immediate family members and other beneficiaries.

SURVIVAL CLAUSE

This clause states 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 span.

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. Such provisions will be unique to each individual's situation and will require 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 interest 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 said division.

BURIAL INSTRUCTIONS OR ORGAN DONATIONS

It is not advisable to stipulate specific funeral instructions in your Will only. At the time of death, the Will is not usually readily accessible to offer this information. Consider also giving specific instructions to family and friends or putting these instructions in a document that will be readily available upon your death. Similarly, the same would apply for 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. These clauses provide the space for the testator and two witnesses of the testator to sign the Will.

5 › Testamentary trusts

A testamentary trust is a trust commonly established in a Will. It only becomes effective subsequent to your death. In a trust, you specify an amount of money or other property to be held for a specified period for beneficiaries you have identified as per the terms outlined by you. For example, you may wish to bequeath your grandchildren with a portion of your estate, but you may feel that they should not receive their inheritance until they are old enough to manage it responsibly. In this case, you would direct your trustees to hold and invest their inheritance in trust for your grandchildren until they reach an age you consider appropriate.

It is common practice (but not mandatory) to have the executor of your estate also be 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 preparing a testamentary trust clause, the testator, 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 also provide for income to be paid to beneficiaries for education or other purposes if the trustees consider it appropriate (using their discretionary powers). Provisions may also be made for some of the capital to be advanced if the income is insufficient to provide for the beneficiaries' needs (through an encroachment clause).

REASONS FOR CREATING TESTAMENTARY TRUSTS

The most common types of testamentary trusts are trusts for children or grandchildren, trusts for spouses and trusts to hold real estate assets (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 to address many circumstances address the following circumstances, among others:

- Trusts for young children — those who have not attained the specified age (i.e. age of majority) when they can hold assets directly
- Trusts for children with disabilities
- Trusts for education
- Trusts to protect a child who has poor money management skills or who has 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. In other words, this represents an income splitting opportunity since the income earned by your child and the child's trust are taxed separately at their own marginal tax rates.

The most common form of a children's trust is one that provides a share of the estate to be held and invested for the child, with income and/or capital available for the child's support and education at the trustee's discretion. The trustee is directed to pay portions 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 of your spouse's remarrying, your children will receive your remaining assets on the death of your spouse
- To ensure that your assets go to your children in situations where the deceased is in a second marriage

- To reduce provincial probate taxes — since the ownership of your assets does not pass to your spouse, the assets in the spousal trust are not included in the spouse's estate at the time of his or her death when calculating the probate taxes payable
- 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.

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.

Should ongoing shared use of the property not be practical, there is time for your trustees, with the benefit of knowing the wishes of your children and grandchildren, to decide which of them will become the owners of the property and on what terms.

In addition, the testator should consider setting up a trust with funds that would be used for the maintenance of the property if it were to be held in trust.

Before you sit down with a lawyer and/or notary to draft your Will, make sure you have considered all elements of your estate plan and addressed all components of the Will

6 › Preparing your Will

(e.g. your selection of executor(s) and trustee). 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.

Be sure to 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 an obligation or right arising out of your marriage or former marriage (e.g. separation agreement or marriage contract) should also be provided. You may wish to consider the use of the RBC publication called *The Family Inventory* to assist you in gathering all of the relevant information.

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

It is important that your Will be properly drafted in order 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, the risk of completing these forms incorrectly or creating ambiguities in the wording could end up costing your beneficiaries more money in court and legal fees than the amount that would have been paid originally to have the Will properly drafted by a lawyer or notary.

Most stationery Wills cannot adequately say what the testator actually means because most clauses are generic in an attempt to cater to all possible scenarios.

The importance of your Will, which governs the passing of your estate on your death and the provisions for your family's support, is likely to justify the expense of having a Will prepared professionally.

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

7 › Reviewing your Will

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 experience the birth or adoption of a child

It may happen that, after the Will is made, you decide that a change is needed. If the changes are considered major, it is usually advisable to draft a new Will. However, if the changes are minor, a codicil may be drafted.

8 › International and multiple Wills

A testator with 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 notorial Will, the probate process is not required.

When your Will has been probated, the court will issue an official document stating that the Will has been probated (e.g. Letters Probate or Grant of Probate). A probate tax will have to be paid by the estate before the Grant of Probate is issued. The tax is based on the total value of the assets that are part of your estate. The rate charged varies between provinces and territories as indicated in **Table 3**.

TABLE 3		
Provincial probate taxes		
Province or territory	**Estate value**	**Rates**
Alberta	Less than $10,000 $10,001–$25,000 $25,001–$125,000 $125,001–250,000 Over $250,000	$25 $100 $200 $300 $400
British Columbia	Less than $25,000 $25,000–$50,000 Over $50,000	Nil $6 per $1,000 $14 per $1,000
Ontario	First $50,000 Over $50,000	$5 per $1,000 $15 per $1,000
Manitoba	Less than $10,000 $10,000 or more	$70 $70 plus $7 per $1,000
New Brunswick	Less than $5,000 $5,000–$10,000 $10,001–$15,000 $15,001–$20,000 Over $20,000	$25 $50 $75 $100 $5 per $1,000
Newfoundland & Labrador	First $1,000 Over $1,000	$60 $5 per $1,000
Nova Scotia	Less than $10,000 $10,000–$25,000 $25,001–$50,000 $50,001–$100,000 $100,001–$150,000 $150,001–$200,000 Over $200,000	$75 $150 $250 $500 $600 $800 $800 plus $5 per $1,000
Prince Edward Island	Less than $10,000 $10,000–$25,000 $25,001–$50,000 $50,001–$100,000 Over $100,000	$50 $100 $200 $400 $400 plus $4 per $1,000 There is a $15 surcharge at all levels for putting the matter in the *Royal Gazette*.
Quebec	Any	No fee if a notarial Will $91 if non-notarial Will (not including legal fees)
Saskatchewan	Any	$7 per $1,000

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

10 › Challenging a Will

Challenging a Will occurs when someone seeks to overturn the last Will and testament of a deceased person through the courts.

The challenge to the Will can be done on several grounds. However, 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).

In an attempt to avoid these types of challenges to a Will, it is usually recommended that you execute a carefully thought-out Will that both protects your wishes and provides for your family.

Wills are most likely to be challenged when you are 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 proper support from your estate should you fail to adequately provide for them 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 one should put off for a later day. It should be drafted as soon as possible to ensure that your estate is distributed in accordance with your wishes and not under the provincial intestacy rules. If you do not presently have a Will, consider taking steps to draft one today.

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 meant to be 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 determined 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 of your registered assets (e.g. RSP, RIF 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 or policies?
☐	☐	Have you considered the use of testamentary trusts for your spouse or for adult and/or minor children?
☐	☐	Have you considered a staggered 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 for any minor children? An alternate guardian?
☐	☐	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 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 your answer is "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 your last Will?
☐	☐	Have you moved to a different province or territory since your last Will?
☐	☐	Have you acquired significant new assets, such as a cottage, business or farm, since your last Will?
☐	☐	Are your 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 *Family Law Act*)?

Glossary

Administrator — An individual or company formally appointed by a court to administer the estate of an intestate individual.

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 — 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 — The name of an absolute 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 governmental assistance.

Holograph Will — A Will entirely handwritten and signed by the testator, which might have no attesting witnesses.

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.

Letter Probate or Grant of Probate — A court document that authorizes a person or company to administer the estate of a deceased person in cases where that deceased person failed to leave a valid Will.

Letters Probate — 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.

Probate — The process of applying to the court to obtain Letters Probate.

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 dependent relief legislation.

Testamentary trust — A trust generally created in the Will. Testamentary trusts are taxed as a separate taxpayer at the graduated tax rates.

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

Trust — A relationship between the trustee, who holds legal title to the property, and the beneficiaries, who are entitled to the use and enjoyment of the property, for whose benefit the trustee owns the property.

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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WILLS (11/2005)