Wills and Will planning

Maintaining your Will throughout your lifetime

RBC Wealth Management

RBC Wealth Management

RBC Wealth Management® provides comprehensive services designed to address your multi-faceted financial concerns, simplify your life, give you the freedom to pursue your other priorities and provide you with the confidence that your goals will be achieved.

Whether you need assistance managing your family's wealth, maximizing your business investments or providing stewardship for non-profit assets, RBC Wealth Management brings together the solutions you need in key areas such as financial planning, private banking, investment management and estate and trust services.

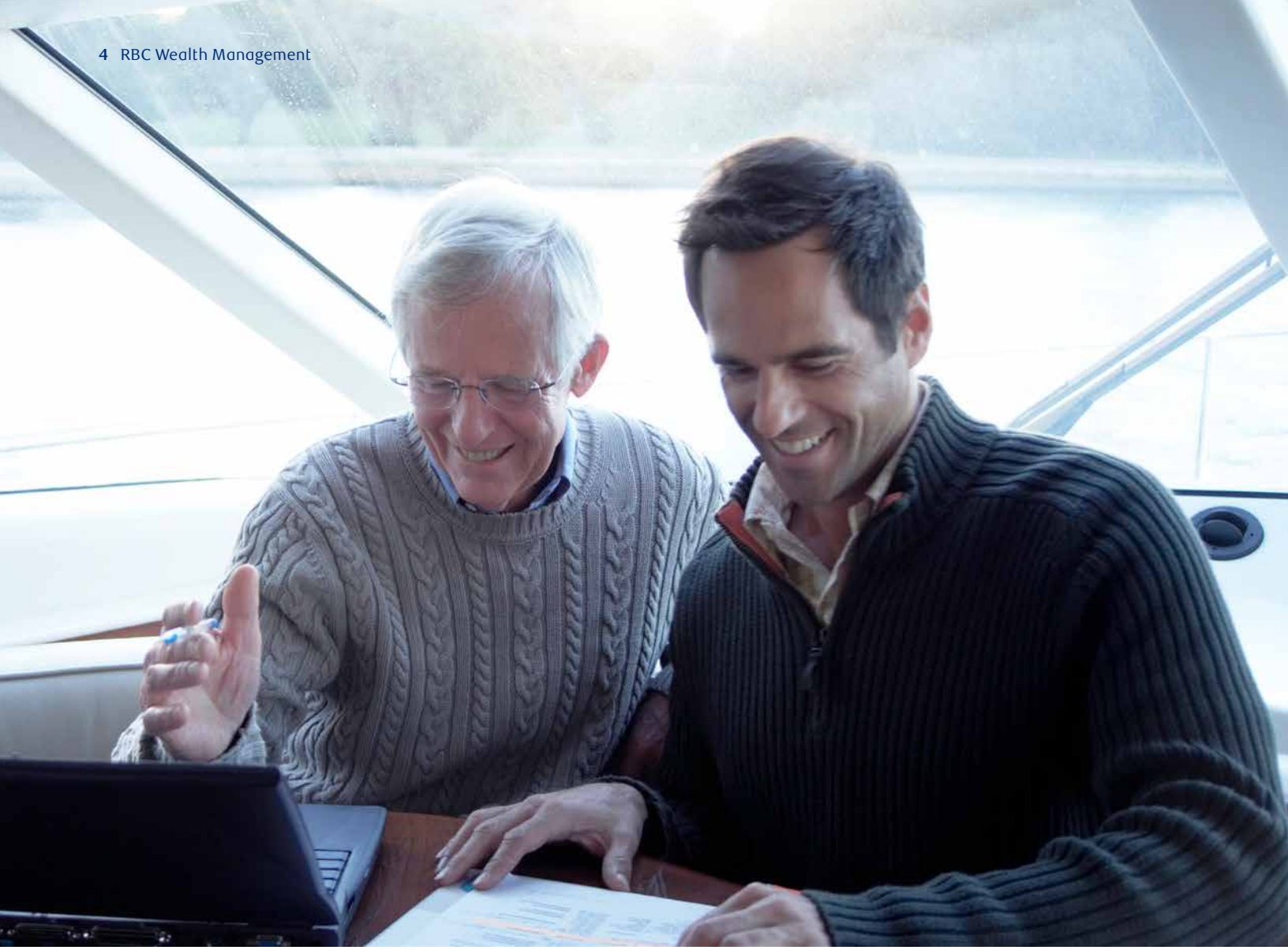
Tailored to your individual needs by your RBC® advisor, RBC Wealth Management provides the specific services you need, today and in the future. Your RBC advisor, supported by a team of specialists drawn from RBC Wealth Management member companies, helps you address your various wealth management needs through each stage of your life:

- Accumulating wealth and growing your assets
- Protecting your wealth by managing risk
- Managing the affairs of a loved one
- Converting your wealth to an income stream
- Transferring wealth to your heirs
- Creating an enduring legacy

RBC Wealth Management publications

To help you understand your choices and make informed decisions, RBC publishes a wide variety of financial, tax and estate publications, written by leading authorities on wealth management for high-net-worth Canadians. Please ask your RBC advisor for information about other RBC Wealth Management publications.

Table of contents



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 you ensure you have addressed all elements of your current situation and that you meet your estate objectives.

This publication is not intended to replace the professional advice provided by your qualified 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 qualified legal advisor, who can help you prepare your Will. For the purpose of this publication, any reference to a spouse means a married spouse (though at times, it may be applicable to a common-law partner). If you have a common-law partner, you should speak to a qualified legal advisor in your province or territory of residence to determine how this might impact your Will planning.

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 your estate if you do not have a Will or your 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 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 will generally be administered under the provincial or territorial intestate succession legislation for the province or territory where you lived at the time of death. Real property owned by you outside your province or territory of residence will be distributed in accordance with the governing intestate succession legislation in the place where it is located.

All provinces and territories have laws that govern the distribution of your property if you die without a Will. In these circumstances, your property will be distributed to your next closest surviving relatives, beginning first with your spouse and/or child(ren) followed by more distant relatives.

In the unlikely event that you do not leave a Will and have no living relatives, those assets will go to the government in the province or territory where 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

When you have a Will you have the opportunity to appoint an executor (also called an "estate trustee with a Will" in Ontario and a "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" or "estate trustee without a Will") to manage your affairs after your death. No one has the 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, or estate trustee without a Will, uses your assets to pay your debts and testamentary expenses and then distributes 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 intestate. In most provinces or territories, if you die leaving a spouse and children, your estate will be divided between them in accordance with a legislated distribution scheme. 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 divided between your spouse and children. The definition of spouse for intestacy purposes varies across jurisdictions. In some provinces and territories (for example, Saskatchewan and British Columbia), "spouse" includes common-law partners of the same or opposite sex.

Planning your Will

A Will is a legal document that can help ensure your assets pass according to your wishes after your death. Your Will only becomes effective 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 one way to ensure 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 intestate, those assets that would have passed under the terms of your Will are going to be distributed according to the laws of the province or territory where you resided at the time of your death (as discussed on page 5).

Your Will should name your executor(s) (liquidator(s) in Quebec), an 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 or estate trustee without a Will for your estate, who may not be the individual or institution you would have chosen.

You can also designate in your Will the individuals(s) you want to be the guardian(s) of your minor children upon your death (should the other parent of your children predecease you). In some provinces, the Court must confirm the appointment for the guardianship to be legal.

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

Who can make a Will

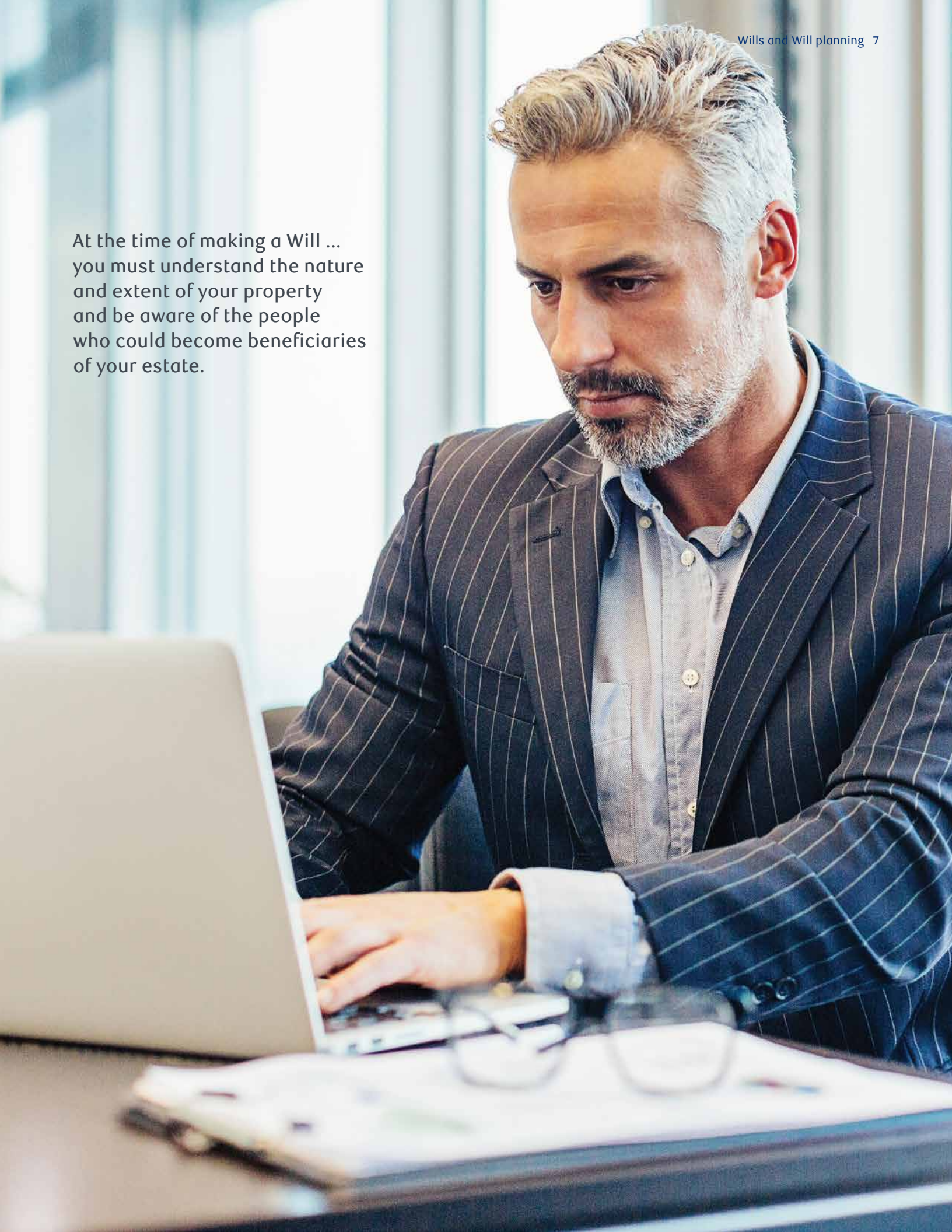
In general, any person who is at least the age of majority in their province or territory of residence and mentally competent can make a Will. In certain circumstances, persons under the age of majority may make a valid Will if they are or have been married or in a spousal relationship or on active duty with the armed forces.

At the time of making a Will, you must be of sound mind. You must understand the nature and extent of your property and be aware of the people who could become beneficiaries of your estate.

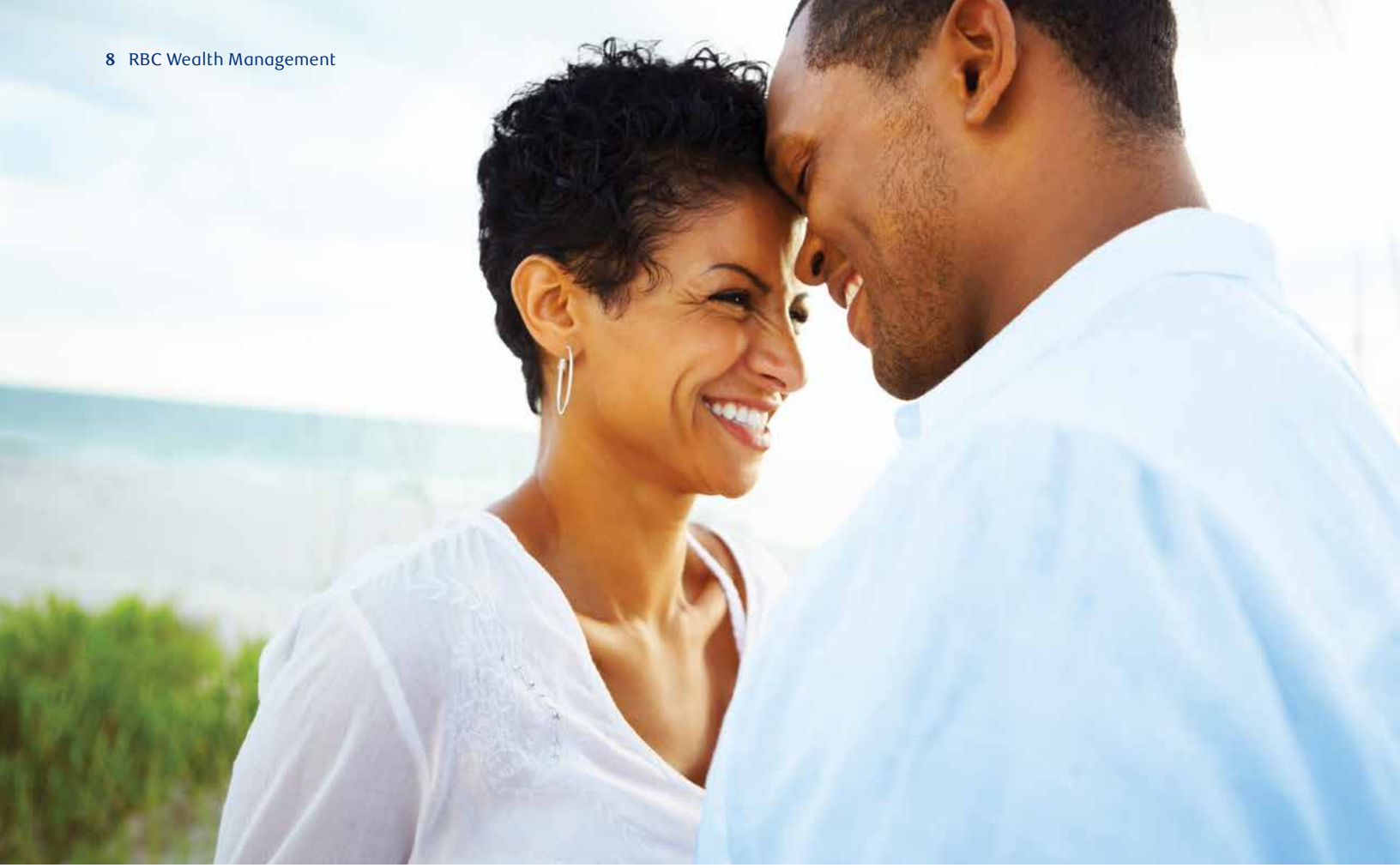
Types of Wills

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.



At the time of making a Will ... you must understand the nature and extent of your property and be aware of the people who could become beneficiaries of your estate.



Formal Will

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

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 some provinces and territories (except British Columbia, Alberta, and Quebec), the act of getting married will cause any previously executed Will to be revoked. The only exception to this rule is to execute a Will that refers specifically to your impending marriage, often referred to as a "Will in contemplation of marriage."

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

In these same provinces and territories, if you have appointed your former spouse as executor, your divorce will revoke this appointment unless there is a contrary provision in your Will.

Issues to consider when planning your Will

A Will requires careful planning to ensure 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 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 about your intentions at the time of death. It is worth noting that if more than one Will exists at the date of death, and there is no formal revocation of a prior Will, both Wills may be admitted to probate. If there is any inconsistency between the two Wills, 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.

There is a common misconception that probate is what gives an executor their authority. In fact, an executor derives their authority directly from the Will. The probate process is used to provide third party individuals and organizations with proof that the executor has the authority to represent the estate.

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 the 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 in the best interests of your beneficiaries and according to the applicable provincial or territorial laws. The executor also has a responsibility to provide a financial record of their management of your estate and the payments that were made to your beneficiaries. If your

children or grandchildren are to share in your estate, your Will may direct your executor to hold their share in trust and invest the funds until they attain the age(s) specified in your Will. As a result, it is not always easy to choose the right executor for your estate.

The clause appointing an executor designates the individual(s) or institution that you wish to name 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. There also may be legal, compliance and tax issues to consider in appointing a foreign executor.

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 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 your estate is administered.

Ask the person you wish to appoint if they are willing to act as executor. This way the person will be informed in advance and will be able to tell you whether or not they are 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.

The executor 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.

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 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 also obtained from Revenu Quebec. If a clearance certificate is not obtained from the CRA and/or Revenu Quebec, then the executor

can be held personally liable for outstanding amounts owed by the deceased to the CRA and/or Revenu Quebec. A clearance certificate certifies that all amounts for which the deceased is liable for have been paid to the CRA and/or Revenu Quebec or that the CRA and/or Revenu Quebec, has accepted security for the payment. Similarly, if your executor fails to identify and pay other creditors of the estate before distributing assets to the estate beneficiaries, your executor may be personally liable to the creditors. This liability is limited to the value of the deceased's assets that are actually distributed.

Beneficiary designations

Registered plans, such as Registered Retirement Savings Plans (RRSPs), Registered Retirement Income Funds (RRIFs), Registered Pension Plans and Tax-Free Savings Accounts (TFSAs), as well as life insurance policies, may be dealt with in your Will. Alternatively, specific beneficiaries may be designated on the plan documents. If a beneficiary is designated directly on the plan documents, the proceeds of the plan will not form part of the estate assets, and probate taxes on these proceeds can be avoided. Note that in Quebec, beneficiary designations are not permitted on registered plans and must be made in your Will.

In general, you can designate anyone as a beneficiary for most of these plans. However, federal, provincial and territorial legislation may affect the impact of your designation. For example, under pension legislation, in general, if you have a spouse as defined in the legislation at the time of your death, only your spouse will be entitled to receive pension benefits.

If you are making reference in your Will to beneficiaries of registered plans or life insurance policies, you should ensure that the beneficiary designations in your Will are consistent with the specific beneficiary designations on the plan documents (except in Quebec) or policies. If the beneficiary designations in your Will do not match the designations made on the plan documents or policies, then the later of the two designations would generally be valid.

You may also wish to include your Registered Education Savings Plan (RESP) and provide instructions for dealing with rights to the RESP, to

You may want to appoint RBC Royal Trust®* as 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 RBC® advisor for information on executor services offered by RBC Royal Trust.

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

the extent that the RESP contract allows for this. For example, you may wish to appoint a successor subscriber in your Will.

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. When you make gifts of such items of personal property in your Will, they are commonly referred to as bequests. If you include them in your Will, your executor will be legally bound to transfer them as you have instructed.

You can also use a binding memorandum to achieve this objective. You must sign this memorandum prior to the date of your Will and make reference to it in your Will. Alternatively, you may wish to leave an informal non-binding memorandum concerning these items and rely on 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 with during your lifetime.

You can include as many legacies as you wish in your Will. These represent an outright distribution of money or money equivalents 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 RBC advisor for articles on charitable giving

Legacies are paid before the balance of your estate (the "residual estate") is distributed to your beneficiaries.

Residual estate

The "residue clause" outlines the distribution of your remaining estate after estate expenses, debts and claims have been settled and bequests and legacies have been made. In general, the residue encompasses all property that is not effectively disposed of by Will. If the Will contains no residuary clause, then the remaining property will be distributed as if you had died intestate (i.e. without a Will) and will be distributed in accordance with the provincial or territorial intestacy laws.

In some cases you may wish to set up a testamentary trust with part or all of the residue of your estate. This may be to benefit your spouse and/or children or grandchildren. However, you should also consider whether 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 in

your estate plan. These could include control and flexibility over the timing and amount of the distribution to your beneficiaries (which may be useful for incapacitated or spendthrift beneficiaries) or preservation of the inherited asset.

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 through the use of a discretionary trust.

A 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 for purposes of provincial and territorial disability-related support programs. In a number of provinces and territories, individuals receiving disability benefits can still be a beneficiary of a Henson Trust and receive discretionary benefits from the trust without it 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 on trustee services provided by RBC Royal Trust.

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 may have to pay the money into court or to the Public Trustee in order to be discharged with respect to the gift. Alternatively, the executor may be discharged by handing over the money to the minor's parent(s) if the amount of money is under a prescribed threshold or if the parents have been appointed by the court as the guardian of property for the child. 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 they want the trustee to deal with assets that are left to a child. Many testators provide powers of encroachment (see "Encroachment clause" on page 15) 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, they 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, they could include a "gift-over" clause – a gift with 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, for example, if the child dies before attaining the specified age, then

the funds will be forfeited (or gifted over) to the other beneficiaries.

Where a minor is designated as the beneficiary on an insurance policy contract or on the registered plan documentation, the funds will generally need to be paid into court or to the Public Trustee to be held until the minor child reaches the age of majority. A court application may be made by a concerned individual, usually a legal guardian such as the parent, to act as the guardian of the child's assets.

Obtaining access to funds from the court is often a time-consuming process. One possible solution with regard to insurance proceeds that might otherwise be payable directly to a minor is to name a trustee as the beneficiary of the insurance policy and create an insurance trust. The terms of the insurance trust can be set out and documented through a separate trust agreement, in an insurance trust clause within a Will or in the initial insurance application with reference to the Will. The trustee will receive the insurance proceeds and hold them for the benefit of the beneficiaries. As an insurance trust is created due to the death of the testator, it is a testamentary trust.

Power clauses

These clauses enable your executor to exercise various powers in the management of your estate and allow trustees to carry out the terms of any trust. If the Will is silent with respect to a certain power, your executor and/or trustee must rely on the powers conferred on them by statute or common law or seek 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 your 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 your executor will be bound by the investment requirements of provincial trust legislation, called the "Trustee Act" in many provinces.

All of the provincial and territorial bodies (except Quebec) have adopted the "prudent investor rule" for their provincial trust legislation. The prudent investor rule requires the trustee to exercise the care, skill, diligence and judgment that a "prudent investor" would when making investment decisions. The trustee must consider the purpose, terms and other circumstances of the trust and pursue an overall investment strategy that is appropriate for 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 their death, it may make sense to transfer assets to the surviving spouse at fair market value, triggering any unrealized capital gains. Your 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 wish to give a beneficiary income from or the enjoyment of the use of an asset (such as real property) for their lifetime, rather than giving them 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.

Life estates enable you to control an asset after your death and ensure that the asset provides 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 they 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 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.

If you have children who have not reached the age of majority, you may wish to appoint custodial guardians in your Will. You should note that if someone else with legal custodial rights of your children survives you, such as the children's other parent, then that person will generally remain the custodial guardian. You may also wish to compensate the guardians for their out-of-pocket expenses or 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 certain provinces, such as Ontario, a spouse is not allowed to dispose of a matrimonial home without the consent of the other spouse, regardless of who is on title. This should be considered when making a bequest of real property in your Will.

You should also consider whether you have any support obligations to a former spouse or dependent child. It is important to ensure that sufficient provision is made in the Will for support payments after death if you are required to make them by a court order or domestic contract or provincial or territorial legislation.

In some provinces and territories, such as Ontario, inheritances received by a beneficiary during their marriage may not be subject to spousal division should the beneficiary's marriage break down if the inheritance is kept separate and not commingled with other family assets. However, the income derived from the inheritance may 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 specify funeral instructions only in your Will. The instructions you provide in your Will are not binding on your executor, and your Will may not be readily accessible to your executor at the time of your death. Consider also giving specific instructions to family and friends or putting these instructions in a document that will be readily available upon your death.

Organ donation is governed by the province or territory in which you reside, and each jurisdiction has slightly different requirements for consent. In general, most provinces require the consent of some combination of the donor (the deceased) and the family or executor. It is therefore helpful to include a statement allowing for organ donation in the Will should you wish to donate your organs on death. Since the Will may not be read or accessible until well after the critical point, it is advisable to inform those who will be in a position to carry out your wishes in the event of your death about your wish to donate your organs. Donor cards are also an excellent way to ensure your wishes are respected.

Testimonium and attestation clauses

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

Testamentary trusts

A testamentary trust is a trust usually established under the terms of a Will. It only becomes effective after your death. In your Will, you may identify a sum of money or other property to be set aside and held in trust for a specified period for specific beneficiaries. 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.

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 the income is insufficient to provide for the beneficiaries' needs.

Children's and grandchildren's trusts

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

- The administration and management of assets for minor beneficiaries who have not attained the age of majority and cannot hold assets directly
- Control over the timing of the distributions from the trust to the beneficiaries and the amount distributed
- Education
- Management of funds for spendthrift or mentally incapable beneficiaries
- Protection of funds from creditors, including marital creditors

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 may be 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 their 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 your spouse remarries, your children will receive your remaining assets on your spouse's death.
- To ensure 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 your surviving spouse dies.

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 whether the property can be shared and, if so, how it 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.

You may wish to use the services of a professional trust company, such as RBC Royal Trust, to act as trustee or co-trustee for your testamentary trust, or agent for your named trustee. Some of the advantages of a corporate trustee include neutrality, availability, expertise, and continuity for long-standing trusts. Appointing a corporate trustee can help to ensure the administration of the trust is done in accordance with the relevant laws. It can relieve your family members and friends of the burden of administering the trust assets and mitigate any potential conflict among your trustees or with beneficiaries. A corporate trustee would be appointed according to a fee schedule determined while the testator is alive, similar to compensation that may be payable to family members, friends or other trusted professionals acting as trustee.

If you have questions about who to appoint as a trustee or the typical responsibilities of a trustee, please speak to your RBC advisor to find out more about the services provided by RBC Royal Trust.

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

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 you have not overlooked any major issues.

Provide your lawyer or notary with a list of your assets and liabilities, copies of relevant title documents (e.g. the deed to your house) and documents concerning any trusts or estates in which you have an interest. Finally, you should also provide any documents concerning obligations or rights arising out of your marriage or former marriage (e.g. separation agreement or marriage contract). You may also wish to consider reading the RBC publication called "The Family Inventory" for further assistance 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 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 good way to save money on legal fees. However, there is a risk that you might complete these forms incorrectly or that ambiguous wording could cost your beneficiaries more money in court and legal fees than the amount 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 distribution of your estate on your death and contains the provisions you have made to support your family. In view of this, you may be able to justify the expense of having your Will professionally prepared.

After you have prepared your Will, 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.

Reviewing your Will

Often Wills are prepared and then filed away, never 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 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, territory or country
- There is a change in legislation that affects your current Will
- You or one of your beneficiaries marries, separates or divorces
- 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 their name
- You or one of your beneficiaries gives birth to or adopts a child

After you have prepared your Will, 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." A codicil is a written document that amends, rather than replaces, an existing Will. A codicil and Will should be read together as one document.

International and multiple Wills

A testator who has assets in numerous jurisdictions may wish to consider having an international Will. The formalities for drafting and executing an international Will are set out in the "Convention Providing a Uniform Law on the Form of an International Will." Although Canada is a signatory to the Convention, the Convention is only in force in limited jurisdictions. In Canada, for example, Quebec and the territories have not ratified the Convention.

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.

Probating a Will

Probate is a legal process used to confirm that a Will is valid. It also confirms the appointment of your executor to third party individuals and organizations. Normally your executor, with the assistance of a lawyer, will file for probate with the court in the province or territory where you were domiciled at the date of death. 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 that probate has been granted. The name of this official probate document varies according to the province or territory where you live. Once probated, the Will becomes a public document, available for viewing by anyone who wishes to search for it. A probate tax has 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.

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 executors obtain probate. Probate offers third parties a form of guarantee that they are transferring the deceased's assets to the correct party.

Conclusion

A Will is an integral component of your estate plan, and is not something that you should put off for a later day. Draft your Will as soon as possible to ensure 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 exhaustive.

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 they wish to fulfill this responsibility? (The executor's duties can be significant. Therefore, it is important that they understand 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 their 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, pension or TFSA)? 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 the inheritance to your children? (This will depend on the size of the inheritance and the child, but you may wish to pro-rate the distribution over several years.)
☐	☐	Have you named a custodial guardian and alternate custodial 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 legislation)?

Glossary

Administrator – An individual or institution 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, also known as a legacy.

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

Discretionary trust – A trust from which beneficiaries will receive a distribution at the time the trustee chooses to make a distribution.

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.

Henson trust – A fully discretionary trust commonly established for physically or mentally challenged beneficiaries. If 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 that is entirely handwritten and signed by the testator. No witnesses are required.

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 certificate – A court document confirming that a Will is the last and valid Will of the deceased 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 certificate. (Terms vary by province or territory.)

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

Testamentary trust – A trust created as a consequence of an individual's death. This can include a trust created under a Will.

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. In Quebec a trust is an entity defined in the Civil Code of Quebec.

Trustee – The person or institution that 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 their death in accordance with their wishes.

Wealth Management

VPS106095

93118 WILLS (01/2020)