

You can't take it **with you**

Wills Explained

A Will is an essential part of an estate plan, but what many people don't understand is why. A Will is what speaks for you after you pass away. It communicates your intentions and allows you, and not the government, to determine how the assets that you have worked a lifetime to accumulate will be distributed upon your death.

A Will facilitates the administration of your estate, can save you taxes, and avoids the potentially severe consequences of dying without a Will (also known as dying "intestate"). Yet, despite its importance, it is estimated that only about one half of all Canadians have a Will. This is alarming when one considers the benefits a Will can provide and the relatively modest cost of drafting a Will. We work hard to acquire our wealth, so doesn't it make sense to spend a little effort to make sure that it is not all frittered away?


What is a Will and why do you need it?

A Will is a formal document that sets out how your assets are to be distributed on your death. It also allows you to designate who should take care of your children should both you and your spouse pass away.

More specifically, the Will designates the person (the "executor") or institution that will administer the estate, to whom the assets are to be distributed, and when and how the distributions are to be made. The Will can also include special provisions for minor and disabled beneficiaries, and can specify whether certain debts owed to the individual are to be repaid or forgiven.

Generally, a Will can be updated either through the use of a Codicil (a testamentary document that makes one or more changes to a Will) or a new Will. In addition, a Will must be revocable – that is, the testator (person making the Will) must always have the ability to amend or revoke the Will if they so choose.

Having a well drafted Will can minimize the cost and delays of administering the estate, reduce or postpone taxes, and reduce the issues that grieving relatives and friends must deal with at the time of the death of a loved one.



What if I don't have a Will?

If you don't have a Will or your Will is deemed to be invalid, you will be deemed to have died intestate. Generally, the court will appoint someone to administer and distribute your estate according to the provincial intestacy laws, regardless of what your wishes are. This means that your assets may not be distributed to the beneficiaries you intended.

Under the intestacy rules, your spouse will usually receive a certain amount of your estate (often known as the "preferential share") and the remainder will be divided between your spouse and children. This may not seem problematic, but it can lead to undesirable results.

Take the situation where spouses are separated and estranged. Because they haven't divorced, they are still technically spouses, which means that the intestacy rules require that all or part of their estate be distributed to the separated spouse. You should also consider the situation with minor children. Portions of an estate payable to a minor child are usually paid into court until the child reaches the age of majority. This means that at the age of 18 (this varies from province to province) a child could take their full entitlement. For many people, this is not what they want.

Intestacy may also result in more taxes being paid leaving less money for your family. The distribution of assets is often much slower and more expensive with intestacies, which can make the whole process frustrating for your loved ones at a time when they are already grieving your loss.



Preparing your Will

There are several do-it-yourself Will planning kits available, however it is generally recommended that you instead retain the services of an experienced lawyer. Wills must satisfy certain technical requirements and one must anticipate and provide for all possibilities. If a court does not agree with the way you have prepared your Will or if parts of it are unclear, it may decide to change the Will or even declare it invalid. Each province has its own laws regarding Wills and your legal advisor will ensure that yours meets these requirements. Besides, the cost of a Will is usually very reasonable.

Preparing a Will involves several steps. First you should make a list of your assets, for example, your home, car, cottage, business interests, life insurance, investments etc. You'll need to review the ownership of these assets. Do you own them solely or jointly? For life insurance policies or registered plans (such as RRSPs or RRIFs), is there a beneficiary named within the contract?

You should consider how your estate will be divided, and who will get what. If done properly, this should include an estimate as to the size of your estate and the taxes owing on your death.

Careful thought should also be given to choosing an administrator ("executor") of your estate. The executor has to protect and administer your estate in a prudent and responsible manner. This person should be trustworthy, familiar with tax, estate, accounting and investment issues, and be willing and able to assume such a responsibility. Naming an alternate executor in case the first one is unable or unwilling to do the job is usually a good idea.

Also very important is the question of who will take care of your children should you and your spouse pass away. When deciding who to select, keep in mind the age of the guardian(s), their health and ability to care for your children. It is recommended that you speak to those being considered to confirm they are willing to accept such a responsibility, and naming a back up in case they can't or won't take on this responsibility is also a good idea.

Your Will has been prepared. Now what?

Once you have prepared your Will, you must remember to keep it updated. You should review your Will regularly and amend it whenever there is a significant event in your life or the lives of your heirs, such as a marriage, divorce, birth, death, disability, new business or other major life event. Keep in mind that in most provinces other than Quebec, marriage revokes an existing Will unless the Will specifically contemplates the marriage. A Will should also be reviewed after a change to income tax, family or successor laws.

Ideally, a Will should be reviewed every year or two even if there haven't been any significant changes to ensure that it continues to reflect your intentions.

What is a Holograph Will?

This is simply a handwritten Will that is signed only by you. A typed Will or fill-in-the-blanks Will does not qualify as a Holograph Will. Holograph Wills can be problematic if the instructions are not absolutely clear. Furthermore, some provinces don't recognize Holograph Wills or have different signing requirements. One must be careful with this type of Will.

Do common-law partners have the same rights as spouses?

Although common-law partners are treated the same as spouses for tax purposes, their rights under certain provincial estate laws are limited, and vary from province to province.

Protection for you and your family

A Will is the foundation of an estate plan. Having a properly drafted Will means that your assets will be distributed according to your wishes and that your loved ones will be properly provided for in a tax efficient manner. You can avoid unnecessary costs and delays, and the undesirable results that come with intestacy, and have the ability to choose the executor of your estate and the guardians of your children. When one considers that most Wills can be prepared for a few hundred dollars, and the potential consequences of not having one, it is clear that everyone should have a Will.