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Wills 101 (national edition)



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Wealth transfer strategy 5

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

Having a will helps simplify the administration of your estate and can help you save taxes. A will communicates your intentions and can allow you—and not someone else—to determine how your assets will be distributed on your death. You put a lot of effort into

acquiring wealth, so doesn't it make sense to make sure your interests are preserved after you pass away?

What if I don't have a will?

If you don't have a will or your will is determined to be invalid, you'll be deemed to have died *intestate*. Ultimately, the court will appoint someone to administer and distribute your estate according to the intestacy laws of the province in which you reside, regardless of what your wishes are. This means that your assets may not be distributed to your beneficiaries as you intended.

Under the provincial intestacy laws, your spouse will usually receive a certain amount of your estate, commonly known as the *preferential share*, and the remainder will be divided between your spouse and your children. This may not seem problematic, but in some situations, it can lead to undesirable results. Take a case in which spouses are separated and estranged. Spouses that aren't yet divorced are still technically spouses, which means the intestacy rules may apply and all or part of the estate may be distributed to the surviving ex. However, spouses that have a separation agreement, a court order, or divorce judgment in place won't be deemed to be a spouse for intestacy purposes.

Also, consider situations in which there are minor children. Portions of an estate payable to a minor child are usually paid to the court (administered by the surviving parent or a court-appointed guardian) until the child reaches the age of majority. This means that at the age of 18 or 19 (this varies from province to province), a child could take charge of the full entitlement. For many people, leaving significant sums of money to young adults is a concern since many teenagers aren't mature enough to make sure that a sudden windfall will be put to prudent use.

An intestacy may also result in more tax being paid. This will impact the amount of money left to distribute to your family members or beneficiaries of your estate. The distribution of your estate may be delayed and costly to administer. This can make the whole process frustrating for your loved ones at a time when they're already grieving.

Preparing your will

It's generally recommended that you retain the services of an experienced lawyer when preparing a will. Wills must satisfy certain technical requirements and it's very important to anticipate and provide for all possibilities. If a court doesn't agree with the way you've prepared your will, or if parts of it are unclear, it may be declared invalid.

Preparing a will involves several steps:

1. *Make a list of your assets.* Include your home, car, cottage, business interests, life insurance, investments, etc. You'll need to review the ownership of these assets. Do you own them solely or jointly? For life insurance policies or registered plans (such as registered retirement savings plans or registered retirement income funds), is there a beneficiary named within the contracts?
2. *Consider how your estate will be divided and who'll get what.* If done properly, this should include an estimate as to the size of your estate and the taxes owing on your death.
3. *Choose an administrator (executor) of your estate.* The executor must protect and administer your estate in a prudent and responsible manner. This person should be trustworthy and willing and able to assume such a responsibility. Naming an alternative executor in case the first one is unable or unwilling to do the job is usually a good idea.
4. *Decide who you want to take care of your children should you and your spouse pass away.* When deciding who to select, keep in mind the age of the guardians, their health, and their ability to care for your children. It's recommended that you speak with those you're considering to confirm they're willing to accept this responsibility. It's also a good idea to name back-ups in case your first choices can't or won't take on the responsibility when the time comes. Note that, ultimately, it's up to the courts to decide what's in the best interest of the children; however, the parents' wishes usually play a significant part in the courts' decisions.
5. *Set out any instructions or wishes for your funeral arrangements.* You can outline how your funeral arrangements are to be handled or any other special instructions.

Note: There may be certain situations in which a will is properly drafted but a dependant who's left out or inadequately provided for can make a dependant's relief claim. If successful, this may change the distribution of assets contemplated by the will.

What happens after I write a will?

Once you've prepared your will, you must remember to keep it updated to make sure it continues to reflect your intentions. You should review your will regularly, perhaps every few years or whenever there's a significant event in your life or the lives of your heirs—such as marriage, divorce, birth, death, disability, or new business. Keep in mind that, in some provinces, a marriage revokes an existing will unless the will specifically contemplates the marriage. A will should also be reviewed after a change to income tax, family, or successor laws.

Generally, a will can be updated either using a codicil (a testamentary document that makes one or more changes to a will) or a new will. In addition, a will is revocable—that is, the testator (the person making the will) can always amend or revoke the 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 may be limited, and this varies from province to province. If you're currently in a common-law relationship, it's very important to consult with a lawyer to become more familiar with the laws in the province where you reside. Without a valid will, a common-law partner could be left with very little. This could be particularly detrimental if there are minor children involved. A common-law partner may not have other assets to adequately provide for them and for the children. In addition, it may be that the common-law partner can't easily access any money inherited by the children.

A will protects you and your family

A will is the foundation of an estate plan. The goal of having a properly drafted will is to make sure your assets will be distributed according to your wishes and that your loved ones will be properly provided for in a tax-efficient manner. By creating a will, you can avoid unnecessary costs, delays, and the undesirable results of intestacy, and gain the ability to choose the executor of your estate and the guardians of your children. When you consider that most wills can be prepared for a few hundred dollars and think about the potential consequences of not having one, it's clear that everyone should have a will.

Other types of wills

Holograph will

A *holograph will* is simply an entirely handwritten will that's signed only by you.

Holograph wills can be problematic if the instructions aren't absolutely clear.

Furthermore, some provinces don't recognize holograph wills or have different signing requirements.

Stationary will

Wills referred to in some jurisdictions as *stationary wills* are available through various retail outlets. A pre-set form provides paragraphs with blanks that the writer of the will completes to provide directions after their death. While stationary wills have grown in popularity in recent years, you should be aware that problems with interpretation and non-compliance with provincial statutory requirements have been associated with these types of documents. Such issues may invalidate the will or add costs to the administration of the estate and delay distributions out of the estate.

Having a will prepared by a lawyer is always preferable to holograph and stationary wills, especially if you have family members you wish to protect or significant assets you wish to allocate after you're gone.

Ideal candidates

Investors who want to:

- make sure their assets are distributed according to their wishes

- facilitate the administration of their estate and minimize taxes
- select the executors of their estate and guardians of their children
- set out specific instructions on certain matters, such as their funeral arrangements

Take action

If this applies to you, then:

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

Important disclosure ▼

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