



The ScotiaMcLeod Wealth Planning Series

Drafting Your Will



ScotiaMcLeod
Building Relationships for Life

ScotiaMcLeod's Wealth Planning Services Drafting Your Will

For most people, a Will is the focal point of their estate planning. However, many people either never prepare a Will or prepare one and file it away thinking that they have taken care of their planning needs. This publication is designed to give you an overview of the issues you should consider when drafting your Will. It should not be substituted for appropriate professional advice.

Building and preserving wealth demands specialized financial advice. ScotiaMcLeod has established a full range of advisory services encompassing tax, estate and retirement planning. Our Wealth Planning Series of educational booklets has been developed to assist investors in all their individual planning needs. Ask your Investment Executive about other Wealth Planning publications.

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Drafting Your Will

What is a Will?

A Will is a legal document that sets out the terms of how your assets will be distributed to your beneficiaries upon death. It is important to note that a Will only takes effect at your death. Therefore, you may change your Will at anytime prior to death, as long as you are considered competent to do so at the time of any change.

Why Have a Will?

The primary reason for having a Will is to ensure your assets are distributed and your other wishes carried out in the manner that you desire and that your beneficiaries are looked after. If you die without a Will, your assets will be distributed in accordance with government rules and formulas, which are seldom consistent with the way you would have distributed your estate if you had prepared a Will.

Your Will also outlines the name of your executor (see opposite) and guardians for your children, if appropriate. A well drafted Will helps to ensure that your executor has the proper powers and authority to structure your estate's affairs and administer your estate in the most tax effective and efficient manner possible, including the ability to make investment decisions with regard to the capital in the estate.

Types of Wills

There are effectively two types of Wills, with a third type available in the province of Quebec:

The first type and most simple form of Will is a **Holograph Will** prepared entirely in your handwriting and signed by you. There are no other formal requirements in order for this type of Will to be valid and effective.

Holograph Wills are recognized as being valid for all purposes in Alberta, Manitoba, New Brunswick, Newfoundland, Ontario, Quebec and Saskatchewan. In other provinces such as British Columbia and Nova Scotia, Holograph Wills are recognized to be valid only insofar as the Will relates to property other than real estate, assuming certain conditions are met.

More common is a **Formal Will** which is usually prepared by a lawyer. This type of Will is signed by you and witnessed by two individuals present at the same time. (These individuals must be at the age of majority and cannot be your spouse, beneficiaries, or dependents. Additionally, these individuals cannot be the potential beneficiaries of any such persons.)

In Quebec, there is a third type of Will available, known as a **Notarial Will** which is made before a notary in the presence of one witness (in certain cases, two witnesses may be required), and remains in the notary's office.

Executors

An executor (known as a liquidator in Quebec) is the person you have chosen to administer your estate in accordance with the wishes outlined in your Will. Choosing an executor is an important decision as you want to make sure that the person you choose has the skills necessary to administer your estate.

Some of an executor's responsibilities include:

- Arranging for your funeral
- Reviewing the Will
- Identifying and preparing a summary list of assets and other relevant documents such as life insurance policies
- Applying for letters probate, if necessary
- Attending to personal matters (paying bills, re-routing mail, canceling subscriptions, etc.)

- Notifying appropriate institutions of your death (banks, employer, etc.) to deal with accounts and other outstanding items such as wages
- Filing appropriate tax returns and securing approvals and clearances from Revenue Canada
- Making decisions as to the sale of assets, where appropriate
- Providing for the basic needs and requirements of the principal beneficiaries
- Distributing and administering the estate assets

Choosing an Executor

When choosing an executor, there are a number of factors that you should consider:

Size of Estate and Amount of Work. Consider the list of duties above and the required skills needed to ensure the estate is administered properly.

Age. Ensure that when you choose your executor they are unlikely to predecease you – that is, they will in fact be around to perform the duties.

Type of Executor. Corporate versus individual—depends upon the complexity of the estate and the skills of individuals involved.

Compensation. Executors are entitled to compensation, however this is best discussed before they undertake their duties.

Skills. As you can see from the above list, the functions that an executor may have to perform are varied and the commitment required is substantial, so be sure that the chosen executor(s) understands what he or she is getting into.

Above all, the executor should not have any conflicts of interest. Remember that the executor has a fiduciary duty to act in the best interests of the beneficiaries of your estate.

Contents of Your Will

When planning your Will, it is important to know that you can have your Will distribute assets in many different ways depending upon your goals and objectives. Each individual's Will could be very different. However, there are some standard clauses that are found in most Wills. Note that the clauses and the descriptions below are not an exhaustive list of the clauses that you may run across.

Identification Clause. Identifies that this is your Will and indicates your residence. It also revokes any other Will and states that this is your last Will.

Appointment of Executors. Appoints your primary executor as well as alternate executors in the event that your primary executor cannot or will not act on your behalf.

Appointment of Guardians. Appoints guardians for your minor children. You should also appoint alternate guardians in the event that your primary guardians cannot or will not perform their duties.

Payment of Debts. Instructs your executor to pay all outstanding debts and any funeral costs.

Payment of Taxes and Other Fees. Allows the executor to pay any taxes due under the Income Tax Act, Probate Fees or any other succession duties that may be payable (eg. US Estate Tax).

Specific Bequests. Outlines the distribution procedure for specific items, usually personal property such as jewelry, art, etc.

Residual. Outlines the distribution of property after the specific bequests—the remainder of your estate.

Common Disaster. Outlines what is to happen in the event that your intended beneficiaries die at the same time that you do.

Survival. Indicates that a beneficiary must survive you for a specified period of time before they are entitled to any distributions from your estate.

Power. Outlines the various powers that an executor can exercise without special permission from a court.

Encroachment. Used in a testamentary trust to allow the trustees to provide additional funds where appropriate outside of what was allocated within the terms of the trust.

Investment. Without this clause, investments within an estate would be limited to those permitted by provincial Trustee Acts, which can be restrictive depending upon the requirements of the estate.

Life Interest. Used when you do not want to leave the asset to a beneficiary but would like them to benefit from the use of the asset for their lifetime. This clause often relates to real estate or to income from a particular asset.

Family Law. This clause protects your beneficiaries' interest in assets left to them in the event of marriage breakdown.

Burial. This clause outlines your wishes for burial. However, make sure that your executor is aware of the clause as the burial is often complete before the Will is read.

Trusts Within A Will

Trusts that arise from the contents of a Will are called Testamentary Trusts. These trusts set aside certain assets to provide for beneficiaries who you do not want to receive outright distribution of the assets due to their age, maturity, capacity or other reasons. These trusts allow the beneficiaries to benefit in the manner you decide with your trustee administering the assets on behalf of the beneficiary.

The most popular types of testamentary trusts are spousal trusts and trusts for children or grandchildren.

Spousal trusts are usually set up to provide a lifetime interest in the assets for your spouse but upon their death, the assets would be distributed according to your Will and not their Will. There are a number of tax reasons for spousal trusts, but many individuals set up spousal trusts to ensure their children receive their assets and not other persons named as beneficiaries of your spouse's Will.

Trusts for children and grandchildren are often set up to provide for specific situations such as education or disabilities, or to hold the assets until the child or grandchild reaches a specific age before they receive the distribution.

Often, second properties can cause problems among family members in determining how the property will be shared. Second property or cottage trusts allow property that has been in a family for a long period of time to remain available for use by everyone until the family can work out their own arrangements as to how the property will be dealt with.

Reviewing Your Will

Your Will should be reviewed whenever there is a major change in your life or every two to three years, as the consequences of having a Will which is out of date may be worse than if a Will had not been prepared at all. Major changes in your life would include:

- Marriage
- Birth of a Child
- Divorce
- Changes in your Financial Situation
- Move to another province or country

Furthermore, other factors which may make it important to review your Will are the death of a beneficiary or the executor or any changes in succession legislation or tax law which may impact the desired objectives set forth in the Will.

Making Changes to Your Will

When you review your Will, you may find that most clauses, appointments and beneficiaries are still appropriate and a whole new Will is not required but there is some minor adjustments to be made. Any minor changes to a Will can be done by attaching a codicil to your Will. A codicil can attach or revoke certain clauses and should be executed in the same manner as the Will. Note that it is very important that codicils be kept with the Will that it is amending.

Before You Visit Your Lawyer....

A lot of time and expense can be saved if you take certain steps before you visit your lawyer to have your Will prepared. To begin with, make sure you have read the ScotiaMcLeod Estate Planning Handbook and you are comfortable with the steps required to plan your estate. Secondly, complete the Will Planning Checklist in Appendix I. This preparation will go a long way to helping your lawyer prepare your Will.

Appendix I

Will Planning Checklist

Prior to visiting your lawyer to prepare your Will, completing the following information provides a good start in the development of your Will.

Executor:

Alternate:

Guardian:

Alternate.....

Executor and Trustee Powers:

Asset Inventory completed

Legacies

Cash

Real Estate.....

Registered accounts

Personal Property.....

Other

Residue.....

Common Disaster Clause.....

Trusts to be Set Up.....

Other Items

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