WHY YOU NEED A WILL - QUEBEC

Where there's a Will, there's a way. Better still, when there's a Will, it's *your* way. Having a Will drafted and executed is the best way to ensure that your property is distributed according to your wishes after your death.

This Reference Guide provides some general information regarding Wills, including:

- some of the adverse consequences of not having a Will;
- the formal requirements for making a Will;
- requirement for probate depending on the form of the Will;
- the implications of marriage, separation and divorce;
- tax planning using a Will; and
- the important elements of a Will.

CONSEQUENCES OF NOT HAVING A WILL

A Will is a legal expression of a person's wishes regarding the distribution of his or her property after death.

A person who dies without a Will is often referred to as "intestate" and the succession is referred to as an "intestacy" or "legal succession". In the absence of a Will:

- Your property will be distributed on your death according to the legal devolution provided under the *Civil Code of Quebec*, rather than according to your directions based on your specific wishes.
- You will have no control over who will liquidate and administer your succession. The office of liquidator devolves of right to your heirs unless otherwise provided by a testamentary disposition. The heirs may, by majority vote, designate the liquidator and provide the mode of his replacement. The court may, on the application of an interested person, designate or replace a liquidator failing agreement among the heirs or if it is impossible to appoint or replace the liquidator. Not appointing liquidators you have selected in a Will

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could cause conflict within your family as well as unnecessary costs and delays. Moreover, someone you would have opposed might be appointed as liquidator.

- You lose the opportunity to establish testamentary trusts for the benefit of your beneficiaries. As a result, the tax savings and other valuable benefits of testamentary trusts would not be available. This could lead to unfavourable consequences for your estate or for your beneficiaries. For example:

  - The tax savings potential of a qualifying spousal trust would not be available, which could result in additional taxes payable by the estate or by the spouse;

  - The tax savings potential with respect to the share of a child in your estate would not be available; and

  - Complex and burdensome administrative rules may apply where the share of a minor beneficiary is given outright to the minor beneficiary rather than in trust for his or her benefit. Furthermore, once the beneficiaries become adults, the entire inheritance would have to be given to them, regardless of the amount or the beneficiary's ability to properly manage it at the time.

- Other opportunities for tax planning and strategic planning are lost.

With proper planning and the preparation of a Will, these adverse consequences could be avoided or minimized.

MAKING A WILL - FORMAL REQUIREMENTS

Every person having the required capacity may, by Will, provide otherwise than as by law for the devolution upon his or her death of the whole or part of his or her property.

A Will is only valid if it meets the requirements set out in the *Civil Code of Quebec*. The forms of Will that may be made are the Notarial Will, the Holograph Will and the Will Made in the Presence of Witnesses.

Notarial Will

A Notarial Will is made before a notary, en minute, in the presence of a witness or, in certain cases, two witnesses. The date and place of the making of the Will shall be noted on the Will.

A Notarial Will is read by the notary to the Testator. Once the reading is done, the Testator shall declare in the presence of the witness that the act read

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contains the expression of his or her last wishes. After being read, the Will is signed by the Testator, the witness or witnesses and the notary, in each other's presence.

The original of the Notarial Will is kept by the notary, so that it can't be lost, destroyed or stolen. The Will is also registered with the Quebec registry for Wills and Mandates. It is therefore easy to find it after death following a Will search procedure.

Holograph Will

A Holograph Will shall be written entirely by the Testator and signed by him or her without the use of any mechanical process. It is subject to no other formal requirement.

To make sure that your heirs will find your Holograph Will following your death, it is advisable to make sure that a trusted person knows where it is located. It can alternatively be filed with a notary or lawyer who may register the Will with the Quebec registry for Wills and Mandates.

Will Made Before Witnesses

A Will made in the presence of witnesses is written by the Testator or by a third person.

After making the Will, the Testator declares in the presence of two witnesses of full age that the document he or she is presenting is his or her Will (however, the contents need not be divulged). The Testator signs it at the end or, if he or she has already signed it, acknowledges his or her signature. The witnesses thereupon sign the Will in the presence of the Testator.

It should be noted that where the Will is written by a third person or by a mechanical process, the Testator and the witnesses initial or sign each page of the act which does not bear their signature.

To make sure that your heirs will find your Will made before witnesses following your death, it is advisable to make sure that a trusted person knows where it is located. It can alternatively be filed with a notary or lawyer who may register the Will with the Quebec registry for Wills and Mandates.

PROBATE OF WILLS

A Notarial Will is an authentic document, which need not be probated. Certified copies of the Notarial Will issued by the notary may be used by the liquidator as official documents to liquidate the succession.

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The Holograph Will and the Will made before witnesses must be probated by the Superior Court in the judicial district in which the Testator resided, in the district where the Testator died, or in the district in which the willed property is located. These two types of Wills can also be probated by a notary, on the condition that the Will to be probated was not filed with a member of the notary's firm.

The application to have a Will probated may be made after the Testator's death by any interested person (usually the liquidator of the succession) or by a legal professional acting on behalf of a person interested in the succession.

Depending on the circumstances, the probate process can take some time, and trigger professional and other related fees.

HOW A WILL IS AFFECTED BY MARRIAGE AND DIVORCE

Note that in the province of Quebec, unlike many other provinces, marriage does not automatically revoke a person's Will. On the other hand, a legacy made to the spouse before a divorce or the dissolution of a civil union is revoked unless the Testator manifested, by means of testamentary dispositions, the intention of benefiting the spouse despite that possibility. Revocation of the legacy also entails revocation of the designation of the spouse as liquidator of the succession.

In general, it is advisable to have a new Will prepared when family circumstances change.

TAX PLANNING WITH A WILL

The use of trusts created under the Will, known as testamentary trusts, can provide considerable tax-planning opportunities.

The federal *Income Tax Act* and the *Quebec Taxation Act* provide that, on death, a person is deemed to have disposed of all of his or her capital property at the fair market value of the property. This can result in considerable taxes being payable.

However, through the use of a Will, there are ways to reduce or defer these and other taxes in certain circumstances.

The most common is the deferral available when assets are transferred to a surviving spouse (or common-law partner) or to a qualifying spousal trust. A qualifying spousal trust is a specific type of testamentary trust. If the requirements under the tax laws are met, the taxes otherwise payable on capital gains at death can be deferred until the asset is disposed of or the surviving spouse dies. For further information regarding spousal trusts, please refer to our Reference Guide on Spousal Trusts.

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Note that the rules with respect to the transfer of registered plans to a surviving spouse or common-law partner are quite different. In this case, a tax deferral is available only when a registered plan is transferred to a surviving spouse's registered plan. There is no tax deferral for a transfer of the registered plan to a spousal trust.

Tax savings is also one of the numerous benefits of using testamentary trusts to provide for other beneficiaries as well, particularly if the beneficiaries are in higher tax brackets. The tax saving opportunities arise from the fact that testamentary trusts are taxed at graduated marginal tax rates, similar to individuals. Without a trust, a beneficiary who is in a high tax bracket who receives an outright gift under the Will will pay tax on the income generated by the inheritance at the high tax rate. If, however, the Will directs the inheritance to be held in a testamentary trust for the beneficiary's benefit, the income from the inheritance can be taxed in the trust, at graduated marginal rates, resulting in lower taxes owing. Depending on the province or territory, the tax savings can be significant. Further information regarding testamentary trusts can be found in our Reference Guide on Testamentary Trusts.

ELEMENTS OF A WILL

While a Will is designed to reflect a Testator's particular circumstances and intentions, there are a number of common elements in most Wills:

- appointment of liquidators;
- appointment of tutors if there are minor children;
- designation or legacy of registered plans;
- distribution of personal effects;
- cash gifts to relatives, friends or charities, if applicable;
- distribution of the balance of the estate (the "residue"); and
- description of the powers provided to the liquidators and trustees.

Each of these elements is discussed below.

Appointment of Liquidators

An important advantage of making a Will is that it enables you to decide who will be the "liquidator" who will administer and liquidate your succession.

The liquidator of the succession plays an important role, since the liquidator is responsible for many tasks, which include collecting the assets of the estate,

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paying taxes and any other liabilities, and distributing the assets according to the terms of the Will.

Given the significance of a liquidator's duties and obligations, the selection of the liquidator should be carefully considered. When choosing a liquidator, you should consider certain factors, including:

- the complexity of your assets and your estate;
- how your estate is to be distributed. A Will leaving only outright gifts to intended beneficiaries will generally be less complex to administer than an estate under which trusts are to be established for one or more beneficiaries;
- the age of the proposed liquidator. It is generally preferable to name a liquidator who is younger than you, as this makes it more likely that your liquidator will be available and able to act when and for as long as required;
- whether a proposed liquidator has the necessary skills and abilities to administer your succession effectively;
- where the proposed liquidator lives. Liquidators who do not reside in Canada can create considerable complexity for the estate and for the beneficiaries since they may also cause the estate to be non-resident for tax purposes; and
- the trustworthiness of the proposed liquidator.

You may decide to have two or more liquidators act together as co-liquidators. If so, the Will should specify how decisions are to be made if the co-liquidators are not able to agree. If only two co-liquidators are named, then one of them could be given the deciding vote; if three are named, then decisions could be made by the majority.

As well, you should always name an alternate liquidator in your Will to act in case your first choice dies or is otherwise unable or unwilling to act.

It is also important, in order to avoid complex issues and conflicting situations, to provide clear instructions as to who should be remunerated for acting as a primary or alternate liquidator, and on what basis, if it is intended to provide remuneration to a primary or alternate liquidator.

Tutors

A father or mother may appoint a tutor for his or her minor child by Will. The right to appoint a tutor belongs exclusively to the last surviving parent or to the last parent who is able to exercise tutorship, as the case may be, if that parent has retained legal tutorship to the day of his or her death.

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If you have minor children, your Will should therefore deal with the appointment of a tutor and alternate tutor.

Retirement Plans

Generally, the designation of beneficiaries of a retirement plan may be made in your Will.

A tax deferral is available where a retirement plan is transferred to a surviving spouse. There is also a limited deferral available where a retirement plan is transferred to a financially dependent child or a grandchild.

Personal Effects and Other Specific Bequests

To avoid or minimize potential disputes among family members or others after your death, it is both sensible and advisable to leave instructions or at least guidelines regarding the distribution of your personal and household effects. When considering this matter, it is important to keep in mind that disagreements could arise among beneficiaries not only regarding valuable items such as jewelry, artwork, vehicles or antiques, but also about items of sentimental value or even clothing, household furnishings and similar items.

One way to deal with the distribution of personal and household items is by setting out specific gifts in your Will. However, this means that any future changes would have to be done by amending the Will.

Many Testators simply prepare a separate list or memorandum dealing with their personal effects, rather than including specific provisions directly in the Will. While such a memorandum is not legally enforceable, it is generally expected that the liquidators would follow the Testator’s wishes. Using a memorandum such as this is useful since it allows the Testator the flexibility to make changes from time to time without formally amending the Will.

Another possible way to deal with personal and other items is to include in your Will a mechanism for how items are to be divided among intended beneficiaries.

Gifts to individuals or to charities can also be made in your Will. When considering leaving gifts of cash (often referred to as “bequests”), it is important to keep in mind that substantial cash gifts will reduce the amount that will be available to be distributed to the beneficiaries of the ‘residue’ of your estate. Accordingly, you should ensure that the total amount of the bequests is appropriate.

Where gifts to registered charities are made by Will, a charitable donation tax credit can be claimed to offset the Testator’s income taxes in the year of death. Any excess credit may also be applied to reduce the taxes for the year prior to

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death. Further information about charitable giving can be found in our Reference Guide on Charitable Giving.

Distribution of the Residue

One of the most important provisions in a Will deals with the distribution of the residue of the Testator's estate. The residue is the amount of the estate that remains after payment of all debts, taxes, bequests, and other specific gifts.

Where a Testator has a spouse (or common-law partner), children, siblings or other family members, he or she needs to decide how to provide for them.

For example, when providing for a surviving spouse or common-law partner, the Testator might consider the use of a spousal trust instead of an outright gift. The decision about whether to use a spousal trust depends on several factors, including the expected amount of the gift to the spouse (there should be at least $300,000 in a spousal trust to be worthwhile), the potential tax saving opportunity discussed earlier, the competence of the surviving spouse and family law issues.

When providing for children or other family members, the Testator might consider issues such as whether each child or family member should be treated equally, whether there should be any special provisions made for any of them, and whether testamentary trusts should be used instead of outright gifts. Testamentary trusts are beneficial for more than just the tax savings mentioned earlier. For example, testamentary trusts can provide flexibility as well as the ability to preserve and protect an inheritance (whether from a beneficiary's own spending or from claims by others such as creditors or a former spouse or common-law partner of a beneficiary).

Where a Testator is married, and also has a child or children from a previous relationship, making a Will is particularly important to ensure that the Testator's intentions with respect to providing for these individuals are clearly set out. Otherwise, the legal devolution which may occur without a Will may result in the Testator's intended beneficiaries being excluded or not benefiting as intended.

In making a Will, a Testator should also decide who should benefit if there are no surviving family members.

A Will is still important even where a Testator has no family members or does not wish to provide for family members, since a Will enables the Testator to determine how and to whom the residue of his or her estate is to be distributed. This may include charitable organizations, for example. As noted earlier, without a Will, the estate would be distributed to relatives of the Testator based on the applicable legal devolution provided in the *Civil Code of Quebec*, despite what the Testator might have wished.

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In making decisions regarding the distribution of your estate, tax-planning opportunities should also be considered, as discussed earlier. In addition, it is often desirable to consider ways to minimize the potential exposure of estate assets or inheritances to creditors and to marital or family property claims.

Protection of Beneficiaries' Marital or Family Property

Including a provision in your Will stating that all legacies or trust distributions shall be and remain the private property of your legatees and/or beneficiaries and shall not form part of any community of property or partnership of acquests, nor be subject to the matrimonial rights of the spouses of such legatees or beneficiaries may help protect these assets from the spouse in case of matrimonial breakdown.

Your Wills could also provide that any benefit is made as alimentary provision for your legatees and/or beneficiaries, and shall be unseizable for payment of their debts, unless they renounce this right of unseizability. (Note that under the *Civil Code of Quebec*, a stipulation of unseizability is without effect, unless it is made in an act by gratuitous title and is temporary and justified by a serious and legitimate interest.) The intent of this is to enhance the protection of such assets from a beneficiary's general creditors.

Powers for the Trustees

Giving the liquidators and trustees a broad range of powers in your Will ensures that your liquidators and trustees have the appropriate authority and flexibility to administer your succession effectively.

In dealing with investments, it is advisable to empower liquidators and trustees to make whatever investments they consider prudent, including using mutual funds and pooled accounts. The liquidators and trustees should also be authorized to delegate investment decisions to a discretionary money manager.

It should be noted that a person charged with full administration shall, under the *Civil Code of Quebec*, preserve the property and make it productive, increase the patrimony or appropriate it to a purpose, where the interest of a beneficiary of the trust requires it. This might constitute a burdensome responsibility in certain circumstances. You may, therefore, indicate in your Wills that the trustees and liquidators charged with full administration shall not be obliged to increase the patrimony they administer assuming they act with prudence and diligence in their administration of such patrimony.

CONCLUSION

As outlined above, there are numerous compelling reasons to have a Will prepared. There are also numerous issues to consider when planning a Will.

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A properly drafted Will is a fundamental component of an estate plan and will give you the peace of mind that comes with knowing your affairs are in order.

Given the broad range of legal areas and issues that must be considered in planning and preparing a Will, some of which are outlined in this Reference Guide, there is really no substitute for the professional legal advice of a lawyer or notary whose practice is focussed on Will, estate and tax planning.

It is also generally recommended that you review your Will every three to five years or more frequently if circumstances change.

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