

Key estate planning documents

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When putting together your estate plan, there are many issues to consider and having the right documents in place will go a long way toward your intentions being followed. Powers of attorney and your will are critical documents to this process that help your representatives understand and carry out your wishes for financial and health matters if you are incapacitated or die. In addition, when registered retirement savings plans (RRSPs), registered retirement income funds (RRIFs) or tax-free savings accounts (TFSA)s are established, or life insurance policies are purchased, making beneficiary designations on these plans, where possible, can have a number of benefits, as we will see.

This report will review the importance of each of these documents, including their key components. We will also explore what can happen without these documents in place. Should you have property or beneficiaries in more than one jurisdiction, you may require that documents be prepared separately for each such jurisdiction.

Your will

Having a will is only one step in the estate-planning process, but it's an important one. A will addresses a number of key estate planning questions.

Who will manage your estate?

The person managing your estate after your death is called the estate representative, often referred to as the executor. You can name one or more persons to be your estate representative(s). You can also name an alternative representative in the event that a person is unable or unwilling to act at the time of your death, or continue to act once they have started to act. When choosing a person for this role, consider if the person is trustworthy, has competency in financial matters, and has the time to devote to administering an estate. You should also speak with any potential estate representative in advance of naming them in your will to confirm that they are able and willing to take on the role. You may also wish to consider appointing a professional trust company if your estate is complex, if you would like an objective party to be involved, or if you don't have someone in mind that you feel is appropriate or sufficiently qualified to take on the task.

Who will inherit your estate assets?

Whom you leave your property to on your death is a very personal choice. When deciding who the beneficiaries of your property should be, think about who depends on you for financial support. There may be provincial dependent's relief laws that you should be aware of before naming beneficiaries. You should also consider naming contingent beneficiaries should a beneficiary predecease you, or pass away shortly after your death. You may also wish to make a charitable donation upon your death.

What steps could be taken to reduce income taxes upon death?

You may be able to reduce taxes on your death by considering which of your beneficiaries is to receive specific property. For instance, certain property can be received by a spouse or partner¹ on a rollover basis. For example, if proceeds of an RRSP or RRIF are transferred to a surviving spouse or partner, taxes can be deferred until the spouse or partner either withdraws the funds from the RRSP or RRIF or until they die. Similarly, if capital property, such as non-registered investments, is transferred to a spouse or partner, taxes are deferred on any unrealized capital gains until the spouse or partner disposes of that property. You may consider transferring proceeds of RRSPs and RRIFs and non-registered investments or real estate with accrued gains to a spouse or partner, while leaving other properties with no inherent built-up tax liabilities to other beneficiaries.

Additionally, you may be able to save capital gains tax by donating listed securities and mutual funds in kind to charities, rather than liquidating such property and donating the proceeds.

When will estate assets be distributed?

You may wish for some beneficiaries to receive their bequests outright, or you may wish for staged distributions, especially when some beneficiaries such as children or grandchildren, or nieces or nephews, may be minors. Even if the beneficiaries are adults, you may wish to stagger the distributions, so that each beneficiary receives a certain percentage of their inheritance over a number of years. You can notably name a trustee in your will to manage your estate assets which flow into a "testamentary trust," which is a trust that arises as a consequence of your death². You can outline directly in your will the terms by which the trustee must abide, such as how trust property should be managed and when property can be distributed³.

¹ In this article, spouse refers to someone to whom you are legally married. Partner refers to a common-law partner under the *Income Tax Act*, which means someone who cohabits with you in a conjugal relationship, provided the two of you have cohabited for the past 12 months or are jointly parents of a child.

² In Quebec, if a trust is not created, the testator may appoint an administrator of the property. This could be the liquidator, prolonged administrator, or other administrator.

³ In Quebec, creating a testamentary trust with insurance proceeds requires a formal trust created in the will.

Guardians

Consider who you want to have custody of your children, and spell these wishes out in your will. Courts will generally approve your choice of guardian, providing that the person or people are willing to act, and there is no opposition from anyone else⁴. The age and geographic residency of the guardian are important considerations to think about when choosing an appropriate guardian for minor children.

What if you die without a will?

While many believe that you don't need a will unless you have a large estate, if you die without a will (an "intestacy"), provincial law dictates who gets your assets upon death, which may not coincide with what you intended. These laws are inflexible and could cause unforeseen problems and undesirable consequences. For instance, in all provinces, these laws provide for some immediate sharing of the estate between a surviving spouse and any children. In some cases, this could require the liquidation of key family assets and an untimely allocation of assets to children. Distributions will not be staged, nor will any trusts be established. In certain provinces, if the children are minors, their money may be required to be paid into court until they reach the age of majority (18 or 19, depending on the province). If funds are needed for the children's upkeep before they reach the age of majority, an application to court may be required in order for funds to be released.

Upon intestacy, if you do not have a spouse or children, then your estate is generally distributed to other family members. If you have no next of kin, your estate goes to the government. Friends or charities are not taken into consideration.

Dying without a will can also mean needless complications to the estate administration process. This could cause delays, extra expense, considerable inconvenience and even hardship for your survivors. Your estate administrator may be limited in the types of investments that can be held. There could also be increased stress and family conflict without a will setting out your wishes. You may also miss out on any opportunity to minimize taxes on death through tax-deferred rollovers and charitable gifting.

In addition, without a will, you may not have an opportunity to express your wishes concerning a guardian for your children.

Power of attorney for property

A power of attorney for property⁵ ("POA") gives someone else the legal ability to deal with your financial affairs while you are alive. This is different from a will which only comes into effect on your death. In the event that you become incapacitated without having signed a POA, your family or friends may need to apply to a court in order to have the ability to deal with your financial affairs.

The person, or persons, granted authority to act on your behalf in the POA is referred to as the attorney. You can also set out a substitute attorney(ies) in the event that the original attorney is unable to fulfil the role. An attorney can be an individual, or it can be a professional trust company. Similar considerations to those used in selecting an executor for your will apply in choosing an attorney. You should decide whether you would like the attorney to be paid for their services. If the POA is silent on this issue, provincial law may entitle the attorney to be compensated at a specified rate.

There may be limitations or restrictions on the term of the POA, or what the attorney may do. The POA may be indefinite, or may have a limited period of application. For instance, a POA may be granted for a period of time in which you may be unavailable to look after your financial affairs. This could be as a result of travel outside of the country, or perhaps because of a hospitalization.

⁴ In Quebec, a tutor assumes office upon accepting it, unless the designation is contested.

⁵ The name of the document, the person making it and the person being granted authority varies by province or territory.

The POA could be limited to one specific transaction, such as the sale of a property. The POA may only come into effect in the event of your incapacity. You should be aware, however, that there may be issues in satisfying third parties that you are in fact incapacitated. In order for an POA that commences while you have capacity to continue should you become incapacitated, most provincial laws require that this be specifically set out in the wording⁶. You may revoke a POA at any time so long as this is done while you have the capacity that would be required to grant a POA.

Although the powers granted to the attorney can be quite broad, there are a few actions that cannot be granted under a POA. For instance, an attorney cannot sign a will, nor can the attorney amend a will. In most circumstances, an attorney cannot make or change beneficiary designations⁷. The attorney may not be able carry on the duties of a director of a corporation, or as the trustee of an estate. Provincial law may also require that a POA specifically provide the attorney with the ability to delegate their authority, or to appoint a successor attorney.

Power of attorney for personal care⁸

This power of attorney authorizes someone to make personal, health and medical decisions on your behalf in the event of your incapacity to make such decisions. This includes not only decisions about medical treatment, but also about housing, hygiene, clothing and safety. If you have the capacity to make a routine decision such as which clothing you would like to wear, but are unable to make a serious health care decision, your attorney could be limited to only make the decision to which you are unable. If you have provided information in advance as to your wishes, subject to provincial law, your attorney should be following those instructions. Many of the rules outlined above regarding POAs apply to powers of attorney for personal care.

Beneficiary designations

You can designate a beneficiary as part of the plan documents for your RRSP, RRIF, TFSA and life insurance policy⁹. You can also make a beneficiary designation for these plans in your will. The benefit of making beneficiary designations for these plans is that these assets will then pass to the designated beneficiaries outside of your estate, and thus, be outside of the provincial probate process. Your estate plan, however, can also be frustrated if you don't coordinate the elements properly. For example, if you have made beneficiary designations directly on registered plans and insurance policies, make sure they do not conflict with your will so that assets can be transferred as intended. It's important to review designations regularly, particularly when you open new accounts or make any changes to them.

Updating documents

Once your these documents are prepared, you're not done. Your will comes into effect only upon your death and you can alter it as often as you wish, as long as you are mentally competent to do so.

It's recommended that you review your will and other documents regularly, at least every five years, but if you experience any significant changes in your personal or financial circumstances, make sure to review it immediately. You may need to redo or amend your will in the event of a change in your marital status, the birth of a child, changes in your assets and liabilities, or relocation to another province or country. You should also consider amendments if circumstances change for your beneficiaries (for example, marriage or birth of a child) or your estate representative (for example death or relocation). You can make changes to your will by either adding an amending document called a codicil or by preparing a new will altogether. If there are several detailed changes to be made or there will be multiple codicils in place, then it may be advisable to execute a new will. You might also wish to consider a new will if the changes are particularly sensitive in nature. For instance, if you noticeably excluded someone from the will, you may wish to correct the situation without drawing attention to the original provisions.

⁶ In Quebec, protection mandate must be homologated upon the occurrence of the incapacity in order to be effective.

⁷ This may be permitted in limited circumstances in certain jurisdictions.

⁸ The name of the document, the person making it and the person being granted authority varies by province or territory.

⁹ In Quebec, beneficiary designations are only permitted for insurance policies.

Conclusion

A well rounded estate plan requires the thoughtful creation of a few key documents. Both legal and tax advice should be obtained to create these documents.

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