

## Quick Definitions

### *Beneficiary/ies*

One or more individuals or corporations who ultimately receive the estate property.

### *Estate*

Formed out of the property of the testator at death.

### *Executor/s*

One or more individuals or corporations responsible to 'execute' the Will instructions.

### *Probate*

A court process for validating a Will (not always necessary); also used to describe the tax the court levies for the process.

### *Testator*

Person who is making the Will.

### *Trust*

Instructions for ongoing management (as opposed to immediate distribution to the beneficiaries) of all or part of the estate.

### *Trustee/s*

One or more individuals or corporations responsible for managing any property which is held in trust. Usually trustees and executors are one and the same.

### *Will*

Names executor and beneficiaries, and establishes trust terms as desired.

# Essential Characteristics of *Wills*

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*This brochure may contain tax and legal information. This brochure is intended to assist individuals in understanding certain concepts of wealth & estate planning, and may contain tax and legal information specific to one or more provinces within Canada. It is not a substitute for consultation with a competent professional. Specifically, this is not a legal, tax or investment opinion on any particular planning strategy or personal fact situation. Interested readers are encouraged to contact a competent professional advisor to further assist them.*

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*All the critical decisions we make in our lives culminate at death: Relationship & property matters, financial & tax planning, personal & business decisions.*

*Your Will is your opportunity to ease the emotional burden, distribute your property, provide for those who depend on you, and arrange your affairs in a tax-efficient manner.*



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## **The Will in estate planning**

Perhaps the most critically needed and most commonly misunderstood legal document in the estate planning process is the Will. It is the cornerstone upon which all estate planning is based, and it is also the touchstone - or reference point - for all other personal planning decisions.

### **‘In’ or ‘out’ of the estate**

The Will determines who will receive the assets owned by the testator on the date of death. There are however numerous exceptions - some intentional, some unintentional - to what property falls into the estate. Having an informed knowledge of how to create or avoid these exceptions enables a testator to structure the Will and other legal arrangements to assure certainty in personal and estate planning.

### **Considerations in estate planning:**

- Existing or contemplated common ownership, such as joint ownership
- Family obligations & living arrangements
- Contractual claims & commitments
- Insurance & RRSP/RRIF beneficiaries
- Creditor/solvency status
- Existing formal and informal trusts
- Future trusts to be established
- Present and future gifts
- General tax implications

## **Ability to make a Will**

Generally, the law of ‘testamentary capacity’ is intended to confirm that a person has both the mental capacity and the considered intention to create a Will.

### **Creating or ‘executing’ a Will**

Normally, formal rules of structure, content and witnessing must be followed in order to assure that a Will is valid. Though uncommon, as an alternate to a formal Will a person can execute a ‘holograph Will’ which is one entirely in that person’s handwriting.

Generally a formal Will executed with the assistance of a lawyer is less likely to be questioned by those requested to turn over the testator’s assets (eg., banks, investment dealers, etc.), or successfully challenged by disappointed/bypassed beneficiaries.

### **Revoking a Will**

A Will may be revoked either by a conscious act, or it may be imposed by law. Situations which may give rise to a partial or full revocation include:

- Marriage and divorce, but not necessarily separation
- Physical destruction by the testator
- At death the Will cannot be found, and was last known to be in the testator’s possession
- Preparation of a subsequent valid Will

## **Guardianship**

Upon the death of the last parent, a major concern is the determination of who will take care of minor age children. By naming a guardian by Will, parents can present their views to a court for a final determination that is in the children’s ‘best interests’; while this is not the ‘final word’, it has significant persuasive power. (Note that contrary to the impression left by ‘do-it-yourself Will kit’ advertising, children will not be arbitrarily placed with strangers.)

### **No Will: Intestacy**

In the absence of a Will, provincial rules of succession are applied to distribute the estate. While generally running along family lines, these rigid rules can result in unintended inclusion or exclusion of beneficiaries, and often result in substantial financial costs that would otherwise not have been incurred.

### ***Do-it-yourself Will kits***

While the advertising for these kits raises awareness of the need for a valid Will, whether those choosing this route are adequately informed of their rights, obligations and planning opportunities is another matter. As well, considering their vulnerability to challenge, this route appears to lack the certainty that is key in good estate planning.