Sun Life

Will, estate and probate planning – avoiding the pitfalls

Ensuring you have a properly drafted will is the first step in building your total estate plan. However, the planning doesn't stop there. This article highlights key estate planning tools and potential pitfalls to avoid. Careful planning ensures your entire estate plan is consistent with your final goals.

Why have a will?

Your will is one of the most important documents you create during your lifetime. In it, you can provide for your intended heirs and express your final wishes. You can create trusts to delay distribution of your estate and maintain some form of control. Your will can also help maximize tax planning and creditor protection opportunities.

If you pass away without a will, your estate will pass to your heirs under provincial intestate laws. Rules vary across Canada and may provide for your *spouse*, children or other heirs depending on your situation. For intestate succession, the definition of spouse varies across Canada. Some provinces and territories recognize common law partners while others do not.[1] Further, qualifying as a common law partner varies based on the provincial laws.

Intestate succession may increase both cost and delay compared to administration with a will. In addition, you may lose valuable tax planning rollovers available in the Income Tax Act (ITA). In short, we recommend everyone have a will, regardless of how simple you believe your estate to be.

Having a properly drafted will is only the first step in building your estate plan. A lot of estate planning involves actions you can take today. Many of these actions have the purpose of planning around the probate process or reducing administration of your estate. Probate is the legal process of proving your will under provincial or territorial laws. In Quebec, you don't need to probate notarial wills whereas non-notarial wills do require probate. Third-party intermediaries may need probate to release assets to the executor (liquidator in Quebec) or intended heir(s). These include financial institutions and real property registries. However, any recipient of assets from an estate may request probate to protect their interests. Further, probate can give protection to an executor who completes the legal process under the provincial or territorial rules.

There are valid reasons to plan for reducing assets that flow through your will or estate:

- Probate fees and costs associated with legal advice to administer the estate;
- Delays associated with estate administration and the probate process;
- Privacy associated with the public probate process; and
- Creditor protection for you, your estate, or heirs.

However, we recommend exercising caution when performing any of these strategies in isolation to your entire estate plan. Many well-intended actions made during a will maker's lifetime have resulted in lengthy disputes and costly legal battles.

Common estate planning strategies outside of your will

Estate planning involves more than creating your will. Below, we highlight some of the more common estate and probate planning strategies as well as pitfalls to avoid.

Giving assets away during your lifetime

One of the simplest estate and probate planning strategies is giving assets away during your lifetime to your heirs. If you don't own the asset at death, it doesn't form part of your estate. However, we recommend you consider the following before giving away assets:

- You give up control of that asset and any associated income to someone else;
- You're disposing of an asset for tax purposes and may be subject to taxes on accumulated growth;
- You may lose other ongoing tax benefits (e.g. principal residence exemption or income splitting opportunities);
- The asset may now be subject to the recipient's creditors or marital claims.

If you want to gift an asset, you need to be comfortable with the associated consequences. If you wish to keep control or avoid the above concerns, gifting is not the best solution for you.

Transferring assets into joint tenancy with right of survivorship (outside Quebec)

Across Canada (other than in Quebec), you can hold certain assets as joint tenants with right of survivorship (JTWROS).[2] Common assets you can hold as JTWROS include bank accounts, non-registered investments and real estate. Assets held in JTWROS generally pass to the surviving owner(s) on your death. So, the asset doesn't form part of your estate.

Transferring assets into JTWROS with another person carries similar considerations when gifting assets. The joint owner(s) may have control or access to the funds during your lifetime. The assets may also be available to their creditors or martial claims. Finally, there may be taxes at the time of transfer and ongoing tax considerations.

However, transferring assets into JTWROS with another individual may not achieve the goal of avoiding your estate or probate. If the recipient joint owner doesn't give you anything for the transfer it is known as a gratuitous transfer. This type of transfer is similar to a gift, but you retain some form of ownership or control. It's different from JTWROS where both parties contribute to the asset or you receive consideration for the transfer.

A common strategy involves transferring assets into JTWROS with one or more of your adult children. A question arises as to whether or not you intended to gift the asset to the child. If the asset bypasses your estate and another heir or creditor receives less than they expected, disputes can arise. This occurs where your intention for making the account JTWROS is unclear. To solve disputes on gratuitous transfers where intention is unclear, courts in Canada apply one of two rebuttable presumptions:

- **Presumption of advancement** –you intend to gift the asset to the joint owner. Therefore, the joint owner gets the asset on your death for his or her own benefit.

- **Presumption of resulting trust** – you did not intend to gift the asset to the joint owner. Therefore, the joint owner holds the asset in trust for you and your estate on your death.

If the presumption of resulting trust applies, the asset doesn't bypass your estate. In fact, the surviving joint owner holds the asset for the benefit of your estate. This defeats the purpose of avoiding probate and your estate.

The presumptions apply depending on the relationship between the original owner and the joint owner added. The presumption of advancement generally applies when a parent gratuitously transfers assets into JTWROS with a minor child. However, the presumption of resulting trust generally applies when a parent gratuitously transfers the asset into JTWROS with an adult child. For spouses, the law varies across Canada and depends on the situation. In most provinces and territories, a modified presumption of resulting trust applies among spouses.[3] In this context, *spouse* depends on the provincial family law and in many cases doesn't include common law relationships. However, the presumption of resulting trust typically applies to common law relationships as well.

In both cases, the presumption is rebuttable. A rebuttable presumption applies unless someone challenging it shows evidence of a contrary intention. This places an onus on the person challenging the presumption. The problem is that proving your intention after your death is difficult unless you plan ahead.

Rather than relying on the presumptions, you can take action today. Build your estate plan to avoid the presumptions and reduce potential disputes amongst your heirs. To ensure your assets pass in accordance with your wishes, you can take the following actions today:

- Place detailed instructions in your will outlining your intention for any joint asset. It's possible to do this without the asset forming part of your probated estate. You may also use a deed of gift or trust to show your intention;
- Discuss your intention with your legal and financial advisors and encourage them to keep detailed notes;
- Discuss your intention with all of your heirs, where possible.

We recommend you speak with your tax, legal and financial advisors prior to transferring assets into JTWROS.

Naming beneficiaries on registered accounts

You may be able to name a beneficiary to receive proceeds from your registered accounts[4] upon your death. Across Canada (other than in Quebec), you can name beneficiaries on registered accounts in three ways:

- On standard financial institution forms for the account;
- In your will (in Saskatchewan only if the plan allows); or
- By separate declaration meeting provincial or territorial requirements.

Beneficiary designations outside of Quebec result in the proceeds flowing outside of your will to the named person. So, the proceeds do not form part of your estate or the probate process.

In Quebec, you can name a beneficiary on registered accounts directly only if the underlying contract is an insurance contract. For non-insurance registered accounts, you must name your intended heir in your will. As such, non-insurance registered assets will in all cases for part of your estate.

Naming a beneficiary is common practice and easily done. However, just because it is easy doesn't mean the consequences are simple. Common pitfalls to watch for include:

- **Competing designations** – generally your last executed designation prevails. Given the various ways to make a designation set out above, you may have competing designations. You may also inadvertently revoke a previous designation by executing a new one in a different manner.

- **Proceeds intended to fund a trust** – your estate plan may include a trust funded by the after-tax proceeds from the registered asset. You can create trusts in your will and during your lifetime. Naming a person as beneficiary to avoid probate results in your trust failing or being unfunded.

- **Accounts with fluctuating values** – your registered accounts can fluctuate in value. You may name different beneficiaries on separate assets with the intention of treating them equally. However, your beneficiary receives the proceeds in the future after your death. If one account drops in value and other increases, you may inadvertently treat your heirs different from your intentions.

- **Associated tax liability** – some accounts (e.g. RRSP and RPP) have deferred tax liabilities assuming no rollover is available. Other accounts (e.g. TFSA) have no tax liability on the date of death. If different beneficiaries receive separate assets, the after-tax values may differ significantly.

Further, the default tax treatment for registered accounts varies. For example, an RPP lump sum payment is taxable to the recipient beneficiary and subject to withholding tax. The RPP beneficiary receives the after-tax amount. However, an RRSP lump sum value at death is taxable to your estate.[5] The RRSP beneficiary receives the gross amount without withholding tax. You may leave your RRSP to one beneficiary and the assets in your will to another beneficiary. Without careful planning, you may inadvertently impose the associated taxes on an unintended beneficiary.

Given the above, we recommend you review your beneficiary designations against your entire estate plan. Beneficiary designations are a powerful planning tool. However, planning for each account/policy in isolation from your entire estate may produce unintended results.

Note: Recent case law in several Canadian provinces has caused uncertainty with beneficiary designations. In particular, courts appear to extend the presumption of resulting trust to beneficiary designations. The result is that the beneficiary recipient holds the proceeds in trust for your estate. This trend causes uncertainty for you and your estate plan. However, there is a common thread among the cases: competing heirs claiming different intent behind the beneficiary designation. The Ontario Bar Association is working with the Ontario government to amend laws for beneficiary designations. If successful, the presumption of resulting trust would not apply to beneficiary designations. Other provinces may follow suit to remove uncertainty. Until then, consider the guidance above to reduce the likelihood of disputes in your estate. Document your intentions, discuss them with your advisors and heirs and review your entire estate plan against your wishes.

Naming beneficiaries for life insurance proceeds

You're also able to name a beneficiary to receive proceeds from your life insurance contract. Similar to registered accounts, the intention being to direct the proceeds outside of your will to the recipient. Unlike registered accounts, all provinces and territories, including Quebec, allow beneficiary designations for life insurance contracts. You can make beneficiary designations for life insurance contracts in three ways:

- On standard financial institution forms for the life insurance contract;
- In your will; or
- By separate declaration meeting provincial or territorial insurance law rules.

In addition to a standard life insurance policy, life insurance contracts include segregated funds, accumulation annuities and other annuities.

Rather than naming a person, you can also direct life insurance proceeds to a trust. This includes a life insurance trust used for probate planning purposes.[6] Your lawyer may include a life insurance trust in your will or by separate trust deed. In either case, if drafted properly, proceeds flow to the trust rather than your estate or the probate process. Consult with your legal advisor if you wish to include a life insurance trust in your estate plan.

When naming a beneficiary for life insurance proceeds, pay careful attention to pitfalls similar to registered accounts. These include competing designations, proceeds intended to fund a trust and policies with fluctuating values. Remember to review any beneficiary designation against your entire estate plan.

Further, keep in mind there are different default rules across Canada for life insurance beneficiary designations. In Quebec, a life insurance designation in favour of your spouse is default irrevocable unless otherwise stated.[7] An irrevocable designation means you can't change it without the beneficiary's consent. In all other provinces and territories, all life insurance designations are default revocable unless otherwise stated.

Planning for specific financial assets

Some financial assets that form part of your estate plan have special considerations.

Successor annuitant on a RRIF and successor holder on a TFSA

Both RRIFs and TFSAs may allow beneficiary designations. However, a RRIF may also have a *successor annuitant* and a TFSA may have a *successor holder*. In both cases, this special successor must be a *spouse*. In this context, *spouse* refers to spouses and common law partners as defined in the ITA.

There are both tax and non-tax benefits to naming a successor. In both cases, the spouse becomes owner of the account automatically. There is no need to transfer underlying funds or close the account. The survivor assumes ownership of the account without affecting his or her own contribution limits. In addition, naming a successor has the following tax benefits:

- **Successor annuitant on RRIF** – the tax-deferred rollover of the RRIF to your spouse is automatic. You don't have to deal with T-slips or contributions on your estate or your spouse's income tax return. A rollover is still available if you name your spouse as beneficiary. However, to complete the rollover, your spouse needs to report an income inclusion reported on a T-slip. You spouse then needs to claim a corresponding offsetting contribution and report it within ITA time limits.

- **Successor holder on TFSA** – the tax-free rollover of the TFSA to your spouse is automatic. Further, any growth that occurs after your date of death also transfers to your spouse. If you name your spouse as beneficiary, a rollover is still available to their TFSA within ITA time limits. However, growth after your date of death is taxable and does not rollover to their TFSA.

Across Canada (other than in Quebec), you can name a successor annuitant or holder directly on the account. Alternatively, you can name them in your will or by separate declaration meeting provincial rules. In Quebec, if your RRIF or TFSA holds a life insurance contract, you can name a spouse *subrogated policy holder* directly on the contract. This provides you with similar results. For non-insurance RRIF or TFSA in Quebec, you need to name your intended heir in your will. In that case, the assets will form part of your estate.

As with beneficiary designations, make sure you review the named successor against your entire estate plan. If your intention is to fund gifts or trusts in your will, naming a successor will bypass the will.

Successor subscriber for an RESP

Registered Education Savings Plans (RESP) allow you and others to contribute funds towards the RESP beneficiary's education. If you are the subscriber to an RESP, it may form part of your estate. Despite the word *RESP beneficiary*, an RESP is not a trust. An RESP is a contract between the subscriber and the financial institution that holds the account. As a subscriber, contributions to the account may be an asset of your estate.[8] Your estate may need to wind up the RESP without careful planning. This defeats the planning and purpose of providing for the RESP beneficiary's education.

When building your estate plan, we recommend you consider provision to deal with the RESP. You can name a successor subscriber to take over administration of the account for the RESP beneficiary. Unfortunately, standard forms with financial institutions don't typically allow you to name a successor subscriber. To ensure your estate deals with the RESP based on your wishes, you can:

- Name a person as successor subscriber in your will to take over the RESP; or
- Name a testamentary trust in your will to hold the RESP for your estate.

By naming a person, you give them the accumulated contributions without conditions. You can't compel the successor subscriber to maintain the RESP for the beneficiary's benefit. You trust them not to collapse the RESP for their own benefit. To reduce any such concerns, the testamentary trust allows you to include specific conditions. Meet with your lawyer and financial advisor to discuss which option meets your needs.

Multiple wills

You can sometimes use multiple wills to reduce assets that flow through probate. You can also use multiple wills when planning for assets across jurisdictions.

Probate fee reduction

Both Ontario and British Columbia allow multiple wills as a probate-planning tool. In all other provinces and territories, the strategy doesn't avoid probate or is untested. In short, your lawyer will draft primary and secondary (or even tertiary) wills to deal with specific assets. Each will deals with assets as follows:

- **Primary will** – includes all assets that require probate. This usually includes assets held with third party financial institutions or real property registries.

- **Secondary will** (sometimes called a "corporate will") – includes assets that don't need third party verification of the will. This usually includes shares in a private corporation, personal debts owed to you and personal use assets.

- **Tertiary will** – includes assets where the need for probate is unknown. This may include art collections, jewellery or items with value where you may or may not need probate. Using a tertiary will avoids tainting the secondary will in the event a specific asset requires probate.

Multiple wills require careful planning with your lawyer. In particular, your lawyer will draft your multiple wills to:

- reference each other to avoid one revoking the other;
- ensure assets don't fall into more than one will; and
- meet provincial specific rules. For example, in British Columbia, the executor for each will needs to be a different person.

If your estate contains assets that could fall to a secondary will, multiple wills can save significant probate fees. In British Columbia and Ontario, savings amounts to roughly $1,400 to $1,500, respectively, for every $100,000 of estate value. Meet with your lawyer to discuss multiple wills for probate fee planning.

Assets in multiple jurisdictions

You can also use multiple wills where you have assets in multiple jurisdictions. For example, assets located in a foreign country. Each country may have their own formality or succession rules, including forced heirship that determines your beneficiaries.

Further, it may be easier to prove the will if you execute and draft it under the foreign country's rules. If you have assets outside of Canada, speak with your lawyer and cross-border advisor about multiple will planning.

Planning using life interest trusts

In addition to the above, more complex probate and estate planning is available to you. This includes the use of trusts set up during your lifetime known as life interest trusts. By transferring assets to a trust now, they may not form part of your estate at death.

Life interests trusts

Examples of life interest trusts include alter ego, joint partner trusts and spousal trusts. You can set up an alter ego or joint partner trusts if you are 65 or older. You can set up a spousal trust at any age (assuming you are over the age of majority). These trusts allow you to rollover your capital assets to the trust on a tax-deferred basis. Registered assets cannot rollover to a life interest trust. You would need to deregister, pay any associated taxes and transfer the proceeds. Given the tax consequences, proceeds from registered assets rarely form part of life interest trusts.

The *initial beneficiary* of the trust is you (alter ego), you and your partner (joint partner) or your spouse (spousal). Life interest trusts must also meet specific rules in the ITA including:

- The initial beneficiary/beneficiaries must receive all income from the trust during their lifetime; and
- No one other than the initial beneficiary/beneficiaries can access the income and capital during their lifetime.

Life interest trusts are subject to deemed disposition of capital assets on death of the last surviving initial beneficiary. This is different from the normal 21-year deemed disposition for other trusts. Upon death of the initial beneficiary/beneficiaries, the trust pays tax and distributes the assets to the contingent beneficiaries. You set out the contingent beneficiaries within the trust deed. If structured properly, the assets in the trust do not fall to your probated estate. Keep in mind that trusts pay tax at the highest marginal tax rate. So, you need to review the potential trust tax against your personal tax rates before implementing.

Using a life interest trust in your estate plan requires careful planning. We recommend reviewing them with your professional tax and legal advisors. You will also need to weigh the additional costs for setup and ongoing administration against the fee probate savings.

Revocation and alteration of your will or designations

We recommend you review your will against your entire estate plan periodically. In addition, keep in mind that your actions may revoke or alter your will or designations.

You may revoke your will through overt acts like creating a new will or intentionally destroying your old will. Revocation of your entire will results in provincial intestate rules determining the distribution of your estate. You may alter a portion of the will through a codicil. Alteration of your will results in the will remaining valid with changes to certain provisions.

However, you may also revoke or alter your will by operation of law. For example, entering into a relationship could be a triggering event that entirely revokes your will. Ending a relationship could be a triggering event that alters the portion of your will for a former spouse or partner. A change in your relationship status depends on the rules set out in your provincial or territorial laws. Each province and territory defines the triggering events differently. In some cases:

- legal marriage is a triggering event while in others entering into a common law relationship is a triggering event. The definition for common law relationship also varies across Canada; or
- separation is a triggering event while in others only a final divorce is a triggering event. Similarly, the definition for separation varies across Canada.

You may be able to include a contrary intention in your will to avoid the default rules applying.

You can also revoke beneficiary designations by overt acts. If you revoke your will by creating a new one or destroying the old one, you revoke any designation in the will. You can also revoke a beneficiary designation by executing a new one. However, a change in relationship status may or may not revoke your beneficiary designations:

- Outside of Quebec, a change in relationship status does not affect a life insurance or registered account beneficiary designation.
- In Quebec, a life insurance designation or legacy in favour of a spouse[7] made during the marriage or civil union is automatically revoked upon divorce.

Regardless of the default rule, review your designations against your estate plan and make any necessary changes. We recommend you meet with your legal and financial advisors in the event of a change in relationship status. This will ensure your estate plan remains current to your goals and objectives.

Summary

Estate planning involves collaboration between you, your lawyer, your tax advisors and your financial advisor. Planning for each asset in isolation to the other can result in disputes, delay or increased taxes. Where possible, ensure all relevant persons are aware of your intentions, including your heirs. Finally, review your plan periodically and, at a minimum, where there is a material change in your situation. Otherwise, your estate may not pass to the intended heirs in accordance with your wishes.

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[1] Currently, British Columbia, Alberta, Manitoba, Saskatchewan, Northwest Territories and Nunavut expressly recognize some form of common law partner under intestate succession rules. Nova Scotia only recognizes registered domestic partners. Prince Edward Island does not expressly recognize it in their intestate succession rules; however, practitioners in the province indicate the laws may extend to common law partners. Ontario, Quebec, New Brunswick, Newfoundland and Labrador and Yukon do not recognize common law partners under intestate succession rules..

[2] The other form of joint ownership is "tenants in common" (co-ownership in Quebec) which has no survivorship right. As such, your percentage interest in the asset forms part of your assets and estate.

[3] Other than, British Columbia and Manitoba, all provinces and territories abolished the presumption of advancement and specifically apply a modified presumption of resulting trust between spouses in matrimonial property and family law matters. Even in British Columbia and Manitoba, common law cases have weakened the presumption of advancement between spouses.

[4] Common registered accounts include:
- Registered Retirement Savings Plans (RRSP) and Registered Retirement Income Funds (RRIF);
- Locked in Retirement Accounts (LIRA), Life Income Funds (LIF) and Locked in Retirement Savings Plans (LRSP);
- Registered Pension Plans (RPP) and Deferred Profit Sharing Plans (DPSP); and
- Tax-Free Savings Accounts (TFSA).

[5] The ITA imposes joint and several liability for the associated taxes on the deceased's estate and the beneficiary recipient. This means CRA does not have to attempt collection from the estate first and can seek reimbursement from the recipient. However, the CRA's general practice is to seek tax liabilities from the estate first rather than the RRSP beneficiary recipient. If a recipient pays the tax, their only recourse is against the estate if assets remain.

[6] See our articles titled "Leaving life insurance proceeds to minor beneficiaries – consider a trust" and "Life insurance proceeds for the benefit of minors (Quebec version)" for more information.

[7] For this purpose in Quebec, spouse refers only to legally married spouses or civil unions and does not extend to common law partners.

[8] An RESP may have joint subscribers. In all common law provinces and territories (i.e. not Quebec), joint subscribers typically hold the account as joint tenants with right of survivorship and the account will pass to the survivor. If you are the surviving subscriber, the RESP would then form part of your estate upon your death. As Quebec doesn't recognize JTWROS, a joint subscriber would hold it in co-ownership and their interest will form part of their estate.