

MAKE A WILL WEEK 2021 – BEYOND THE BASICS IN BC



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Estate Planning & Wealth Preservation Update

The Will is the bedrock of most estate planning, and the majority of us are familiar with the basic reasons for preparing Wills:

- making guardianship arrangements for minor children and setting up trusts for their inheritances so a government agency does not manage their inheritance for the duration of their minority (in BC, until the age of 19); and
- setting out a distribution that reflects your wishes as opposed to hanging your hat on the intestacy provisions of the *Wills, Estates and Succession Act* (British Columbia). Intestacy is where a person dies without a Will, and this legislation sets out a default distributive scheme that can result in unintended consequences, like your spouse not being able to stay in your home.

To celebrate this year's Make a Will Week, we will (no pun intended) take a look at two of the niftier features and opportunities of Wills: Multiple Wills and Qualified Disability Trusts. Hopefully this will inspire us all to create Wills if we do not have them and review them if we do.

Multiple Wills – Wahool!

Multiple Jurisdictions

Where a person has assets, particularly real estate, in multiple jurisdictions, preparing Wills specific to each jurisdiction can save your

estate and family lots of time and cost when dealing with these assets after death.

Foremost, having a Will in each jurisdiction avoids the need to have a grant of probate obtained here in BC before your executor can even begin to have that grant of probate recognized in the other jurisdiction; rather your executor can move ahead with both estates concurrently. If the market is going down in that other jurisdiction, having your assets tied up longer than absolutely necessary can result in a financial hit to your estate. Keep in mind that each province in Canada is a separate jurisdiction for estate law purposes.

Also, different jurisdictions have different requirements as to what constitutes a valid Will, and what can be done under the terms of that Will. If you have only a BC Will and it purports to deal with your assets everywhere in the world, there is no guarantee that other country(ies) will recognize your Will or that the distributions under your Will will be considered valid in those other countries.

Wills for Specific Assets that can Bypass Probate

In BC, the law permits a person to make a Will dealing with assets that can bypass the probate process (often called a “**Limited Will**”) and a Will dealing with everything else that is subject to the probate process (often called a “**General Will**”). The allure of bypassing the probate process is largely twofold:

1. probate fees do not apply to assets that bypass probate. At 1.4% of the value of the asset probated, there is a savings of \$14,000 for every million dollars of assets that bypass the probate process; and
2. the overall probate and estate process can take 2-3 years on average in BC. Avoiding holding periods and delays derived from the probate process therefore results in beneficiaries receiving inheritances more quickly.

Why doesn't everyone just put everything in a Limited Will? Not all assets can be transferred without a grant of probate, such as real estate in a person's sole name and many bank accounts. The assets that can most commonly be dealt with under a Limited Will are shares in a private company. The same can be said for money owing by such company, including loans by a shareholder, and dividends the company has declared but not yet paid.

If, for example, you have a medical company, holding company, or operating company and your shares are worth \$1.5M and the company owes you for \$1M in loans, you can avoid \$35,000 in probate fees by using a Limited Will to govern these assets.

Other assets can also be captured in a Limited Will in some circumstances, such as art, collections, jewelry, and partnership or joint venture interests. The details of these items, including where they are stored and the terms of contracts, can be quite important in determining how well a multiple Will plan may work for such items.

These types of multiple Wills can be tricky for families that face Wills variation issues, and a lawyer can canvass their suitability for your circumstances.

That's Right, Wahoo!

Creating a structure that deploys more than one Will can therefore save material

procedural cost, delay, and probate and fees. For those of us inclined to get excited about such things, Wahoo!

Qualified Disability Trusts

It is a long-standing practice in Canada to structure inheritances for beneficiaries who are receiving disability benefits in a discretionary trust (often referred to as a "**Henson Trust**"). In 2016, the taxation of testamentary trusts (trusts created under Wills) changed, adding an additional layer of possible planning to create "Qualified Disability Trusts", more commonly referred to as "**QDTs**".

The current tax rules are that all income earned by assets of a testamentary trust is taxed at the highest tax bracket. In BC, this is currently over 50%. Consequently, if you have set up a Henson Trust for a family member, and the assets of that trust earn \$10,000 in a year, approximately \$5,000 can be lost to tax. If your family member has limited earning opportunity personally, this is a huge loss to your beneficiary and, by extension, his or her quality of life.

If your beneficiary is entitled to the federal disability tax credit, the testamentary trust can be structured as a Henson Trust (to protect provincial benefit entitlement) and a QDT. A QDT receives preferred tax treatment: each year that the trust is operating it can elect to have QDT status, and all income earned by the QDT in that year is taxed at the relevant marginal rate, as opposed to at the highest tax rate. As a result, if the assets of a QDT earn the same \$10,000 of income, there is no tax paid since that is currently in the lowest tax bracket.

Our Team

Our team of estate and wealth advisory lawyers welcomes the opportunity to explore your individual circumstance, the potential risks, and the estate planning options available specific to you.

We hope you found this material useful. If you'd like to receive helpful information on similar topics directly to your inbox, consider subscribing using the link below.

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