

Is it time to revise your Will?



Three prompts to keep your estate planning current

For some people, even the thought of creating a Will casts a pall over their mood. Yes, a Will deals with a person's death, but the broader process of estate planning is about caring for the most important people in your life. Having an up-to-date Will is central to that process.

But how do you know if you are really "up-to-date"? Realistically, it isn't feasible for you to constantly adjust your Will, but the three prompts discussed in this article will help you keep on top of any necessary changes.

The purpose of a Will

Estate planning is about taking care of yourself now and in the future. It is also about taking care of the people around you – now, in the future and when you are no longer there.

As much as the phrase "taking care" expresses your values and emotional commitment, it has an equally important practical purpose. With a clear picture of who is the focus of your planning, you're in position to manage your property to fulfill your intentions during your lifetime, and to prepare for the eventuality of your death – that being when your Will takes effect.

With the benefit of good legal guidance, your Will will be drafted within the boundaries of the law, while anticipating reasonable contingencies. Still, there is nothing more constant than change itself, and that also applies to the people, the property and the law of estate planning.

When to review your Will – The 3 P's

What then may prompt the review of a Will and thus require a discussion with your lawyer? The potential changes to your circumstances can be grouped into the following three categories, which are listed in order of priority:

1. People changes

This includes you, a dependent, a Will beneficiary, an immediate family member (whether or not a beneficiary), an executor, or a trustee or guardian.

- Beginning or end of a close personal relationship, whether or not legally married
- A birth, adoption, death, mental capacity concern or significant health event
- Immigration, emigration or change in citizenship, and even a permanent move to or from the province
- A change in liability exposure, such as a bankruptcy, being joined in a lawsuit, signing a guarantee or starting a business

2. Property changes

Your Will is used to direct who will receive the property out of your estate, which in turn is the property you own when you die. Changes in the nature, legal title and dollar value of property could affect proportions among beneficiaries, and at the extreme could effectively disinherit one or more of them, intended or not.

- Sale of a large asset, especially if it is the subject of a specific Will bequest
- A windfall, such as an inheritance, court award or lottery prize
- A theft, loss or consumption, including a marked decline in or withdrawal from an investment account, especially for an RRSP/RRIF plan where a beneficiary designation is in place that was designed to coordinate with inclusion or exclusion of beneficiaries in a Will
- Ownership change or transfer, including loans or gifts to Will beneficiaries, a change to bank signing authority, or the addition of a joint owner on investments or real estate
- New life insurance, or cancellation or loss of insurance (for example, on retirement from employment) where the plan proceeds or a beneficiary designation were factored into Will planning

3. Passage of time

Even if you and the property have remained effectively the same, the legal landscape may have shifted beneath you. The principal sources of law are the courts, provincial legislatures and the federal Parliament.

- **Case law** – A judge may have ruled in a court case where the strategies, circumstances and or facts are similar to your situation and planning decisions.
- **Provincial law** – Changes may be made to legal entitlements or processes. For example, in 2020 Manitoba eliminated its probate fees, and as of 2021 Ontario no longer treats a marriage as revoking a pre-existing Will.
- **Federal law** – Changes are regularly made in tax legislation, so there could be developments that could have an impact on Wills, or the administration of estates and trusts.

It is difficult to say exactly how often you should review your Will, but it is commonly suggested that you review it at least every five years. Though the timing of court judgments is somewhat random, political change is more predictable. A sitting provincial or federal government must call an election within five years, and there could possibly be two elections in that time.

Testamentary trust tax changes

Indeed, one of the most significant estate tax changes came about just over five years ago. For decades, testamentary trusts – those created through a Will – were entitled to preferred tax treatment. As of 2016 they are now taxed at the top tax bracket, near or exceeding 50% in most provinces, with two key exceptions:

- **Graduated rate estate** – For the first 36 months of an estate, graduated tax brackets apply. However, the rules are complex, and if not carefully navigated, the preferential treatment may be lost.
- **Qualified disability trust** – Ongoing graduated-tax-bracket treatment may be available to a testamentary trust with a beneficiary who is qualified for the disability tax credit.

Wills drafted and executed before this development may have included one or more testamentary trusts to take advantage of the tax rules in place at the time. Today, those trusts will have little or no tax benefit and may turn out to be an impediment to efficient estate administration. For those who have benefited from what was good planning in the past, it may be time to call the lawyer and discuss appropriate planning in this new environment.

For more information, please consult your advisor and tax professional.

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