WeirFoulds LLP

Estate Alert: Can I Disinherit My Child?

February 17, 2022

By Anna Alizadeh

It has been two years since the pandemic began. It has been a stressful period for everyone, and estate planning is one issue that has been brought to the forefront of people's minds. In that regard, some of the most common questions people ask with respect to their estate planning is about their children; specifically, whether one must treat all their children equally in their estate planning and whether one can disinherit one or more of their children.

Whether an individual is legally obligated to leave assets to his or her children, and in what share, depends on where that person resides. In most common law jurisdictions, which includes all of Canada's provinces and territories except Quebec, the law recognizes that people have the freedom to dispose of their assets as they wish.[1] This is referred to as "testamentary freedom". [2] As such, parents can leave more assets to one child over another or completely cut one or more children out of their estate planning subject to certain considerations as set out below.

When deciding how to leave assets on death to family members, including children, there are several factors one should consider. For one, depending on where you reside, there may be limits to testamentary freedom. In Canada, the rules of testamentary succession (i.e., Wills and estates planning) are governed by provincial law. This includes, for example, laws limiting testamentary freedom. In that regard, most provinces in Canada require an individual to make "adequate provision" for his or her "dependants" on death. Provinces may somewhat differ in whom they consider to be a "dependant" of an estate, but it typically includes the deceased's surviving spouse and child (depending on the child's age and physical or mental limitations).[3] What adequate support means may also differ from one province to another, and it will involve assessing various elements.[4] A failure to make adequate provision for a dependant could result in lengthy litigation by a dependant seeking support from the estate. Nevertheless, so long as adequate provisions are made for dependants, parents can decide on an unequal distribution of their wealth to their children.

Another factor to consider is family dynamics. In some cases, it may be best for parents to leave a letter or video explaining why they chose to treat their children differently in order to avoid unnecessary legal battles between the children.

Finally, it is important to keep in mind what happens if one does not execute a Will at all. When an individual does not make a Will, the distribution of his or her estate is governed by the specific intestacy rules of the province of their residence. In Ontario, for example, the laws on intestacy are set out at Part II of the *Succession Law Reform Act*. This Act provides for a list of individuals, in hierarchical order, to whom the law presumes the deceased would have wanted to leave money. For example:

- if you are married and have no children at the time of your death, your spouse inherits your entire estate; and
- if you are married with children, your spouse will first inherit a "preferential share" of the value of your estate and the remainder of the estate (if any) is divided among your spouse and children (how the remainder is split depends on the number of children you have). The regulations made under the *Succession Law Reform Act* were recently amended to increase the value of a surviving spouse's "preferential share" from $200,000 to $350,000 where a deceased died intestate on or after March 1, 2021. For an individual who died prior to March 1, 2021, the value of the surviving spouse's preferential share

remains to be $200,000.

Therefore, if you do not have a Will, the law will take over as to how your estate will be divided, which could result in a distribution that is contrary to your wishes. If you do make a Will, the law may limit your freedom as to how you divide your assets.

It has become more imperative than ever to ensure that your estate planning documents are up to date. You may wish to take this time at home as an opportunity to assess your assets, debts, and estate planning to make sure that your affairs are in order. Importantly, you may wish to confirm that the people you care for are taken care of as part of your estate planning and to specifically consider any dependants to whom you may be required to provide support. While estate planning can be a daunting task, speaking with an estates and trusts lawyer about the matter may help alleviate some of that stress by ensuring that your wishes are met within the parameters of the governing law.

[1] However, civil law jurisdictions (including Quebec) usually have forced heirship laws that require a deceased's assets to automatically pass to their next of kin.

[2] *Spence v BMO Trust Co*, 2016 ONCA 196 (CanLII) at para 30.

[3] See for example, Part V of Ontario's *Succession Law Reform Act*, RSO 1990, c S 26 [the "*SLRA*"]; British Columbia's *Wills, Estates and Succession Act*, SBC 2009, c 13; and Alberta's *Wills and Succession Act*, SA 2010, c W-12.2.

[4] In Ontario, for example, this involves assessing factors such as the dependant's assets, means, and needs, as well as the proximity and duration of the dependant's relationship with the deceased (see the *SLRA*, s 62(1)).

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035