

Estate Essentials: Do You Need a Will?

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By Carissa DeMarinis

A common question we receive as estate lawyers is whether it is necessary to make a Will. What's the big deal about dying without one? The short answer is that there are legal and tax consequences associated with dying without a Will. No matter how small or straightforward your estate may seem, there are advantages to having a well-drafted and properly executed Will, some of which will be discussed in this blog.

What happens if you die without a Will?

Each province has different rules which govern the distribution of the estate of someone who dies without a Will (i.e., someone who dies "intestate").

In Ontario, if a person dies intestate, their estate will be governed by Part II of the *Succession Law Reform Act*, [RSO 1990, c. S.26](#) (the "SLRA").

Under Part II of the SLRA, the distribution of an intestate estate varies depending on the family the deceased left behind. A non-exhaustive list of the distribution schemes under Part II of the SLRA is set out below:

- **A Spouse and No Issue:**

If you die leaving a spouse to whom you are legally married and not separated from at your death^[1] and no issue ("issue" means a "descendant," including children, grandchildren, great-grandchildren, and so on – see s 1(1) of the SLRA), your spouse is entitled to the entire estate. See s 44 of the SLRA.

- **A Spouse and One Child or Issue of a Predeceased Child:**

If you die leaving a spouse to whom you are legally married and not separated from at your death and only one child (and no issue of a deceased child), your spouse will receive what is known as a "preferential share" (which is currently prescribed by regulation to be \$350,000) and, if anything remains, 1/2 of what remains in the estate after the preferential share is paid. Your child will receive the remaining 1/2 of your estate. If your child predeceases you leaving children of their own (i.e., your grandchild or grandchildren), the share of the estate which he or she would have received will be distributed equally amongst his or her own children. See ss 45, 46 and 47 of the SLRA.

- **A Spouse and Two or More Children:**

If you die leaving a spouse to whom you are legally married and not separated from at your death and two or more children, your spouse will receive the preferential share and 1/3 of the balance of the estate after the preferential share is paid. The remaining 2/3

of the estate will be equally divided amongst your children (and if one or more of your children predecease you leaving children of their own, those children will inherit in lieu of their deceased parent). See ss 45, 46 and 47 of the SLRA.

- **No Spouse and One or More Children:**

If you die leaving children but no spouse, your estate will be divided equally amongst your children (and if one or more of your children predecease you leaving children of their own, those children will inherit in lieu of their deceased parent). See s 47(1)-(2) of the SLRA.

- **No Spouse or Issue:**

If you die without a spouse or issue, your estate will be divided equally amongst your parents. See s 47(3) of the SLRA. If you have no living parents, the SLRA provides further directions.

Taking Control of Your Assets

A Will allows you to exert control over your assets by deviating from the intestate distribution schemes set out in the SLRA. Consider, amongst other things, the following:

- **Do you have a common-law spouse?**

Common law spouses are not considered “spouses” under Part II of the SLRA and therefore are not automatically entitled to receive any portion of an intestate estate. A Will gives you the opportunity to name your common-law spouse as a beneficiary.

- **Do you have children? Are they minors?**

If you die without a Will and your minor child’s share of your intestate estate is more than \$35,000, it will need to be paid into court, to be held and managed by the Accountant of the Superior Court of Justice until your child turns 18 years old. With a Will, you can instead decide, for instance, that the entirety of your estate be distributed to your spouse (whether or not you are legally married to them), or that funds be held in trust for your (minor and/or adult) children, with payments being made to them at the trustee’s discretion and/or for certain purposes, such as for their education, and/or when they attain a certain age.

- **Are there specific possessions, such as jewelry, artwork, or family heirlooms, which you would like to give to a certain individual?**

A Will can include a specific gift of such item(s).

- **Would you like to have a contingency plan?**

If, for instance, your spouse and/or children predecease you or die at the same time as you, would you still be satisfied with how your estate would be distributed on an intestacy? A Will gives you the chance to name alternate beneficiaries, should your primary beneficiaries fail to survive you.

- **Would you like to donate any portion of your estate to charity?**

A Will gives you the ability to name beneficiaries who would not otherwise be entitled to inherit under Ontario’s intestacy laws,

including, without limitation, one or more charities.

- **Would you like to direct that some or all your estate be held in testamentary trusts?**

A Will gives you the flexibility to draft trust structures tailored to your wishes and your loved ones' needs. Some examples are discussed above and other examples of possible trust structures include:

- a trust which directs that your spouse receive income from the trust during their lifetime, no one except your spouse is entitled to receive the capital of the trust during their lifetime, and your children or other beneficiaries receive the capital of the trust remaining on your spouse's death; and
- a type of trust known as a Henson trust, which is typically set up to provide for individuals with disabilities without disqualifying them from ODSP.

Probate Considerations and Minimizing Estate Administration Tax

With a Will, not only can you exercise some control over your assets, but you can also:

- name one or more persons as the "estate trustee(s)" of your estate (i.e., the person(s) who will administer your estate. See our blog post on "[Who Should Administer Your Estate?](#)"); and
- utilize strategies to minimize the tax payable by your estate.

When a person dies intestate, a court application is a necessary precursor to the appointment of an estate trustee and, therefore, the entire value of the estate will (subject to certain exceptions) be subject to estate administration tax ("EAT") – equal to approximately 1.5% of the value of the estate over \$50,000. See Sanaya Mistry's post "[What is Probate and Why Should You Know About It?](#)"

This is not always the case when a person dies with a Will. Where a Will names a person as estate trustee, that person derives their authority to act from the Will itself. In certain circumstances, therefore, an estate trustee named in a Will can administer the estate without probate and, accordingly, without paying EAT.

Note, however, that even where a Will exists, an estate trustee will often need to apply for probate before he or she can deal with certain assets. Where probate will likely be required to deal with certain estate assets but not others, individuals may choose to "divide" their estate among multiple Wills, such that only one of those Wills – and therefore a portion of the overall estate – will need to be probated and be subject to EAT (see John Siferd's post "[Ways to Reduce Estate Administration Tax](#)").

Minimizing EAT is not the only type of tax planning to consider when drafting a Will; however, these further tax planning strategies are outside the scope of this blog. We invite you to reach out to any of our [estate planning lawyers](#) for more information on estate, trust, and tax planning, including the best approach for your individual circumstances.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[1] See s 43.1(2) of the SLRA for the meaning of "separated" spouses.

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