

The Importance of a Will



Matthew Getzler
Partner, Minden Gross LLP
T. 416.369.4316
mgetzler@mindengross.com

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We are living in unprecedented times. The importance of a Will—during this COVID-19 pandemic or anytime for that matter—simply cannot be overstated.

This first part of this two-part article discusses some of the major implications of dying without a Will. As a tax lawyer, I would be remiss if I did not address the potential exposure one has to both prematurely paying income taxes and unnecessarily incurring probate fees when dying without a Will. These tax/probate consequences will be discussed in Part 2.

Powers of Attorney should also be addressed while drafting a Will to determine who can make decisions on the individual's behalf, if eventually the individual is incapable or incapacitated. I will not go into the details of Powers of Attorney here. I recommend reading Sheila Morris' article "[Substitute Decision Making During Covid-19: Why you need \(or may need to update\) your Power of Attorney](#)" on the Minden Gross LLP website.

Appointment of Executors and Trustees

When an individual dies without a Will, an application must be made to the court to have an estate trustee appointed. This could be costly, time-consuming and there is no way to ensure who will be successfully appointed in this capacity. The process could be contentious, causing rifts among family members, etc., as they apply for appointment.

A proper Will appoints the executors and trustees and typically appoints alternates as well, ensuring that an individual's estate is administered by the people he or she (and not the court) believe to be best suited.

Guardianship Provisions

While a guardianship provision in a Will is not permanent, it is generally binding for the first 90 days following death, and within that time, an application to the court for permanent guardianship is undertaken. Courts have generally given great weight to guardianship appointments in a Will when

appointing permanent guardians for minors. Without an appointment in a Will, immediate action will be required to appoint someone as guardian right away and an individual is relying on the judge to use his or her best judgement to determine who should be the guardian(s) of the individual's minor children, both immediately and on a permanent basis. This could result in contentious custody battles among family members, and could have a long-lasting and unintended impact on the children themselves.

Distributive Provisions

When an individual dies without a Will, he or she is deemed to have died "intestate" and the rules of intestacy under the [Succession Law Reform Act](#) apply to the distribution of the individual's assets (subject to a surviving spouse making an equalization claim under the [Family Law Act](#)).

More particularly, the intestacy distribution provides that:

- Where an individual is survived only by a spouse, the spouse inherits everything
- Where an individual is survived by spouse and issue (children, grandchildren, etc.) and the value of the estate is less than \$200,000, the spouse inherits everything
- Where an individual is survived by spouse and issue (children, grandchildren, etc.) and the value of the estate is greater than \$200,000, the spouse inherits \$200,000 and the remainder of the estate is divided between the spouse and issue (depending on how many children there are)
- Where there are no spouse and issue, parents inherit
- Where there are no spouse, issue and parents, brothers and sisters inherit
- Where there are no spouse, issue, parents, brothers and sisters, nephews and nieces inherit
- Where there are no spouse, issue, parents, brothers, sisters, nephews and nieces, "next of kin" inherit

A Will, on the other hand, dictates how an individual's assets are dealt with following the individual's death. Not only does this ensure that the individual's assets are distributed in accordance with his or her wishes, but there can also be significant income tax implications to having an estate distributed under an intestacy where there is a surviving spouse.

For more information on Will and estate planning, please contact [Matthew Getzler](#).