

## The Importance of a Will: Part 2

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April 2020

In [Part One](#) of this article, I discussed some of the practical implications associated with dying without a Will, focusing on the appointment of executors/trustees, guardianship provisions and the distribution of assets on an intestacy.<sup>1</sup> Part Two discusses certain income tax and probate fee consequences of dying without a Will.

### Premature Income Tax Implications

Upon death, an individual is—subject to certain exemptions—deemed to have disposed of his/her assets at fair market value. Any inherent gains on such assets is subject to tax as a capital gain, which can be taxed at a rate in excess of 25% in Ontario in 2020.

The most common exception to this rule is when assets are transferred to a surviving spouse. The effect of such a transfer is that the capital gains owing upon the first spouse's death can be deferred until the later of the two spouse's deaths. This deferral can be significant where a surviving spouse survives the first-to-die spouse for a long period of time.

When an individual dies intestate and is survived by a spouse and children, his/her estate—as discussed in Part One—is divided between the spouse and children, depending on the number of children who survive the individual. Where a spouse and more than one child survives the individual, the spouse, absent a claim for equalization, is entitled to a preferential share (the first \$200,000 of an estate) and one-third of the balance of the estate, while the children divide two-thirds of the value of the estate in excess of the preferential share. So, if an individual died with \$1 million, the surviving spouse would receive \$466,667 and the children would divide the balance, \$533,333. Since there is no general exception for transfers to children upon death, capital gains

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<sup>1</sup> "The Importance of a Will: Part 1," <https://www.mindengross.com/resources/news-events/2020/04/21/the-importance-of-a-will>.

taxes in excess of \$130,000 (13% of the value of the estate) could be prematurely owing upon the individual's death as a result of an intestacy.

## Unnecessary Payment of Probate Fees

Probate is the process by which an individual's Will is certified by a provincial court, if necessary. Where an individual holds certain assets in his or her own name, a probated Will is ordinarily required in order for the estate trustees to deal with a variety of those assets (such as bank/investment accounts and Canadian real estate). Many people own a variety of assets for which a probated Will is not required to effect a change in ownership (i.e., private company shares, certain indebtedness owing to the individual.) In Ontario, a probate fee equal to roughly 1.5% of the fair market value of the individual's assets under the probated Will is charged by the court in order to probate the Will (resulting in roughly \$15,000 in probate fees for every \$1 million of assets). To make matters worse, assets may be subject to probate fees on multiple occasions (i.e., both spouses may be subject to probate fees on the same assets).

In order to appoint an executor and trustee of an estate *without a Will*, probate fees must be paid on *all* of the testator's assets, regardless of whether a probated Will is required to effect the transfer of certain assets.

A detailed discussion on probate planning is beyond the scope of this article, but it must be noted that in Ontario, a common and effective form of probate planning is the use of "multiple Wills," one Will that deals with those assets for which a probated Will is required (often called a "public Will") and another Will that deals with those assets for which a probated Will is not required (often called a "private Will").<sup>2</sup> When multiple Wills are used, only the fair market value of those assets that form part of the public Will are subject to probate fees. Probate fees can accordingly be avoided to the extent of the fair market value of those assets forming part of the private Will. Simply incorporating the multiple Will strategy into an estate plan can significantly reduce an individual's estate's probate fee exposure.

For more information, please contact [Matthew Getzler](#).

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<sup>2</sup> A more detailed discussion on probate planning, take a look at my article "[Probate Planning 101](https://www.mindengross.com/docs/default-source/publications/make-a-will-month-probate-planning-101)" from the Minden Gross LLP website at: <https://www.mindengross.com/docs/default-source/publications/make-a-will-month-probate-planning-101>.