

WHY HAVE A WILL?

A. Introduction

Many people die without having taken the time to sit down and prepare properly for the transfer of their assets after they are gone. We can all understand why. Nobody wants to die, and making a will sometimes forces a person to acknowledge that it will happen. This paper will address some of the issues that arise as a result of intestacy.

B. The Statutory Will

When a person dies without a will they are said to die intestate. There is legislation in all Provinces and Territories across Canada that deal with this eventuality. The form of this legislation has been around for centuries in Britain and some of the language and concepts are quite archaic. In Manitoba the legislation dealing with the distribution of the assets of a person without a will is *The Intestate Succession Act*. The Act dealing with the administration of the estate of the person dying without a will is *The Court of Queens Bench Surrogate Practices Act*. The legislation provides a scheme for the administration and distribution of a person's assets on death. The scheme provides that the closest living relative has the primary obligations and rights to administer and receive the deceased's property. These legislated obligations and rights based solely on

kinship often conflict with a person's intentions, making it important for some people to avoid the impact of these schemes.

C. Administration under The Court of Queen's Bench Surrogate Practices Act

The Court of Queen's Bench Surrogate Practices Act deals with the various court procedures associated with the administration of a deceased person's estate. When a person dies without a will that person will usually have assets that require court sanction to administer. Where an executor is validly appointed under a will, the executor is authorized by that appointment to deal with the deceased's affairs. In order to confirm this authorization in relation to third parties, an application for probate is made to the Court of Queens Bench Probate Division. The grant of probate, once provided by the court is evidence to third parties that the executor has been appointed and approved as the authorized representative of the deceased. Where there is no will, an application for administration must be made to the Court of Queen's Bench Probate division. There are some similarities to these applications but there are significant differences as well.

Appointing an administrator can give rise to complications.

1. *Next of Kin – The Court of Queen’s Bench Surrogate Practices Act* implies that the next of kin must apply for administration of the estate. It never actually states that the next of kin has the first right but *The Queen’s Bench Rules* (Forms 74N and 74P) provide that where the next of kin does not apply, that a written renunciation and a nomination must be obtained from those with equal or greater right to apply for administration. This creates added paperwork and inconvenience for the family. Without making a will and designating a personal representative, the deceased also loses all control regarding who will be his representative. The family member who steps forward may not be the family member the deceased would have chosen as the best for the job. Who is more likely to step forward as the administrator, the busy accountant or the unemployed busybody? As often as not, the next of kin is not the best person for the job.
2. *Administrator Must be Resident in Manitoba – The Surrogate Court Practices Act* provides that “administration shall not be granted to a person who is not habitually resident within Manitoba.” (s.7(1)) This can present difficulties for the administration of an estate. If all of the next of kin are resident in another province they will, no matter that there is no one in the province, not be granted the authority to deal with the estate assets. Resort in this case must be to a friend of the deceased or a trust company. If the estate is larger, a trust company can be an excellent

choice. However, a trust company will usually charge a minimum amount for administering an estate and if the estate is smaller, this can present a real burden. Sometimes if an estate is too small a trust company will refuse to act as administrator. The public trustee can be enlisted as a course of last resort but they are usually hesitant to act and their fees too are significant.

Naming an executor in the will avoids these problems. An executor does not have to be resident in Manitoba.

3. *A Bond Must be Posted* – When applying for administration, the applicant must post a bond. If it's a personal bond it must be for twice the value of the amount declared on the inventory. Where the value of the estate is over \$50,000, in addition to the bond of the administrator, a surety must be solvent to the extent of being able to pledge assets equal to twice the value of the estate. This can present a real difficulty and often an administrator must go through the added expense of paying a surety company to put up the bond. An executor appointed under the will does not have to worry about this process unless he or she resides outside of Canada.
4. *No Immediate Authority* – As mentioned above, the executor appointed in the will draws immediate authority to act on the deceased's behalf. There

can be some significant ramifications if there is no immediate authority to handle the deceased's affairs.

Consider the following situation. There was a woman who had lived for years in a very difficult relationship. In her final days she summoned the courage to leave the relationship and arranged with her siblings, one of whom was appointed as the executor under the will, that she would be cremated and interred in the cemetery of her faith. She died and even in her death, her spouse would not give her peace. He insisted that she be buried in the family plot (his side of the family) that he had arranged far from where they lived. The executor carried out her wishes over the protestations of the spouse.

5. *Delayed Administration* – While the issues of who is going to apply as administrator, who will have to renounce, and will they nominate the prospective administrator, who does step forward, and if a bond and surety are required, can they be secured; while these issues are being resolved, the estate is delayed. An executor appointed under a will has the authority according to that will to begin acting immediately so as to resolve any urgent matters that require attention. A great deal of confusion, loss, and anxiety can occur where a person dies and no one knows what to do with the deceased's property.

D. Distribution of Assets Under *The Intestate Succession Act*

There is a simple scheme under *The Intestate Succession Act* for the distribution of assets as long as the family circumstances are simple. The scheme is that all of the intestate's assets will go to the closest living relative. The degree of consanguinity, or who is considered closest in kinship to a deceased, is as follows:

- the deceased's spouse;
- if the deceased had children of a previous relationship, the deceased's spouse and issue;
- issue (children, grandchildren and great-grandchildren etc.);
- parents;
- siblings;
- grandparents (divided between maternal and paternal grandparents or their issue);
- aunts and uncles related by blood, and so on.

So, according to the scheme in the Act, if a person dies leaving a spouse surviving, all goes to the surviving spouse. If the deceased is a parent without a surviving spouse, all goes to the children.

The complications arise when the family relationships of the deceased are not as simple as the above cases. For example, if a person dies leaving a spouse and children of a previous relationship then the first \$50,000 of the estate goes outright to the surviving spouse. The remainder is divided in two equal parts and one part is given to the spouse and the other part is divided into as many equal shares as the deceased had children and paid to the children. Adoptive children are treated as natural children.

Stepchildren do not receive a share. Many people come to think of their step kids as theirs. This is particularly the case if they stood in the position of the parent for many years. Over time these relationships develop characteristics very similar to that of parent and child by blood relation. The children may refer to their stepparents as “mom” or “dad” and they in turn may refer to them as “son”. This has no impact on the distribution under the Act. When “mom” or “dad” die without a will, that step “son” will be completely shut out of the distribution.

If a deceased was in a common-law relationship, regardless of the duration of that relationship the surviving common-law partner is not entitled to claim under *The Intestate Succession Act*. This is often not what a couple expects or wants.

A real life example is a woman who came to see a lawyer to draw up an estate plan. She was in common-law relationship for about 20 years. There was a

family business that they had built up but held in the name of the common-law partner. The common-law partner had no will. She had every expectation that if her partner died, that she would inherit everything. Her (and his) accountant had told her that was the case. She was quite shocked to learn that she would be entirely shut out of the distribution of her partner's estate should he pass away. She had no statutory right to inherit the business, or any of the other assets in his name.

There is draft legislation in the works in Manitoba right now to change the intestacy rules as they affect common-law partners, both heterosexual and homosexual. This comes in the form of Bill 53 – *The Common-law Partners Property and Related Amendments Act*. It is intended that these changes will bring the rights of common-law partners in line with those of married couples. The bill has passed its required three readings in the house but it sits ineffective right now awaiting official proclamation.

A surviving common-law partner can bring an action at common law for a constructive trust or, if they qualify as a common-law partner and are able to demonstrate need, can apply under *The Dependant's Relief Act* for support from the estate. The common law suit based on constructive trust is expensive and unpredictable, and may not be an option where the assets of the estate are not sufficient to warrant the expense.

If a person makes a will they have control over the distribution of his or her property and can allocate their assets where they are most needed.

E. Loss of Opportunity

A significant and often overlooked drawback in not making a will is the loss of opportunity that results. An estate plan is very personal and unique to an individual and their needs. When estates aren't carefully planned dependants, beneficiaries and charities suffer for the loss of opportunities.

Some obvious opportunities are discussed below.

1. *Tax Reduction Through Testamentary Trusts* – A testamentary trust could be a strategy available to the beneficiary to reduce taxes on income earned in the trust. The beneficiary can choose whether to utilize the trust for this purpose if the trust provisions are properly drafted. If the assets of the testator are sufficient and the beneficiaries have alternate sources of income, a testamentary trust can be created by a testator's will with the advantages set out below.
 - o The income of the trust is taxed as a separate income earner at the graduated rates (with no personal exemption), the testamentary trust

being a second taxpayer with a second return, therefore doubling access to the lowest tax bracket.

- o The trustee can designate to have the income taxed in the testamentary trust and the beneficiary can receive the income after taxes if he or she is at a higher tax bracket than the trust.

- o The income can be paid out directly to the income beneficiaries (children or a spouse for example) to take advantage of their personal exemptions and/or lower rates. This results in an income splitting plan to reduce overall income taxes payable in the family unit.

This can result in thousands of dollars per year in tax savings in the hands of beneficiaries.

2. *Holding Gifts Beyond the Age of Maturity* – under the statutory regime discussed above, a beneficiary receives any entitlement when they attain the age of 18 or if they have attained that age, they receive the gift outright. Age 18 is a young age for some people. They may not be able to handle the responsibility of an inheritance at that age and squander it. Wills are often drafted to allow for a gradual release or delayed outright release of the capital of a gift so as to allow the beneficiary to mature and

still have the gift available for them when they know how to properly deal with it.

3. *Special Beneficiaries* – There are a number of scenarios where a person might want to structure arrangements for special beneficiaries, either to protect them from harm or to improve their lives. Where there is a disabled beneficiary, a person may want to provide that certain assets should be held by a particular person for the long term care and benefit of that disabled beneficiary. Where a beneficiary has trouble with spending too much money too quickly, a person may want to restrict that amounts of money available to that person so that they don't waste it all foolishly. Where a person has dependant parents, they may want to set a certain amount aside so that their parents are cared for in their old age. All of these situations and many more can be adequately and carefully planned for in a professionally drafted will.
4. *Special Wishes* – A person may wish to leave certain special gifts (china, a car, etc.) to a particular person. Or they may provide that a fund is to be used to throw a wake for the deceased. These special wishes can be accommodated in the terms of a will.
5. *Special Property* – Where a person has a farm, a cottage, a business or shares in a corporation, the opportunities for estate planning become even

more diverse and complicated. Where this type of special property exists, the need for a properly thought out and carefully drafted estate plan becomes even more important. The estate plan should provide for a seamless and tax-efficient transition in the ownership of the property from the deceased, to the estate, and to the ultimate beneficiaries.

6. *Appointing a Guardian for Minor Children* – Where a person has minor children he or she will usually like to have some say regarding who is to care for those children if that person should suddenly pass away. A will allows a person that option.

7. *Charitable Giving* – Providing a charitable gift to an organization that the deceased was involved in during life affords the opportunity to provide a lasting legacy that can be very attractive to certain people. It can also reduce the taxes payable on the estate assets on death, leaving a greater over all estate to distribute to the deceased's beneficiaries. Needless to say, these are benefits that are completely lost if the deceased fails to make a will.

G. Information in this Paper not Substitute for Legal Advice

This paper is intended as an introduction to this topic. It is not a substitute for specific legal advice tailored to a client's particular needs. Any person wishing advice on how to order their affairs, or those of a client, should contact a member of our Wealth and Succession Practice Group. This paper is also based on the laws of Manitoba, and while laws are similar from Province to Province, the content of this paper may not be accurate in other provinces.

H. Conclusion

A person who doesn't make an estate plan opts for a simple statutory distribution of the assets of their estate. When this happens there are a number of opportunities that are lost to the deceased and to his or her beneficiaries. Just as every person has a unique life and deals with a unique set of circumstances in their lives, they should avail themselves of the opportunity to develop unique estate plans that properly reflect their unique circumstances.

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