Planning**Matters**

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Do I really need a Will?

As Wills and Estates and lawyers, we are often asked; "Do I really need a Will?" or "Why would I need a Will? Everything goes to my spouse and children anyways." However, once a person has gone through the process to complete a Will they quickly realize that the provincial default laws that apply when a valid Will is not in place do not reflect their wishes, in particular where there are second marriages and children from different relationships. A lawyer can help to outline the potential pitfalls and the various options to achieve the wishes of the Will-maker. With a Will in place a person can have peace of mind that his or her wishes will be fulfilled.

What is a Will?

A Will is a document that outlines who will manage your estate and inherit your assets. However, there's more to a Will than a listing of beneficiaries. A valid Will can also be used to:

1. appoint an executor who would take steps to manage your estate, including paying debts and making applications for probate (if necessary), and distribute your assets in accordance with the terms of your Will;
2. minimize or even avoid the probate process and probate fees;
3. designate a person to care for and manage funds for your children if you die before they become legal adults;
4. set out your burial wishes; and
5. protect the assets you give to your family members.

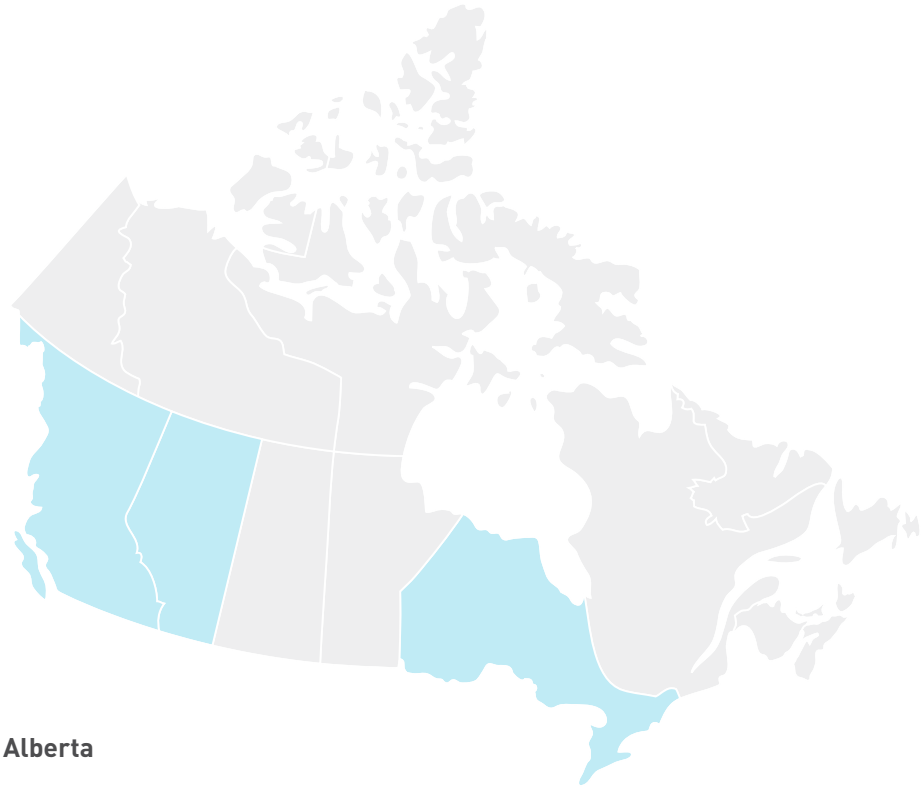
What happens if I die without a Will?

Most people are surprised to learn what would happen to their assets if they don't have a valid Will in place. Although the rules in each province usually direct the assets to family members, those rules may not actually reflect your wishes.

British Columbia

For example, if you are resident in British Columbia, die without a valid Will and have a spouse but no children, then your spouse would inherit your estate. However, a spouse includes a person with whom you have lived in a marriage-like relationship for at least 2 years. Determining whether a couple is living in a marriage-like relationship is not always black and white. While many couples may choose a common law relationship, others may do so inadvertently, making a decision to live together without actually considering whether they are or intend to be in a common law relationship. Depending on the facts, a person may even have more than one spouse who may be entitled to an estate if there is no Will.

If you die with a spouse and children, then in British Columbia the amount your spouse would receive under current legislation in British Columbia would depend on whether you and your spouse had children together. For example, if you have a spouse and children only with that spouse, your spouse would receive all of your household furnishings, the first $300,000 of your estate and an option to buy the spousal home from your estate. One-half of the remainder of your estate would go to your spouse and the other one-half would be divided among your children. However, if you have a spouse and children from more than one relationship, then the preferential amount decreases from $300,000 to $150,000.



Alberta

The rules in Alberta are different. If you have a spouse and children only with that spouse then the surviving spouse receives the entire estate. However, if you have a spouse and children from more than one relationship, then the surviving spouse receives the greater of $150,000 and one-half of your estate, and your children (not your spouse's children) would share equally in the balance of your estate.

As the average life expectancy increases so have the associated medical and health care costs. As a result, many people want their spouses to receive their entire estate to ensure their spouse has sufficient assets for his or her lifetime, and only upon the death of the surviving spouse would any remaining amounts be given to children. As outlined above, if you don't have a Will then your surviving spouse may not inherit your entire estate and may need to negotiate with children and other family members or sue the estate for a greater share.

Ontario

In Ontario, if you die with a spouse and children your spouse is entitled to $200,000 and if the couple had one child then the balance of the estate is divided 50/50 between the spouse and child. However, if there is a surviving spouse and more than one child, then the spouse receives $200,000 plus one-third of the balance and the remaining estate is divided equally among the children.

How can a Will protect the assets I give to beneficiaries?

In each province a beneficiary must be above the age of majority before he or she is entitled to receive his or her share of the estate. In Ontario and Alberta the age of majority is 18 and in British Columbia it is 19. If property or money is left to a minor, then a provincial government department may step in to hold the money and property in trust until that minor attains the age of majority. With a valid Will you can arrange for the money and property to be held in trust for the beneficiary by a close friend or family member. The terms of the trust could specify that the beneficiary receive the funds upon attaining the age of 19 or even at a later age when the beneficiary may be more mature and financially responsible. The trust could also set out guidelines about the types of expenses that are to be paid from the trust fund (i.e., medical expenses, university tuition, or to purchase a home or vehicle).

Similarly, if you have a family member who is unable to manage his or her finances, then with a valid Will you can establish a trust which would give an independent trustee the authority to make decisions as to how funds may be spent. In addition, if you have a family member that has a disability, then you can set out specific provisions in your Will to minimize the effect of his or her inheritance on any disability benefits that beneficiary may be receiving.

Other benefits of having a Will

Even if the provincial default rules setting out the distribution of your estate reflect your wishes, there are other reasons for putting a valid Will in place. The stress of dealing with a family member's death can be magnified when the deceased died without a valid Will. Where there is no Will in place, there is also no executor appointed to manage the estate and a Court application will need to be made to appoint a person to administer the estate. This person is called an administrator. For the period when no administrator has been appointed, bank and investment accounts could be frozen and it may be hard for family members to obtain information about the estate assets since that information may not be disclosed for privacy reasons. Also, the spouse and other family members of the deceased will not have certainty about their inheritance and there could be disputes about whether a person is considered a spouse and who among the family members should be appointed as the administrator.

A Will is important, but it is only the first piece of the estate planning puzzle. Your Will only addresses assets that you own personally and does not include assets that are owned jointly and assets where there is a valid beneficiary designation in place (such as with life insurance, Tax Free Savings Accounts and RRSPs and RRIFs).

By going through the process to prepare a valid Will, all of these issues and your assets will be reviewed and addressed, your wishes will be clearly stated, and you will have the peace of mind that you have left your family members with the proper framework to manage your estate.

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