



Client Information Summary

Dying Without a Will (Intestate) and the Succession Law Act (Ontario)

If you die without a will, the laws of each province dictate how your estate is distributed and this would seldom reflect your actual wishes. In addition, there would be a significant delay in settling things because of the need to bring in certain government officials to wind up the estate.

Consider the following seven points that apply in the event that a person dies intestate:

1. A spouse does not automatically inherit all of the property.
2. A spouse does not have the right to decide how property should be divided among the children, or at what age they should get their share.
3. A spouse does not have the right to pick the person who will be responsible for handling all the arrangements for a division of estate assets.
4. Next-of-kin do not have the right to decide how to divide up the estate, or as appropriate to minimize taxes.
5. The distribution is not decided by a judge on the particular merits of the case, but is decided rigidly according to provincial legislation.
6. The distribution of an estate can be delayed until one year from the date of death by law.
7. Provincial laws governing the distribution of an intestate estate may change.

SUCCESSION LAW ACT OF ONTARIO

Each province in Canada has its own laws with respect to distribution of an intestate's estate. Reproduced below is the distribution as determined by the Succession Law Act in Ontario:

Spouse only: Entire estate to spouse.

Spouse and one child: First \$200,000 to spouse. Remainder: one-half to spouse; one-half to child.

Spouse and children: First \$200,000 to spouse. Remainder: one-third to spouse; two-thirds to children divided equally. If only grandchildren survive, they would share the estate equally (per capita).

No spouse and children: All children share equally.

No spouse or children: Entire estate to parents or the surviving parent. If none survive, siblings share equally. Children of a deceased brother or sister take their parent's share. If only nephews and nieces survive, they would share in the estate equally (per capita)

Descendants and relatives conceived but unborn: If born alive after your death, they inherit as if they had been born during your lifetime.

Children born outside marriage: Same rights to share in estate as children born in marriage.

As intestacy could also result when a will exclude certain contingent provisions such as a common disaster of husband and wife where there are no children of the marriage. In Ontario, and some other provinces, where any portion of an estate is indisposed of by will, that portion is distributed as if the testator had died intestate and has left no other estate. In addition, the estate becomes the property of the Province, in situations where there are no lawful heirs.

In addition to these general considerations where the law would not reflect your personal wishes, also consider these possibilities:

1. Your estate may be left in a legal tangle thus delaying settlement and causing additional legal fees.
2. Your family could be left without income which would result in considerable difficulty, if not hardship, for your spouse and children.
3. Your spouse's hands are financial tied in raising children. The children's share of the estate is paid into court to be administered by government authorities until the child reaches the age of majority, and then is automatically distributed.
4. Your home and other assets could be sold under unfavourable market conditions resulting in inadequate resources to take care of your family.
5. Your heirs could end up paying taxes that may have easily been reduced or deferred.
6. Your children may be placed under guardianship to someone other than someone you would have chosen. While proposing a guardian for minor children is not binding, it does indicate your wishes and ensures that those wishes will be taken into consideration.

A will enables you to divide up your property quite specifically among the people you want to benefit, and to protect the value of your estate.

THE FAMILY LAW ACT (FLA)

The Family Law Act (FLA), 1986, came into force on March 1, 1986. It applies to many aspects of law and is of concern in several areas, only some of which are addressed here.

The intent of the FLA is to encourage and strengthen the role of the family, and to recognize the equal contribution of spouses. It also ensures that on death, one spouse is not left in an insecure financial situation. When a will clearly establishes how the assets of a deceased spouse are to be distributed, there is always a possibility that a surviving spouses claim for an equalization payment will upset the testator's intended distribution under the will.

At the death of a spouse the value of the net family property must be equalized between the spouses, subject to certain conditions. This means that if spouse A has assets of \$200,000 and spouse B has assets of \$50,000, then in the event of death, spouse B would be entitled to an equalization payment of \$75,000.

If no will exists at time of death, a surviving spouse is given 6 months to make an election whether they wish to claim under the Family Law Act (FLA) or the Succession Law Reform Act. This decision would be based upon which of the two acts was more favourable. Even if a will does exist the spouse may still elect to claim under the FLA, as opposed to the will, in situations where it is more advantageous to do so. In the above example, if a will does exist, spouse B could review his/her entitlement under the terms of the will versus the Family Law Act. If the will provided less than \$75,000 to the surviving spouse, he/she could elect to claim under the FLA. This complicating factor should be considered when drafting a will.

IN CONCLUSION

Making a will is a process that can save much hardship and confusion for survivors upon death. While thought and care is required to do it properly, it is a necessary step to ensure that your estate is settled according to your wishes.

Note: This summary is drawn from sources believed reliable. The contents are for general information only and should not be construed as legal advice or opinion on any specific matter. No action should be taken on the basis of this summary. Action should only be taken on the advice of your professional advisor as it applies to your specific situation.

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