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Torkin Manes LegalSource

WILLS, TRUSTS & ESTATES

Why Do I Need a Will?

As estate lawyers, we are often asked "Why do I need a Will?". While the benefits of a Will are too numerous to explain in a few short pages, we have compiled a list of some of the most common, and arguably most important, reasons below.

You need a Will….

…to ensure that your estate is distributed in accordance with your wishes.

If you die without a Will, contrary to popular belief, your estate is not transferred to the government. (There is one rare, but important exception to this rule: if you do not have any surviving family members, even those remotely related to you, in the absence of a Will your estate will be transferred to the government subject to the *Escheats Act*.) However, in most circumstances, your estate will be distributed to your family members in accordance with Ontario's *Succession Law Reform Act*, based on who survives you. As a result, family members who you do not wish to benefit may be entitled to a share of your estate, and vice versa:

- Separated spouses ***are*** entitled to share in their spouse's estate.
- Common law spouses ***are not*** automatically entitled to share in their spouse's estate. Step-children are also not entitled to share in their step-parent's estate.
- A spouse is entitled to the first $200,000 of the deceased spouse's estate (or the entire estate, if it has a value of $200,000 or less). Any amount over $200,000 is to be divided between the surviving spouse and the deceased's children (the proportions each party receives depends on how many children the deceased has surviving him or her).
- If there is no spouse or issue, then the estate is distributed amongst more remote family members, beginning with parents, then siblings, and so on.

…to protect your children.

If your children become entitled to a share of your estate pursuant to the *Succession Law Reform Act*, they

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Our estate planning services include techniques to achieve our clients' objectives and minimize taxes, through the preparation of Wills, powers of attorney for property and personal care, trusts and charitable giving. As well, we coordinate with U.S. professional advisors when completing cross-border planning for U.S. citizens and clients purchasing vacation properties in the U.S.

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will receive their share of your estate at age 18, regardless of the value of their share. In addition, if a minor child becomes entitled to inherit any amount over $10,000, in the absence of the court appointment of a Guardian for Property for the child, the funds will be paid into court and the Office of the Children's Lawyer (an agency of the Ministry of the Attorney General) will control the funds until the child turns 18. In contrast, in a Will, you can set up trusts for your children, and dictate the age or ages at which they are to receive the income and capital of the trusts, as well as who is to act as trustee of such trusts (most commonly, the executor of your estate).

You may also appoint a guardian for your minor children in your Will. Many people struggle with whom to appoint as guardian of their minor children in their Will, and put off preparing the Will as a result, not realizing that the guardianship appointment in a Will is valid for only 90 days following the date of death, following which an application must be made to the court to determine guardianship. The court determines guardianship based on what is in the best interests for the minor children at the date of death of the parent. However, appointing a guardian will ensure that plans are in place for what is likely to be a trying time, immediately following death, and will give evidence to your intentions for the eventual application to court.

…to ensure the right person is administering your estate, and that the administration occurs in a cost-effective and timely manner.

Without a Will, no one has the authority to deal with your estate following your death. As a result, someone will need to apply to the court to be appointed as estate trustee of your estate. Until someone is appointed, your assets cannot be dealt with in any way and no distributions can be made from your estate.

The *Estates Act* sets out the priority of who can apply to be appointed as the estate trustee without a Will, beginning with a spouse, and then moving through next-of-kin, starting with adult children, then parents, then siblings, then to more remote family members. As such, a family member could be appointed without consideration of the relationship that existed between you, their knowledge of your estate, or their financial acumen.

The application process to be appointed as the estate trustee can be expensive and onerous, particularly in a time of grief for your loved ones. In addition, the application may require the payment of a bond into court, which will be an additional expense paid from your estate. By appointing someone in your Will to act as your estate trustee, you will eliminate these additional steps and expenses and may reduce delay in the administration of your estate.

…to defer and minimize taxes.

Without a Will, the Estate Administration Tax (commonly referred to as "probate fees"), currently levied at 1.5% of the value of the assets subject to probate, will be payable on most, if not all, of your estate. In preparing your Will, your estates lawyer will work with you to find ways to minimize the probate fees payable on your estate.

If you hold assets in other countries, or if you hold citizenship from another country, including the U.S., your assets may be subject to estate taxes on your death, regardless of where they are held. Effective estate planning can minimize the estate taxes payable on your estate.

Finally, on death, an individual is deemed to have disposed of his or her property at its fair market value, and is taxed on any accrued capital gains. However, where assets pass between spouses on death, the capital gains tax is deferred until the death of the second spouse, or until the second spouse disposes of the asset. As discussed above, if you pass away without a Will, your spouse is not automatically entitled to receive all of your assets, and as a result, there may be capital gains taxes payable on those assets that do not pass to your spouse on your death. With a Will, however, you can set out what your spouse is to receive, thereby maximizing the deferral of capital gains taxes.

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