The Grave Consequences of Not Having a Will

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A surprising number of Canadians do not have a Last Will and Testament. Surveys over the past few years have consistently shown that over half of adult Canadians do not have a will.

This low level of estate planning preparedness can be attributed to several factors, including a lack of knowledge of the applicable law and concerns over the cost of hiring a lawyer. Many people often feel they are too young or do not have enough assets to justify having a will.

Yet the drawbacks and potential risks of not having a will are significant and make a will the one legal document almost every adult should have, regardless of age or wealth.

Main Reasons to Have a Will

A will is a written legal document that sets out a person's wishes about how his or her assets should be administered and distributed after death.

Here are the main reasons you should have a will:

Protect Your Assets

Without a will, there is no-one authorized to deal with your estate. A will allows you to appoint an executor who automatically has the authority to make the important decisions necessitated by death, including making funeral arrangements, securing assets, and handling business interests. An executor's authority arises from the will, which means he or she has the right to deal with the estate assets immediately upon death. In contrast, where there is no will (known as an "intestacy"), there is no person who can act immediately upon death; someone must apply to the court to be appointed the personal representative of the estate, which can take several weeks or more, depending on the location of the court. Until the court order is issued, he or she has no legal right to deal with any estate matters. This can lead to delays and expenses that could have been avoided with a will.

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Choose Your Executor

Having a will allows you to decide who the best person is to look after your assets and fulfill your wishes after your death. In the case of an intestacy, the law sets out who has priority to apply to be appointed the personal representative. Any person may apply but the court will require the consent and formal renunciation of any individuals with a prior legal right to apply. If there are several persons standing in the same degree of kinship who have the right to apply, the court may exercise its discretion as to who will be appointed. Thus, not having a will may result in someone you would not have chosen being in charge of your estate. There is also a greater potential for dispute among family members who each feel they are best suited to administer the estate.

Choose Your Beneficiaries

When you have a will, you decide who will benefit from your estate and who will be excluded. Without a will, the law will determine who inherits your estate, which may result in your assets being distributed to people you didn't intend to benefit. For example, in the case of a common disaster (where your whole immediate family has passed away), your estate may go to a distant relative rather than the charity you may have preferred. Assets that you may have wanted to remain in the family or to be transferred to a specific individual may instead have to be sold. Furthermore, the law in Ontario governing rights on intestacy does not recognize common law spouses, meaning your common law spouse may not receive anything on your death if you do not have a will. Instead, depending on who survives you and whether or not you had children, your estate could pass to your parents or siblings or other relatives instead of your spouse. This could lead to the unfortunate result that your spouse has to sue the estate in court to try to obtain his or her fair share. Similarly, Ontario intestacy rules exclude stepchildren; a stepchild will only inherit if specifically named in the will.

Avoid Payments into Court

Without a will, any sum of money greater than $10,000 to be paid to a minor child must be paid into court or to a guardian of property appointed by the court. The court will invest and hold the funds until the child turns 18, at which point the funds are automatically distributed to the child (minus the government's fees) regardless of his or her maturity level. Any surviving parent wishing to take control of a child's share in an estate must first apply to court to be appointed the guardian of property, because in Ontario a parent is not automatically the guardian of property of his or her minor children. The Office of the Children's Lawyer is automatically involved in any estate where there are minor beneficiaries and no will. In contrast, a will could set up a trust for minor children whose terms allow for a deferral of distributions past age 18. A trust is also a means of permitting a surviving parent to control a minor's share of an estate on the child's behalf if appointed trustee, and/or to receive payments from the trust for the benefit of the child

Appoint a Guardian

The law in Ontario also allows you to appoint a guardian for your minor children in your will. The appointment is only effective for 90 days; the guardian must apply to court for the appointment to be permanent. Since the court will decide in the best interests of the child, the appointment in the will serves as strong evidence of your confidence in your chosen guardian.

Minimize Taxes and Legal Costs

A well-drafted will can be used as an effective tax saving tool. Without a will, you are potentially foregoing the opportunity to limit estate administration tax (aka probate tax). Estate administration tax in Ontario is currently roughly 1.5% the value of your assets at the time of death (with certain exceptions); it may be worthwhile to consider the options available to reduce the tax, including the use of multiple wills, if the estate is of significant value. Furthermore, your estate may end up paying more in legal and court costs and the administration of the estate may be delayed if you do not have a will. For example, when there is no will, the powers of the personal representative to deal with the estate assets are limited to those found in statute and common law, which are more restricted than those generally found in wills and may not be sufficient to deal with a complex estate. This may result in the personal representative having to make an application to court for direction and advice. As well, as noted, the absence of a will can also result in disputes among family members, leading to expensive litigation that may otherwise have been avoided had your intentions been clearly set out in a will.

Proper Planning Protects Your Estate and Your Family

Many people naturally wish to avoid having to think about what will happen when they die, but the consequences of not addressing the issue can be grave. If your goal is to ensure that your spouse and children are properly taken care of and your assets are not unnecessarily depleted or distributed against your wishes, it is important to find the time, regardless of how hectic your schedule may be, to meet with a lawyer and discuss your estate planning wishes and concerns. While it is possible to write a will without retaining a lawyer, a lawyer can ensure that your will accurately reflects your wishes and meets the legal requirements for a valid will. As is often the case in legal matters, an initial outlay to get proper advice upfront can help avoid far more expensive costs in the future.

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