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Why You Need a Will

By Tyler Inkster

"Make appointment with lawyer to do will." It's one of those items on our "to do" list that seems to consistently take a back seat to more pressing matters. In the business of modern life, the tyranny of the urgent is ever-present. Day-to-day activities like, *"take Lauren to piano lessons," "pick Kevin up from football practice,"* or *"paint the powder room",* always seem to push the estate planning issue to the backburner. Aside from having schedule time to meet with your lawyer, preparing a Will also forces us to face our own mortality, something none of us like to ponder. Based upon what I have seen in my practice, it tends to be a significant life event, such as the birth of a child or the untimely death of a close friend, that forces the estate planning issue into priority on the "to do" list. I find that many clients come into my office with a general sense that having a will prepared is a good idea, but many do not know exactly why they need one. To understand why you need a will, you need to understand what happens if you die without one.

When you die without a will, in the language of the law, you die intestate. The most significant consequence of dying intestate is complete loss of control over what happens with your estate after you die. You lose control over who will administer your estate. You lose the ability to determine who will become a beneficiary of your estate. You lose the ability to determine the age at which any minor child will become entitled to his or her share of your estate. You lose the ability to have your say as to who should be appointed as the legal guardian of any minor children that you leave behind. You lose the opportunity that a will affords to address any special needs of any incompetent child that is left behind. You lose the ability to benefit any charities that you may wish to support through your estate. You forego the opportunity that a will provides to structure your estate in as tax-efficient a manner as possible. In short, you lose the ability to have your wishes carried out after you die. Each of these consequences is explored in turn in greater detail in the remainder of this article.

Appointment of Your Estate Trustee

Estates need to be administered by someone. If you die without a will, your family will have to file a court application for an order appointing someone as an Estate Trustee Without a Will to administer your estate. Section 29 of the Estates Act grants the court absolute discretion to appoint the spouse, common law spouse or same-sex partner and/or the next of kin, as the court considers appropriate. While the statute does not explicitly give the spouse

or common-law spouse or same-sex partner prior to the appointment over the next of kin, the weight of authority is to do so. Accordingly, the usual order of appointment is as follows: (1) spouse; (2) children; (3) grandchildren; (4) great grandchildren or other lineal descendants; (5) father or mother; (6) siblings and (7) other next of kin in the same order as entitlement to an interest in the estate.

Notwithstanding the usual order, the statutory beneficiaries, who have a majority interest in the estate and who are resident in Ontario, may nominate another person to be appointed as Estate Trustee Without a Will. The court will continue to have overriding discretion to appoint any person it sees fit to administer the estate. Without a will the court will not have any evidence before it regarding what your wishes were concerning your choice of Estate Trustee. Given the overriding discretion of the court, it is conceivable that the court could end up appointing someone as the Estate Trustee of your estate that you would consider an appropriate choice.

Intestate Succession Rules under the Succession Law Reform Act (the "SLRA")

If you die without a will, the intestate succession rules contained in Part II of the SLRA will determine who will be entitled to share as a beneficiary of your estate. Exactly who will be a beneficiary of your estate will depend upon which of your relations survive you. Assuming that you do not have any children and that your spouse survives you, the SLRA provides that your surviving spouse will be entitled to all of your estate. It is vitally important to understand that this only applies to married spouses. It is a common misconception that a common law spouse is a "spouse" for the purposes of the intestate succession provisions contained in Part II of the SLRA; however, this is not true. Common law spouses are entirely excluded from any entitlement to share in the estate of a common law spouse that dies intestate.

In order to receive anything from the estate of the deceased common law spouse, a surviving common law spouse must bring a costly court application under Part V of the SLRA in which the common law spouse would have to convince a judge that he or she was a financial dependent of the deceased common law spouse. If other statutory beneficiaries choose to contest such a court application, the financial costs of litigating the entitlement increase. Given the high cost of litigation, the involvement of the courts should be avoided whenever possible. Aside from the costs involved in litigating the issue, the toll that it takes on the surviving family members can be devastating. If you are in a common law relationship and you wish to provide for your common law spouse after you die, you need to make adequate provision for your common law spouse in a will. This will likely prevent a costly court battle between your common law spouse and the statutory beneficiaries and the attendant inter-familial.

Assuming that you are married at the date of your death, and are survived by your spouse and by one child, the SLRA provides that your surviving spouse will be entitled to receive a "preferential share" of your estate. As of the date of this article, the preferential share amounts to $200,000.00. If your estate is worth more than $200,000.00, the remaining amount, (the "residue"), will then be divided equally between your surviving spouse and your surviving child. If you are survived by your spouse and more than one child, your surviving spouse will be entitled to the preferential share and to one-third of the residue of

your estate. The remaining two-thirds of the residue will be divided equally between your surviving children.

Assuming that you are not married at the date of your death and have no surviving children or grandchildren but your parents survive you, your estate will be divided equally between them. If only one parent survives you, the SLRA provides that your entire estate will be distributed to the surviving parent. If your parents have predeceased you, your estate will be divided equally among your brothers and sisters. If any brothers and sisters do not survive you, the SLRA provides your estate will be distributed to your next of kin. This would include your grandparents, great grandparents and their children and all of their lineal descendants. In some situations, it may be extremely difficult to locate the next of kin. In this situation, the SLRA provides your estate will "escheat to the Crown". Essentially, this means that the government becomes entitled to your estate.

Minor Children

If you die intestate and have children under the age of 18 as of the date of your death, the share of any minor child will be paid into court and will be invested by the Accountant of the Superior Court of Justice until the child reaches the age of 18. Once the minor child reaches 18, the Accountant of the Superior Court of Justice will pay out the entire share to the child, regardless of whether the child is mature enough to manage the money. Some children are mature enough at the age of 18 to manage this responsibility; others are not. If a child is not, the result is often that the child burns through his or her inheritance in short order. One way of avoiding this problem of the "spendthrift child" is to establish a testamentary trust in your will, which would allow such child's share in the estate to be held in trust by the Estate Trustee for the child's benefit until the child reaches a specified age, chosen by you. Such a testamentary trust could also grant the Estate Trustee discretion to apply the trust funds for the care, maintenance and education of the child while such child is under the chosen age.

Mentally Incompetent Children

If you die intestate and you have a child who is not mentally competent, such child's share in your estate will have to be paid into court, regardless of whether the child is a minor or not. Once the child's share has been paid into court, an application must be made to the court to access the child's share. It is much more expensive to administer an estate where one of the beneficiaries is mentally incompetent when there is no will in place.

Guardianship of Minor Children

If your spouse predeceases you and you die intestate, there will not be an expressed intention regarding your choice concerning the legal guardian of any minor children. Your remaining family will have to decide who should be appointed as guardian. Unfortunately, this often leads to disagreement within the family. A court application will be necessary to appoint a guardian. The court will base its decision upon what it considers to be the best interests of the minor children. When making its decision, the court will not have the benefit of knowing your intentions and what you consider to be in the best interests of the child or children. If you die with a will in which you appoint a legal guardian for any minor children that you leave behind, the appointment of the guardian is valid for 90 days from the date of your death. Within that 90 day period, the appointed legal guardian will need to bring

a court application for a court order appointing him or her as the legal guardian of the minor children; however, the court will have the benefit of knowing what your expressed intentions as it considers the application. Usually, the court will honour the appointment of the legal guardian that you appoint in your will.

Charitable Bequests and Legacies

If you wish to make any bequests or leave any legacies to your favourite charities, you will need to make provision for such charities in your will. If you die without a will, the intestate succession rules in Part II of the SLRA make no provision for any distribution to charitable beneficiaries.

Intestacy and Taxes

You are familiar with the well-worn aphorism that "the only two things certain in life are death and taxes." From a tax perspective, there will likely be an income tax liability for your estate resulting from your death. There will also be a deemed disposition of your assets for tax purposes, which may result in a taxable capital gain liability for your estate. A key advantage of preparing a will is the opportunity it creates for you to structure your estate in as tax-efficient a manner as possible. If you die without a will, you lose this opportunity and run the risk of paying more tax than otherwise may be necessary. Tax issues can be complex and require the guidance of your accountant. An accountant can prepare a report for you on anticipated income tax and capital gains tax liabilities that could materialize with your death. One strategy for dealing with these tax liabilities is to insure over them. You may consider contacting your insurance specialist to discuss the various insurance products available to help you defray various expenses that arise with death. These can include income taxes, capital gains taxes (payable by the estate), funeral expenses, estate trustee compensation and probate costs.

Given the negative consequences that can result from dying without a will, it is important that you make the time to develop an estate plan with qualified advisors and that you implement that estate plan through a will. Unfortunately, many people simply never get around to doing a will, despite having the best of intentions. It sits on the "to do" list. The reality is that is Kevin can find his own way home from football practice. Someone else can drive Lauren to her piano lesson. The powder room isn't going anywhere. Do yourself and your family a favour: sit down with your lawyer and *tick that nagging "to do" item off your list.*

Tyler Inkster is a partner with the law firm of Langlois Konrad Inkster LLP. Should you have any questions relating to the topic covered in this article or any other estate matter, Tyler can be reached at 905.272.4224. ext. 24, or at tyler@lkilaw.ca