CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

LEGAL UPDATE

JANUARY 2013

EDITOR: TERRANCE S. CARTER

DO YOU NEED A WILL?
THE LEGAL CONSEQUENCES OF DYING WITHOUT ONE

Introduction

To the question "Do you need a will?", most lawyers and laypeople would answer "Of course! Despite that, I ask again, "Do you *really* need one?" The answer lies in a determination of what would happen if you should die without one. Contrary to the belief of many, the government does not take it all. That can happen, but only in rare circumstances. It is always true, however, that if you do not make a Will, the law will make one for you. That "Will" is enshrined in the *Succession Law Reform Act*. The Will that is written for you varies with different situations.

The other question to look at is what does a Will do for you. The benefit of having a Will is that it speaks for you from the moment of your death. It allows you to decide who will look after your affairs, who is to inherit what they are to inherit. It allows you to benefit family members and other organizations or charities which may not be possible if you died without a Will. The decision as to whether you would need a Will often will be made after reviewing what happens to your estate if you don't have one. The process to administer your estate if you were to die without a Will often takes longer and is costlier. Many people want to know what would happen to their estate if they didn't have a Will. This Update is a review of some of the situations and how they are dealt with under the *Succession Law Reform Act*.

INTESTATE SUCCESSION

A. Person Dies Survived By Spouse And Has No Children Or Grandchildren

The *Succession Law Reform Act* provides that in this situation, the surviving spouse is entitled to the deceased's property absolutely. Should you wish others to benefit including charities you will need to set this out in your own Will.

B. Common Law Spouses

Contrary to popular believe, the rights of a common law spouse are not the same as those of spouses who are married. A common law spouse has no property interest in the estate of the other common law spouse. Accordingly, if one of them should die without having made a will, the other would not be entitled to the deceased's property. The surviving common law spouse might have a claim for support from the estate as a dependant, but would not be entitled to assets by virtue of their relationship. If the common law couple had children, the children would share in the whole estate. If there were no children, the estate would go to the legal next of kin of the deceased partner, being the parents, brothers and sisters or nephews and nieces for example

Accordingly, if you are living in a common law relationship with another, you will have no protection on the death of the other unless the other has a will naming you as the beneficiary.

C. Person Dies Survived By Spouse And Children

In this situation, the Act states that the surviving spouse gets a preferential share. The balance is divided between the surviving spouse on the one hand and the children on the other.

The preferential share of an estate is $200,000.00. If it is your intention that your spouse should receive the whole of your estate, and your estate has a value of less than $200,000.00, you may not need a will if the only purpose would be to transfer your property to your spouse.

If your estate is greater than $200,000.00, the *Succession Law Reform Act* provides that if you are survived by a spouse and one child, the balance is divided equally between your spouse and that child.

If your estate is greater than $200,000.00, and you are survived by a spouse and more than one child, then your spouse will get one third of the balance, and your children will divide the remaining two thirds equally among themselves.

D. Person Dying Having No Spouse But Survived By Children

In this circumstance, the estate is divided equally among the children. If any child has predeceased his or her parent, and such child in turn has children (that is, grandchildren of the person who has died) such child's share is divided equally among his or her children. It does not go to the spouse of such child. If such child had no children, his or her share is divided equally among his or her brothers and sisters.

E. Children Who Are Minors

A child is a minor in the eyes of the law until such time as he or she becomes eighteen years of age. If you should die without a will, and one or more of your children is under eighteen, the estate trustee who is administering your estate is under an obligation to determine the value of the share of such child, liquidate sufficient assets to raise the money to satisfy such share, and pay the share into Court to the credit of the child. There is no doubt that this could create difficulties for a surviving spouse.

While the money is in Court it bears interest at the same rate as the Consolidated Revenue Account of the Province of Ontario, which may be a better rate than your estate trustee can obtain. If the money is needed for the support or other benefit of the child before he or she becomes eighteen years old, an application can be made to the Court for payment out on behalf of the child in either instalments for support or for a lump sum for a specific purpose. When the child becomes eighteen years old, the child can apply to have the money paid out of Court to him or her.

The obligation that the estate trustee has in liquidating sufficient assets to raise the money to pay the child's share into Court, the legal expense of "passing the accounts", the expense of paying the money into Court, the expense of making an application or applications for paying money out of Court before the child becomes eighteen, the expense of making an application to obtain the money after he or she becomes eighteen, and the fact that the child will have perhaps a substantial amount of money when he or she becomes eighteen years old to do with as he or she pleases, may be a sufficient reason all by itself to make a will.

F. Person Dying Without Spouse or Children

In these circumstances, if the person is survived by a parent or parents, such parent or parents inherit the whole estate.

If the person who has died has no surviving parent or parents, his or her share is divided equally among his or her brothers and sisters. If any of them have predeceased the person who has died, the share of such brother or sister is divided equally among his or her children. It does not go to the spouse of such brother or sister.

G. Guardianship and Custody of Minors

If the person who has died has no will, then no expression of their wish with respect to the guardianship and custody of any of their children if there is no surviving spouse would have been made. The family, if any, will need to decide this question together and often will require assistance of the Court. The Court has the jurisdiction to place any minor children where they think they should be in the child's best interests. They

will have to make that decision in the absence of your expressed wishes with respect to custody and guardianship.

H. Children Who Are Incompetent

If you should die without a will and have a child who is not mentally competent, that child's share of your estate must be paid into Court whether or not he or she is a minor.

After the money is paid into Court, an application can be made to the Court to have it paid out on an instalment basis until it is all used up.

There is no doubt, however, that administration of an estate where one of the beneficiaries is mentally incompetent is substantially more expensive in an estate where there is no will than is the case of an estate where there is a will.

If you have a child who is not mentally competent and you wish to provide for that child, a will is a necessity. A person can be appointed in it to invest the money on behalf of the child and use it for the child's benefit.

I. Second Marriages

The Act makes no distinctions between first and second marriages. Accordingly, if a person dies without a will and is survived by a second spouse, the second spouse will take the preferential share and divide any balance with all of the children of the first marriage.

If both parties to the second marriage have children from an earlier marriage that they wish to protect, it is essential that they both have a will. If they do not, on the death of one of them, the surviving spouse would inherit from the estate of the other assets having a value equal to the preferential share of $200,000.00 plus a share of any balance. In most cases, that will be the whole estate. The children of the party first to die will receive a share of the surviving spouse's estate only if the surviving spouse makes a will leaving a share of his or her estate to them.

J. No Surviving Spouse, Heirs, or Next of Kin

In legal terminology, the surviving spouse of a person who has died is neither an heir, nor one of the next of kin. That is an accident of legal history which is not relevant to this Update, but is the reason for including the spouse in a separate category.

A persons heirs are his or her children and their lineal descendants (grandchildren, great-grandchildren and so on down the line).

A persons next of kin include his or her parents, grandparents, great grandparents and their children and all of their lineal descendants. Next of kin also include brothers and sisters and all of their lineal descendants, and uncles and aunts and all of their lineal descendants.

Strictly speaking, it is impossible to die without leaving next of kin somewhere in the world. It can happen, however, that it is not possible to identify them. How many generations in your family can you go back identifying all grandparents, great grandparents, etc., and all of their children and lineal descendants. Assuming you can do that, can you locate them? In some cases, no trace can be found of any of them.

In these cases, if a person dies without a will, his or her estate will "escheat to the Crown". That means that the government will get it all. That could have been prevented if that person had made a proper will leaving his or her estate to the people or institutions such person wished to benefit.

K. Bequests/Legacies to Friends and Charities

If it is your wish to give an item of your personal property (a bequest) or money (a legacy) to a friend or charity, to grandchildren, or to anyone or any institution other than your immediate heirs and next of kin, you must have a will to do so. If you do not, they will not share.

Do You Need A Will?

The answer seems to be that if you don't care about what happens to your estate after you die, you don't. But, if you are among those who are not satisfied to have the administration of your estate governed by the *Succession Law Reform Act*, who do worry about the custody and guardianship of children, who do care about whether or not the persons administering your estate will be able to minimize taxes and other government fees, and who do care whether or not it will be easy to administer your estate when you die, you do need one.

Other reasons to have a Will include minimizing taxes and government fees. If a person dies without leaving a will, it is usually impossible to take any steps to minimize taxes and fees that are otherwise payable. This is not always the case, but it is usually the case.

Further, if a person dies with a will, it is sometimes possible to deal with his or her estate without incurring large legal expenses. If, however, a person should die without a will, there are few people or institutions who will deal with his surviving spouse or children before such surviving spouse or children have been appointed by the Court to administer the business affairs of the deceased person.

What Will It Cost?

The following are the fees charged by this firm for making a will.

Simple will made by husband & wife	$315.00 ea.
Single person making a simple will	$375.00

H.S.T. and out of pocket expenses incurred in making investigations before the will is completed are charged in addition.

A simple will for a husband and wife includes the appointment of an estate trustee and alternate estate trustee if requested, appointment of guardians/custodians of children, transfer of the whole estate to the surviving spouse, division of the estate among children if there is no surviving spouse, and trustee provisions for dealing with the investment and use of shares of children who are minors for educational and other purposes before they receive their shares, and giving to estate trustees the powers needed to carry out their duties.

More complicated wills, which include those setting up life estates for surviving spouses rather than making an outright transfer of assets to them, dealing with the shares of children who are not mentally competent, and wills containing special provisions dealing with other matters not easily covered in this Update, will be more expensive. The cost will be based on the time and effort involved in taking instructions, making whatever investigations that may have to be made, and preparing it.

In addition, if, in making an analysis of your assets, it is discovered that other legal work should be done, such as, for example, putting property into the joint names of spouses, severing joint tenancies, and preparing powers of attorney for property and powers of attorney for personal care, the fees involved in doing such work will be charged in addition to the fees charged for preparing the will.