

The Consequences of Dying Without a Will

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It is estimated that one third of Canadians do not have a Will, and many others have Wills that are inadequate to give effect to current wishes and intentions, because their assets or family situation has changed since the Will was drawn up. This article provides information on the risks and consequences of dying without a Will.

Intestacy

Wealth brings opportunities for you and your loved ones, but it also adds complexity to your estate planning. Without a Will, you are said to die “intestate,” and provincial or territorial laws will dictate who receives the assets of your estate.

If you die intestate, and there is no executor named to administer your estate, someone must apply to the court to get permission to administer your estate. In addition, the following should be noted:

- In Quebec, this may not be necessary if a majority of the heirs vote to name an Administrator – called a “liquidator” in that province.
- Any application to court is costly and time consuming and the person asking the court for permission to administer the estate (the Administrator) may have to post a bond equal to twice the value of the estate as security.
- Distribution of assets cannot take place until the court grants authority to the Administrator and all legal fees have been paid by the estate, leaving a reduced estate to be distributed among the heirs.

Further delays will occur if you die intestate and there are minor children, or if there is a dispute among family members or others regarding who should be appointed to administer your estate, or who should receive certain assets. In these situations, consider the following:

- Where minor children are concerned, the provincial government must get involved.
- Assets distributed to a minor will be invested and supervised by the provincial government and paid in full to the child when he/she reaches the age of majority, whether the child is mature enough to manage the money or not.

Importance of preparing a Will

The following provides an overview of why it is important to prepare and maintain a Will.

Readiness to make decisions

Many people avoid making a Will because they are not comfortable thinking about dying, they do not want to, or are not ready to make decisions about beneficiaries.

While it is true that the process can be challenging, it is far more beneficial to all involved to have a clear Will in place. It is dangerous to make assumptions such as, I don't need a Will, or my spouse is getting everything. The portion of the estate that a spouse is entitled to depends on provincial law and whether there are surviving children or grandchildren. It can become even more complicated if you've had a previous marriage, where the consequences of dying without a Will can have serious consequence for one, or both spouses.

Loss of control over the distribution of your assets

Without a Will, you lose the opportunity to decide and control how your assets are distributed. If a valid Will is not in place, your estate will be administered and your property distributed under provincial legislation. If you have surviving family members, your assets will be divided and distributed to them according to provincial rules.

Provincial formulas for distribution on intestacy generally provide for a preferential share of the estate going to a surviving spouse first, with the balance then to be divided between the surviving spouse and children, whether they are minors or adults. Depending on the circumstances and the province, there could be major complications and competing interests.

Loss of investment and management powers

The Administrator will only have the powers of investment and management provided by applicable legislation and the common law (in Quebec the provisions of the Civil Code will apply). These can be excessively restrictive in many situations, including in the following situations:

- When the court holds funds on behalf of a minor heir, those funds are not actively managed by the court; and
- When the Public Trustee holds such funds, it may have limited powers of investment. This can mean that the return earned during the heir's minority can be quite modest.

Higher cost and greater delay

Without a valid Will in place, it will take longer and there will be additional costs to settle the estate – especially if dependants launch court challenges to the distributions.

No trust options

There are many situations in which the establishment of a trust may be the best way for your assets to be managed after your death; for example, to provide for disabled, minor or young adult beneficiaries. These arrangements can be made in the context of a valid Will, preferably with the assistance of a legal professional.

No guardianship instructions

If you have minor children, you should include your choice of legal guardian for your minor children in your Will. In Quebec, a guardian is known as a “dative tutor.” While such appointment in the Will is not legally binding, except in Quebec, the court will usually give strong consideration to the wishes you have provided in this respect. Without such direction in a Will, family members may disagree about who should apply to court to be the guardian of your minor children.

Get your affairs in order

Having a Will can save your estate money and save your family a lot of anguish and frustration. It is the only way to control who will administer your estate, the manner in which your estate will be distributed, and who will be the beneficiaries of your assets.

For more information, speak with your BMO financial professional.



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