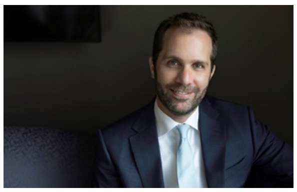
MINDEN GROSS LLP BARRISTERS AND SOLICITORS
145 King Street West, Suite 2200, Toronto, ON M5H 4G2
P. 416.362.3711 ▪ F. 416.864.9223 ▪ www.mindengross.com

Make a Will Month

The Importance of a Will



Matthew Getzler
Partner, Minden Gross LLP
T. 416.369.4316
mgetzler@mindengross.com

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We continue to live in unprecedented times. The importance of a Will – during this pandemic or anytime for that matter - simply cannot be overstated.

This article summarizes some of the major implications of dying without a Will - focusing first on some non-tax considerations and then on certain income tax and probate fee implications that may arise when someone dies without a Will.

Appointment of Executors and Trustees

When an individual dies without a Will, an application must be made to the court to have an estate trustee appointed without a Will. This could be costly, time-consuming, and there is no way to ensure who will be successfully appointed in this capacity. The process could be contentious, causing rifts among family members, etc., as they apply for appointment.

A proper Will appoints the executors and trustees and typically appoints alternates as well, ensuring that an individual's estate is administered by those people he or she (and not the court) believe to be best suited.

Guardianship Provisions

While a guardianship provision in a Will is not determinative on a permanent basis, it is generally binding for the first 90 days following death, and within that time, an application to the court for permanent guardianship is undertaken. Courts have generally given great weight to guardianship appointments in a Will when appointing permanent guardians for minors. Without an appointment in a Will, immediate action is required to appoint someone as guardian right away. The individual is relying significantly on the judge to use their best judgement to determine who should be the guardian(s) of the individual's minor children. This could result in contentious custody battles among family members and could have a long-lasting impact on the children themselves.

Distributive Provisions

When an individual dies without a Will, they are deemed to have died "intestate" and the rules of intestacy under the *Succession Law Reform Act* in Ontario apply to the distribution of the individual's assets (subject to a surviving spouse making an equalization claim under the *Family Law Act*).

More particularly, the intestacy distribution provides that:

- Where an individual is survived only by a spouse, the spouse inherits everything
- Where an individual is survived by spouse and issue (children, grandchildren, etc.) and the value of the estate is less than $350,000, the spouse inherits everything
- Where an individual is survived by spouse and issue (children, grandchildren, etc.) and the value of the estate is greater than $350,000, the spouse inherits $350,000 and the remainder of the estate is divided between the spouse and issue (depending on how many children there are)
- Where there are no spouse and issue, parents inherit
- Where there are no spouse, issue, and parents, brothers and sisters inherit
- Where there are no spouse, issue, parents, brothers, and sisters, nephews and nieces inherit
- Where there are no spouse, issue, parents, brothers, sisters, nephews, and nieces, "next of kin" inherit

A Will, on the other hand, dictates how an individual's assets are dealt with following the individual's death. Not only does this ensure that the individual's assets are distributed in accordance with their wishes, but there can also be significant income tax implications to having an estate distributed under an intestacy where there is a surviving spouse.

Premature Income Tax Implications

Upon death, an individual is, subject to certain exemptions, is deemed to have disposed of their assets at fair market value and any underlying gain on such assets is subject to tax as a capital gain, which can be taxed at a rate in excess of 25% in Ontario in 2021. There has been a lot of speculation about this tax rate increasing – thankfully nothing has come of this as of yet.

One exception to this rule is when assets are transferred to a surviving spouse, either on an outright basis or to a "qualifying spousal trust" for the purposes of the *Income Tax Act*. The effect of such a transfer is that the capital gains owing upon the first spouse's death can be deferred until the later of the two spouse's deaths. This deferral can be quite meaningful where a surviving spouse survives the first-to-die spouse for a long period of time.

When an individual dies intestate and is survived by a spouse and all of his/her children, the estate (as discussed above) is divided between such spouse and children, depending on the number of children who are then alive. Where a spouse and more than one child survives the individual, the spouse, absent a claim for equalization, is entitled to a preferential share ($350,000) and one-third of the balance of the estate, while the children divide two-thirds of the value of the estate in excess of the preferential share. So, if an individual died with $1 million, the surviving spouse would receive $566,667 and the children would divide the $433,333 balance. Since there is no general exception for transfers to children upon death, capital gains taxes in excess of $100,000 (10% of the value of the estate!!) could be prematurely owing upon the individual's death as a result of the intestacy.

Unnecessary Payment of Probate Fees

When an individual dies without a Will, **all** of their assets will be subject to probate fees if a probated Will is necessary in respect of **any** of their assets. Jennifer Katz will take a deeper dive into probate planning this month, but it is critical to note that having a Will (or, more likely, two Wills) is critical in order to limit (or even eliminate) the probate fees that will otherwise be owing upon death.

For more information, please contact Matthew Getzler at 416-369-4316 or mgetzler@mindengross.com.