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What Happens if You Die Without a Will

If you do not have a will, each provincial government has an "Intestate Succession Act" which will tell the administrator (appointed by the government) who will inherit your estate. Do not assume that if you are married, that your spouse would receive your estate.

In Alberta, the Wills and Succession Act divides up your estate according to the following table:

Married or common law, with no children or issue	All of estate to spouse
Married or common law, with children or issue	All of estate to spouse
Married or common law, with children from different relationships	One half of estate to spouse or adult interdependent partner, One half of estate split equally to children or issue
Not married or common law, with a child or issue	All of the estate to child or issue
Not married or common law, with children or issue	All of the estate divided equally amongst the children or issue
Not married or common law, without children or issue	All of the estate divided equally between parents or survivor
If no parents	All of the estate divided equally amongst brothers and sisters
If no brothers or sisters	All of the estate divided equally amongst nieces and nephews
If no nieces or nephews	All of the estate divided equally amongst your next of kin
If no next of kin	All of the estate to the Province of Alberta with the income paid to the Universities

If your wishes will be carried out by the terms of the Wills and Succession Act, then you may not need a will. You should be aware, however, that the cost and time of having the province divide up your estate will be greater than the cost of preparing a will.

Some of the problems that may be created without a will are:

- Your spouse may not receive the desired amount,
- Your children may receive too much too young (their money is held in trust until they reach the age of majority, then they receive the total amount),

- A common disaster (where both spouses die) may benefit an undesired relative (family of younger spouse if no children),
- You have no control over which beneficiaries receive which assets,
- Your friends or charities receive nothing,
- There is no planning for tax reduction,
- You have no opportunity to select a guardian for your children.

What Happens to Assets Not in the Estate

The will is not the only control that you have over your assets when you die. The will controls just the estate. Assets held in "joint tenancy" are not part of the estate. Upon death, these assets would go directly to the survivor. If your home, bank accounts and investments are in joint names with your partner, then these assets would go directly to your partner. In the case of bank accounts, it is important that your partner have signing authority. If not, they would own the funds in the bank account but the funds would be frozen for a period of time.

Assets held as "tenants in common" are not the same. Tenants in common means that each individual named owns an undivided share. If you hold any assets as tenants in common, then if you die, your share would go into your estate. The remainder would continue to belong to the survivor(s).

If you own any assets that have beneficiaries designated, then at your death, these would go directly to your chosen beneficiary. You can designate a beneficiary on your RRSPs, RPPs and DPSPs. Upon your death they would not make up part of your estate but go directly to the beneficiary. You can also designate a beneficiary on your life insurance policies. But remember, if you change your will, you will probably have to change the beneficiaries on these assets as well.

Probate Fees

If you want to get the maximum amount of your assets into your beneficiaries hands, you will want to minimize probate fees and taxes. In Alberta, probate fees start out relatively small but increase as the size of the estate get larger ($25 for estates of $5,000 or less up to $400 for estates of $250,000 or more). To reduce probate fees on the estate, you can reduce its size.

You can reduce the size of your estate easily by registering your assets in joint name. These assets would go around the estate directly to the survivor. If you designate a beneficiary on your other assets such as RRSPs, RPPs and life insurance, these assets would go directly to the beneficiaries, bypassing the estate. Some non-registered insurance products like Guaranteed Investment Annuities and Segregated Funds (the insurance industry's equivalent of GICs and Mutual Funds) can have beneficiaries designated.

If you give away some of your assets before death, you will reduce the value of the estate. You could give away your assets directly or by setting up a trust. If you have real estate, you could give it away and retain a life interest. There are other, more complicated ways of reducing the size of the estate.

Income Taxes

Income taxes arise from your estate in two ways. The first is the tax that you pay on income up to your death. The second is on the income generated by your assets after death, either in your estate or in the hands of your beneficiaries.

When you die, Canada Revenue Agency assumes that you sold all of your capital assets that day, including your cabin at the lake, your rental real estate, all your investment assets and even your personal assets like art, stamp collections etc. Canada Revenue Agency also assumes that you collapsed all of your tax-sheltered savings plans like RRSPs, RRIFs, RPPs and DPSPs. These are on top of any income that you have already received during the year.

To reduce the income taxes on death, there are a few simple things that you can do. First is to designate your spouse as beneficiary on your tax-sheltered savings plans. These can be rolled over into your spouse's plans without triggering any taxes. In addition, your executor can make an RRSP contribution on your behalf to your spousal RRSP up to sixty days after the end of the year of your death.

You can transfer all of your capital assets to your spouse at the original cost. Doing so avoids the tax on the capital gains until your spouse disposes of them. However, if you transfer the assets, then you will not be able to use your capital gains exemption. It would make sense to declare enough capital gains to use up the balance of your exemption and transfer the balance of your assets at original cost.

After your death, any income from your investments will continue to be taxed. You can reduce this tax by setting up a trust and allocating the income to beneficiaries that are in lower tax brackets (i.e. your children or grand children). If the inheritance is spent (even to reduce debt) then there will be no investment left to generate income and there will be no taxes owing.

Other, more complicated methods can be used to reduce income taxes on your assets. Do not allow the planning for reduced probate fees or income taxes to interfere with your initial desires of getting your assets into your beneficiaries' hands as quickly and as easily as possible. It may be worth while paying higher probate fees or taxes if you can be more certain that your wishes will be complied with.

Executors

The executor looks after the administration of the estate. The trustee looks after the administration of any trusts that are created from the estate. Some of the duties of the executor are:

Review your will and carry out all the instructions in it;
Meet with your heirs, lawyers, bankers, brokers and insurance agent;
Prepare a statement of your assets and liabilities;
Arrange for probate of the will;
Sell securities and property or anything else necessary to carry out your wishes;
Pay your debts, funeral expenses and taxes;

Prepare and file your final tax return;
Distribute your estate and legacies.

Being an executor is not usually difficult. Many people appoint their spouse as executor. This makes sense as generally the spouse knows the most about your estate. You can name a co-executor to help your spouse. This may be an older child, brother, friend, lawyer, accountant or trust company. You should appoint alternate executors in the event that your executor is unable or unwilling to act. It is probably a good idea to ask an executor if they would act for you before you appoint them, as they can renounce their executorship.

Other considerations to keep in mind when choosing an executor are:

- What is their financial acumen, can they handle the assets that are in your estate?
- What is their age, will they still be able to handle the assets when you die?
- Will they be able to work together?
- Where do they live? If they live outside the province, they may have to post a bond to act as executor.

Trustees

The trustee is usually the same person as the executor, although this is not mandatory. You may choose to appoint the Guardian of your children as the trustee for their money. The duties of the trustee are often spelled out in the will. If the duties are not indicated or if they are not clear, then the Trustee Act of the particular province will apply. You should give your trustee the power to invest the money to the best of their ability. They should have to power to pay for the maintenance and education of your children. You should also give them the power to provide for unexpected expenses. These powers are not given in the Trustee Act.

You should spell out in your will when each of your children will receive their inheritance from the trust. Will they each receive their share when they reach the age of majority (as is indicated in the provincial Trustee Act, age 18 in Alberta)? Will you choose to make them wait until they are more “grown up”? You could stagger their inheritances, giving them one half at age 21 and the other half at 25 or one third at 21, a third at 25 and a third at age 30. You can make up any distribution you want.

Guardians

A trustee looks after the financial well-being of your children, a guardian looks after the emotional and physical well-being of your children. Being a guardian is probably a much more important job than trustee. In your will you can appoint a guardian. If both you and your spouse die, then the courts could review your will to determine your wishes. Things to consider when appointing a guardian are:

- Is the guardian an appropriate age — not too young, not too old,
- Does the guardian have children of a similar age as yours,
- Does the guardian have similar views of raising children as yourself, and

- Where does the guardian live.

Power of Attorney

A power of attorney is a legal document that appoints a person or persons to manage your personal and financial property. If you become incapable of handling your own affairs and do not have an enduring power of attorney, a family member or friend will have to apply to the courts to appoint someone to manage your property.

An ordinary power of attorney comes into effect when you sign it. It becomes null and void if you become incapacitated. An enduring power of attorney continues (endures) if you become mentally incapacitated.

There are two types of enduring powers of attorney. They are an “immediate” power and a “springing” power. As you might expect, an immediate enduring power of attorney gives your attorney the power to manage your affairs as soon as it is signed and continues if you lose capacity. You might want to use this type of power of attorney if you are leaving the country for a period of time and you want someone to look after your affairs while you are gone. Other individuals will use this power to appoint their spouse or another trusted individual to manage their investments. You should not give a power of attorney to your investment advisor or financial planner in the normal course of business.

A springing enduring power of attorney does not come into effect until you lose capacity. In the document, you name a person or persons to decide when you have become incapacitated (this could be a spouse, child or family doctor). The power of attorney springs into effect when that person or persons decides that you are no longer capable of managing your property.

A power of attorney can be changed or revoked at any time prior to you becoming mentally incapacitated.

Personal Directive

A personal directive is a legal document that appoints a person or persons to make personal decisions for you in the event that you cannot make your own decisions. That person (called an agent) can make decisions on your behalf relating to any or all of the following: your health care; where you live; with whom you live and associate; your participation in social, educational and employment activities; and legal matters that do not concern your property.

You may choose to appoint your spouse, friend or children to be your agent or agents. You can name alternate agents in case your primary agent is unable or unwilling to act for you. You can specify when the personal directive will come into effect. If that is to be when you lack capacity, then you should identify who will make that determination. For instance, the decision could be made by your agent (possibly your spouse) and your family doctor acting together. If you do not specify a person, then two medical service providers can bring the personal directive into effect.

Thank you to Phil Renaud of Duncan & Craig for the information about Powers of Attorney and Personal Directives.