

Where There's No Will...
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C. Prins

It is human nature to put much thought and care into the protection of our loved ones, our financial affairs and our possessions. While we strive to protect these things during the course of our lives, many individuals do not consider their protection subsequent to their demise. This would certainly not be by intent; who would not want to ensure that their children are cared for both physically and financially once they pass away? Who would not wish that the wealth they accumulated during their lifetime transfers into the hands of someone they care for or a charity to which they are partial? The establishment of a legal and valid will is a solution to these problems which can become complicated and somewhat arbitrary in the case of an absence of relations. As well, the increased propensity towards successive marriages and relationships can add complexities to the estate planning process, rendering a valid will imperative in carrying out the objectives of a testator. Interestingly, there are many individuals who do not prepare a will at all or find themselves in a position where circumstances have caused their will to be void, the implications of which are counterintuitive to prudent estate planning in its most basic form.

Intestacy in Ontario results when an individual dies without a will, with a will that is no longer enforceable or with a will that does not dispose of all assets¹. An appropriate estate trustee may be appointed if available, or the Court may appoint the Office of the Public Guardian and Trustee to act in this capacity². In most cases, subsequent to the death of an individual and upon the realization that no will exists, a close family member will

present themselves as a willing and appropriate trustee and be appointed with the assistance of their legal counsel. Any assets of the estate are distributed according to the Succession Law Reform Act³ based on a pre-determined set of rules later followed by use of the Table of Consanguinity which determines preference based on the degree of relation should no immediate relatives exist⁴. Should there not be any living relations, ownership of estate property transfers to the Crown and is then administered under the Escheats Act⁴. Potential heirs must submit evidence including at least two sworn statements indicating the reason for their claim as well as an Ontario corroborator with knowledge of the individual's relation to the deceased⁵.

In general, living spouses receive the entire estate unless there are children. In this case, the first \$200,000 goes to the spouse, with any excess shared with children or the children's descendants according to specific rules. In the absence of children or a spouse, the parents of the deceased are next in priority, followed by the siblings of the deceased. In the absence of these individuals, nieces and nephews are found, (likely perpetuating the expression made in reference to a windfall from a "long, lost uncle"). At this point, should no individuals be made evident, the aforementioned Table of Consanguinity determines priority followed by the Escheats Act in the absence of kin⁶. Normally children will include those born outside marriage and adopted children⁷ and spouses would include common-law spouses in certain circumstances, although the definition differs between the Ontario Family Law Act, Succession Law and the Income Tax Act⁸. To complicate matters, Ontario allows a surviving spouse to elect to receive their share of

the estate either through the intestacy rules or under the Family Law Act's division and equalization rules which are normally applicable upon marital separation⁹.

As mentioned, the absence of a will is not the only source of intestacy. A will can be inadvertently revoked by the testator via destruction (i.e. purposely tearing it up in front of a witness)¹⁰, be rendered invalid if not formally signed, made while mentally incapacitated, made under undue influence or drafted by a minor in certain circumstances¹¹. The acceptance of the form of a will is surprisingly open, giving legal recognition, in addition to conventional attested wills, to holograph wills (in writing by the testator) and international wills¹². In general, the Courts would prefer to attempt to determine the testator's intent via documentation available and will defer to the "presumption against intestacy", a concept which facilitates interpretation of a testator's silence regarding their estate assets¹³. For instance, in the Supreme Court of Canada Case, *Karutha Jayaraman v. Gloria DeHart*, a testator who drafted a holograph will in 2001 and died in 2003 named his common-law spouse as beneficiary for specific assets, however remained silent on others. The courts used the presumption against intestacy aid to determine that the partial will meant to deliver all assets to the spouse (with the exception of property jointly-owned with his brother, the applicant in the case)¹⁴. Therefore, where some sort of statement of intent or a partial formal will exists, the Courts will look beyond the immediate legal paperwork available in an attempt to avoid intestate situations and make presumptions as to the deceased's true wishes.

In the case of a destroyed will, the Courts, in their attempt to mirror distribution to that of the deceased's intent, may also attempt to avoid intestacy by looking at the circumstances beyond the destruction. For instance, in a 2005 Ontario Supreme Court case, *Bennett v. Smith*, the deceased executed a will in 1980 followed by a new will in 1983 with different beneficiaries which was subsequently destroyed by her. In this case, Justice Glithero had to determine whether either of the wills were valid or if the deceased actually had died intestate. It was determined that the 1980 will was valid, however despite the deceased giving instructions to her solicitor to draft a new will in 1983, the solicitor's recollection of her signature and the location of some unsigned draft versions marked "cancelled" in 1995 in her own handwriting, no original was found. In this case, the Court found that although the 1980 will was validly executed, it was revoked by the 1983 will. This will was then revoked when it was apparently destroyed wilfully by the deceased. Unfortunately, as a result, it was determined that the testator died intestate with her wealth to be distributed by the succession legislation¹⁵. This case demonstrates the Courts' willingness to attempt to look beyond the mere fact that a valid will may not be readily available in the hopes of avoiding the succession requirements in a quest to satisfy the deceased's silent intentions.

In some cases, an individual may prefer to have their estate given to charity as opposed to a relative or if they do not have any immediate family; this will not occur without a will as very distant relatives will share in the wealth before a charity due to the Succession Act's priority to kin. Even where there are no next-of-kin according to the consanguinity chart, the involvement of the Escheats Act, Section 14 results in an ultimate payment of

net proceeds to the Crown¹⁶. As a result, it is important to ensure that intent, as it relates to wealth distribution upon death, is in proper form in order to avoid the very specific intestacy legislation.

The results of intestacy have become particularly complex as a result of the greater frequency of complex family circumstances. For instance, the Vanier Institute of the Family has found that more couples are living in common-law relationships, more couples are parting ways and children are experiencing more transitions as parents change their marital status based on 2001 data¹⁷. The more recent 2006 Canadian census showed the most growth in common-law family structures overall from 2001¹⁸. The estate-related problems as they relate to intestacy are twofold; multiple marriages can void an existing will causing inadvertent intestacy, and the absence of a will altogether can create complexities in terms of wealth distribution due to the volume and perceived priority of interested parties.

In the case of multiple marriages, not only can there be several parties involved, the interests may be contradictory and even acrimonious. Common-law spouses or subsequent spouses may not be recognized or accepted by children from a previous marriage, nor by the Succession Law Reform Act which at times, struggles to determine the legitimacy of an informal “spousal” agreement. This was evident in the case, *Hopkins (Estate) v. Moser*, a 2005 Ontario Supreme Court Case where the named trustee (the daughter of the deceased who died intestate) and the common-law spouse of the deceased

disagreed on the ownership and deceased's intended distribution of a specific real estate property due to a break-down in the relationship with the daughter. Although the statement of defence and reply were struck due to technicalities, Justice Harris stated "...it appears to me that the relationship becomes relevant if and when the property is found to be part of the estate.", inferring that the Courts may give consideration beyond the simplistic wording of the succession laws in the case where non-traditional relationships must be considered¹⁹. Another, more recent case, examined a situation where an intestate estate involved dispute among a common-law spouse, a second spouse and two children from a first marriage as well as two children from his second spouse. A child from his first marriage and his second wife were appointed as estate trustees. Not surprisingly, the relationship between the estate trustees and the common-law spouse was fractured, resulting in the involvement of the Ontario Provincial Police at one encounter. Under the intestacy, the four children were to equally inherit the assets, however the common-law spouse argued that she was entitled to a life interest in the deceased's home²⁰. While this problem was not settled in this particular hearing, it demonstrates the issues that can arise with multiple marriages and the Court's willingness to consider the circumstances surrounding the claims by a common-law spouse before submitting to the succession legislation.

The appointed trustee must not only deal with potential conflicts and a higher degree of risk of litigation in these cases, but must also manage the tax complexities that arise in such circumstances. For instance, there may be opportunities for tax-deferred rollovers of RRSP and RRIF investments should a surviving spouse (common-law or otherwise), a

dependent child or a dependent grand-child attain a beneficial interest in the estate assets. Extended litigation or determination of estate beneficiaries under the protocol prescribed by the Succession Act could defer (or possibly even prevent) the ability to engage in these elections. Subsection 60(1) of the Income Tax Act²¹ outlines the opportunities for these rollovers. Similarly, deferral of taxable capital gains on appreciated assets such as shares or land may be available under Subsection 70(6)²² in the case of a spousal roll-over and farm properties may enjoy favourable roll-over treatment if passed to a spouse or child, grand-child or great grand-child under Subsection 70(9)²³. In some of these situations, elections are required to be filed in a prescribed time. An example would be the joint election between an estate and a spouse to treat RRSP proceeds paid to the estate as a refund of premiums; this could be disallowed if executed beyond a statute barred period²⁴. While the Canada Revenue Agency may ultimately accept a late-filed election or favourable adjustment based on the circumstances under the fairness provisions, it may require much administration, communication and involvement of the accountant and perhaps even a trip to the tax court. Adjustment requests much after the fact, even if accepted, could also result in penalties and interest should an assumed roll-over been denied subsequent to litigation when the beneficiaries have been revised. In cases where tax opportunities exist but are contingent upon unknown or unconfirmed beneficiaries, it may be useful to request an extension or a ruling in advance to ensure that the optimal tax treatment will be available should the process extend beyond the normal assessment period.

Another complexity for the estate trustee appointed to an intestate situation relates to the interpretation of the succession prioritization. Although these guidelines appear relatively straightforward, there can be some ambiguity in determining their application to certain situations, particularly when individuals involved in the succession prioritization have predeceased the testator. For instance, the case of *Farmer Estate v. Karabin Estate* (1997) demonstrated that the Succession Law Reform Act could indeed be subject to interpretation. Justices Finlayson, Osborne and Labrosse of the Ontario Court of Appeal considered the situation where a deceased died intestate with no surviving children, spouse or parents. According to the succession rules, the next of kin in this case would be the testator's siblings. Only one sibling was alive at that time, however one of the deceased siblings had a child who was also deceased. The trustee for that estate claimed that under the succession rules, the child of the child of the sibling should be able to share in one-half of the estate proceeds of the deceased. Careful examination and interpretation of s. 47(4) of the Succession Law Reform Act determined that this subsection did not extend beyond the immediate children of the sibling²⁵.

The sole practice of ensuring a valid legal will is in place may not necessarily assure that distribution will occur based on the testator's wishes. Beneficiaries and potential beneficiaries can contest what appears to be a valid will on the basis of mental capacity of the testator or undue influence ("the doctrine of suspicious circumstances")²⁶. Should either of these circumstances arise (presumably usually brought about by unfairly-treated beneficiaries through litigation), a will could be voided, leaving the courts to distribute wealth as though the deceased was intestate. Circumstances that may raise attention

would include unequal division of assets among children, substantial deviation of the terms of the will from a previous will, bequests to a caregiver or professional advisor or bequests to persons unfamiliar to the testator's family²⁷. The professional advisor should also consider Part V, Section 58(1) of the Succession Law Reform Act which requires testators to provide for certain individuals beyond their death that they would have had an obligation to provide for while they were living²⁸. For instance, in the case of *Cummings v. Cummings*, a 2004 Ontario Court of Appeal case, the judge took into account the financial requirements of the two adult dependent children and their late father's ethical obligations to provide for them and held the original judgement which had acknowledged that the testamentary trust established through the will had not been sufficient²⁹. Therefore, even when a will is prepared with the testator's wishes in mind, it is important to consider the circumstances under which the individual is faced including his mental state, possible influence by third parties and existing moral and ethical personal obligations.

While the Succession Law Reform Act and the Escheats Act exist in Ontario in order to facilitate the distribution of an intestate estate, administrative issues, conflicts and ambiguities can still occur. Clearly, the most prudent advice for all individuals is to prepare, continuously monitor and update where necessary, a valid legal will. In the case of a second marriage or complex family situation with differing beneficial interests, this is even more important. This practice will ensure that assets are distributed based on the testator's wishes and will minimize the administrative problems that can occur with an intestate situation on both the appointed trustee and Courts.

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