

The Butler Bulletin

Butler Wills and Estates

6/1/2016

Edition 1, Volume 9

What happens when a person dies intestate?

When someone passes away without a valid will, they are said to have died “intestate”. Most often people think of someone who passes away without a will, and that is certainly one of the ways intestacy happens. However, intestacy can also occur when the person has a will, but it isn’t valid.

Newfoundland and Labrador decides how the estate will be distributed. The way the estate is distributed depends on if the person was legally married, whether or not they had children, if (s)he had given large sums of money to any children, and who is left in the person’s family.

For example, a legally

There is hierarchy in place to determine who has the right to apply to administer the estate. In order for someone with a lower priority to apply to be the administrator, everybody with a higher priority must either be deceased, or formally and legally renounce his or her right to apply. As well, everyone on one priority level has the same right to apply, so the others on that level must renounce their right to apply.

The person given first priority is the spouse of the deceased person. After that, it is children and then grandchildren, and continues through the family tree.

In many cases more than one person feels they are the best choice for the job, and this can lead to disputes.

The entire hierarchy is subject to the discretion of the court, so the court can break a stalemate if the people involved cannot decide who will apply.

The distribution of any particular estate will depend on which family members are living when the intestate person passes away.

Some of the most common ways a will is invalidated are:

- The person made the will when (s)he was under the age of 17;
- The will was not signed;
- The will was not witnessed properly;
- The will was made when the person was single, and the person later got married.

When intestacy happens, the *Intestate Succession Act* of

married spouse would inherit everything if he or she is the only person in the family. However, if there are children, either biological or adopted, then the division changes. As well, the legal definition of “children” does not include step-children.

There still needs to be someone in charge of distributing the estate and wrapping everything up. In a case with a valid will, this is the executor. In intestacy, this is an administrator.

What Happens When Someone Who Isn't a Lawyer Writes a Legal Document?

The straightforward answer is pretty obvious – you end up with a document that isn't very good. Unfortunately, in estate planning and business succession planning it's your family who is responsible for cleaning up the mess made by a weak document.

Often poor documents are made by people who think they know what they're doing but don't, or who have done it before and haven't been told about the problems it caused.

Either way, it's the same as going to a nurse instead of a doctor to have surgery. They each have different jobs, and while both are important, they require different skill sets.

Having someone other than a lawyer write your legal documents leaves you with an assortment of problems, most importantly a document that is based on information that is more than likely incorrect, or at best, outdated.

Also, people who aren't experienced in the area of estate law can't warn you of the potential pitfalls, because they aren't aware of them.

There are several regulations for correctly executing a legal document, for both witnessing and signing. These are things that someone outside of the legal profession might not know to complete. This means your document either isn't very reliable, or possibly not legal at all.

Here are some of the legal documents that are often written by people other than lawyers.

**Listen for us on VOCM,
weekdays at 1:30!**

Powers of Attorney

This document is intended to give a lot of power regarding your finances to someone you trust when you have lost your capacity. We've had several clients whose financial advisors have drafted their POAs, assuming that since the document is about their money, someone in the financial industry should write it.

Shareholders Agreements

These documents are sometimes prepared by accountants. Although the contents relate to your business and finances, they are legal documents and therefore should be prepared by a lawyer.

Wills

Several of our clients have come in to get a wills package with their previous will in hand. Sometimes these documents have been prepared by a lawyer who previously completed other work for the person, but a fair number of them have been written by a Justice of the Peace or Commissioner for Oaths.

In each case, these wills are not very thorough, and leave the majority of the content open to interpretation.

If your will is valid, having unclear instructions in your will means your family is more than likely to argue when you've passed.

If your will isn't valid, it means your wishes won't be followed.

What is a Memorandum of Personal Effects?

A Memorandum of Personal Effects is used in conjunction with your will to leave personal items to your friends and family. Put simply, it is a list.

Down one side of piece of paper describe the item you would like the person to have, and down the other write the name of the person you would like to receive it. A Memorandum can be changed as often as you like, and it doesn't need to be witnessed. As long as you sign and date it, your Memorandum is legally binding.

You can send a copy to the lawyer who did your will if you want, but it isn't necessary.

Also, mention in your will that you may leave a Memorandum so your executor knows to look for it. It's best to store your Memorandum with your will so that it can easily be found by your executor.

How to Use a Memorandum of Personal Effects

You can include just about anything in your Memorandum. Here are some tips for filling it in:

1. Don't include money or property. Adding these into your Memorandum can contradict or even revoke your will, so if you want to leave money or property to someone it is best to do so only in your will.

2. Describe the item. Giving accurate descriptions will cut down on confusion. For example, if you say you want to leave your ring to Suzy, and you have two rings, make sure it is clear which one you mean. Regardless of the type of item, try to use factual descriptors such as the color, design, or size. Descriptors such as "my favorite" are not helpful.

3. Make sure it is clear to whom you are leaving the item. Often families have several people in different generations with the same name, as the name is handed down. Including the person's relationship to you will help specify who you mean. For example, "my sister Suzanne" and "my niece Suzy" are two different people, and the difference is made clear by what your relationship is with that person.

How to Get Started with Probate

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As the executor of someone's will, you probably know it's likely that you need to probate it. Many executors need to do some research to find out what probate is, but what do you actually need to do to get started? Here are five steps to get started with probate.

1. Look at the will. Make sure you have an original, NOT a photocopy. If there is more than one will, make sure you have the most recent version.
2. Get an original Funeral Director's Statement of Death and a government-issued Death Certificate.
3. Decide if you are going to complete the probate application yourself, or if you are going to hire professional help. Often this is a lawyer, although it can also be a trust company. If you decide to hire help, find a specialist.
4. Look through the deceased person's desk, filing cabinets, etc. for items like bank statements, tax returns, contracts, bank account numbers, and other important information. Keep everything you find.
5. Start the inventory. This is a list of everything in the estate and its value on the date the person died. Put small items somewhere secure.

Did You Know...?

If a will doesn't state how much an executor should receive as compensation, he/she can request 1%-5%. The executor will only be paid the amount requested if all the residuary beneficiaries agree. If even one disagrees, the amount may need to be set by a judge.

If an item was borrowed from a person and not returned, is it part of the estate?

If something was borrowed from a person before he or she passed away, it is still part of the estate. Whether or not the item is in the home at the time the person dies is irrelevant. The core assumption of borrowing is that it still belongs to the original person, and will be given back. It is up to the executor to collect all of these items, as they are considered assets of the deceased person.

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"Yes, it's a terrible tragedy. But if we're really honest with ourselves, aren't we all thinking about taking a bite out of him right now?"

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or would like to unsubscribe
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