

The Widower – the Will – and the Way

Peter Howarth had always been a private person, and after his wife of 60 years passed away, he was even more taciturn. So it was frustrating, but not terribly surprising, when his son got a call from a neighbour that Peter had been taken away in an ambulance. Once his chest pains were diagnosed as angina he was discharged, only to face the ire of his son, Brian. “Dad, I had no information – nothing about your health instructions, your bank accounts, your Will – I need to know this stuff.” “You don’t need to know it, and I’m not going to tell you, so stop asking”.

Brian has reluctantly accepted his dad’s refusal to make a Will, but how can he prepare for when Peter passes away? What are the practical and emotional steps he can take now, to make things easier in the future?

Practical Matters

Dying without a Will is termed *dying intestate*, e.g. without a Testament, which is also called a Will. The person’s assets - property, including the family home, cottage, cash, cars, other possessions and investments - are distributed according to a provincially regulated formula that may not be the distribution they would have wished. Contrary to popular belief, not all assets automatically go to the spouse; rather, the formula assigns a ‘preferential share’ to the legal spouse (even if they are separated, or if there is a subsequent common-law spouse), with the residue paid to other survivors. In the case of children, all get an equal share. Distributions are made only after outstanding debts, taxes, bills, fees and expenses are paid by the *administrator*. This administrator acts as executor - e.g. to execute the instructions - and is appointed by the province; it is usually a family member, but others may apply to the province to become the administrator; the estate cannot be settled until this administrator is appointed.

These are the facts; what is the potential effect on the estate and the surviving family members?

More legal fees

Legal fees are required to apply to name an administrator; to resolve residue issues that were not clarified by a Will; possibly to post a bond via an insurance company if there are debts or to ensure the assets are not mismanaged by the administrator; and to challenge the distribution (for example, by a common-law spouse). Time delays also occur during the appointment of the administrator, when seeking beneficiaries, and generally when legal documents are being prepared and filed through the provincial courts.

Higher income tax

Professionally prepared Wills are designed to take full advantage of estate planning to avoid income tax, especially by the spouse, as assets left in a Will can usually be tax-deferred. Otherwise these assets are subject to tax – and those taxes can be significant.

Loss of investment opportunities

Assets and investments can change in value over time; an administrator may not be in place or have limited investment powers. The value of a stock or property can vary greatly over the 2-3 years it may take to settle the estate.

□ **General lack of control**

The distribution formula, appointment, and decisions made by the administrator may not be in accordance with the deceased's wishes; family members who are not the administrator have no influence over the process unless they apply to replace the administrator, causing further delays and costs.

Ironically, one of Peter Howarth's favourite topics was railing against 'The Tax Man' – if only he realized!

Tactical Matters

When Peter does pass away, Brian's first task will be to contact an estate lawyer who will prepare and file an application for the certificate of appointment of administrator/executor – assuming Brian wishes to assume this role – which entails several legal forms, as well as a security bonding process. The application also lists details about the deceased, their marriage status, and persons entitled to share in the state, which may entail some research, as well as details on assets. Since more than one potential administrator may be identified – often, the various children - they may act jointly, or some may "renounce" in favour of a single administrator. In some families, this may require some discussion to reach a unanimous decision.

There are several things Brian can do now to prepare:

- contact an estate lawyer to discuss the implications, the process and estimated costs
 - Brian should talk to a few lawyers to make a comfortable choice. The executor works very closely with their estate lawyer, often entailing over a year or more of correspondence and shared work. Brian should be able to feel free to ask questions and be as involved in the process as he wishes
- decide if you will wish to apply as administrator in the event of your father's death
 - This decision cannot be taken lightly; being an executor requires time, patience, dedication and some detective skills. Like his mother, Brian is an outgoing, 'big-picture guy' who hates detail; his sister Angela has a flair for numbers; his older sister Pamela is shy, quiet and a bit suspicious where money is concerned. This family should have some serious discussions about exactly what the job requires, who is best suited, and who would like to do it.
- consider who else might wish to apply for the task, and confer now about the options for acting jointly or renouncing
 - Given the potential family dynamics, the siblings should investigate the options and costs for appointing a third party such as a lawyer or trust company as executor. Appointing a third party does not mean letting your father down – it's about achieving a successful result for all parties. The most harmonious families have fallen out over the most minor estate distribution issues.
- be clear on the facts
 - Brian assumed that asking his dad to name him as Power of Attorney for Property would automatically make him the estate's executor. Obtaining Powers of Attorney for both Property and Personal Care will indeed help him manage his dad's health and business affairs, but by definition, a Power of Attorney ceases at death, and the Will – or, as we have seen, if intestate, the provincial estate regulations – is the defining document. The former

Power of Attorney has no formal role in the estate process and does not become executor unless named as such.

- gather information on Dad's assets, debts, personal and marital status
 - This task may take time, research and co-operation. Brian's dad need not divulge any personal or financial information, but he may be willing to share where that information might be found - he doesn't need to share details of his investment portfolio, but he might be willing to name his financial advisor or bank branch. He may also have this information documented somewhere, perhaps in a safety deposit box. While he needn't give anyone the key, he should be willing to advise where that box may be located. He may need to be reassured by the estate lawyer on these points.
- list names and contact details of potential beneficiaries
 - It may seem obvious, but listing the name, date of birth and address of each family member will save time and ensure accuracy when it's time to provide the information to the lawyer.

Emotional Matters

It is always difficult to assist a parent that resists help. Brian and his sisters made every effort to make their dad understand the implications of not making a Will, but Peter was adamant. The siblings speculated – was there something in their dad's past that made him unwilling or superstitious? Would making plans bring back sad reminders of their mom's death? Fundamentally, Peter is simply a private man who dislikes taking advice. He loves his children and trusts them to do the right things after he is gone, so sees no need to fuss with papers and plans.

He three adult children have mixed emotions. They respect their dad's need for privacy, but are worried that as he ages, they will lack the information they'll need to make good decisions on his behalf. They did approach their dad to identify specific bequests – of money and possessions – and Peter said he would consider it. The estate lawyer said a letter could be prepared – 'to be opened in the event of my death' – that, while not legally binding, would at least provide some guidance. However they remain worried and frustrated, and acknowledge that it affects their enjoyment of their dad's remaining years.

So, for these siblings, it's no fairy tale – but maybe it can be a cautionary tale. Even without a Will, there may be a way.

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