



Dying Without a Will

This is one in a series of pamphlets dealing with wills and estate planning. Other publications in this series include **Making a Will, Choosing an Executor, Being an Executor** and **Probate of a Will**. The purpose of this pamphlet is to provide some basic information about intestacy in New Brunswick. It does not contain a complete statement of the law in the area and laws change from time to time. If you have specific questions about your legal situation or want to make a will you should consult a lawyer.

What does intestate mean?

Intestate refers to a person who dies without leaving a valid will distributing his or her estate. When this happens in New Brunswick, the *Devolution of Estates Act* sets out how the estate is to be distributed. The **Act** tries to distribute property as most people would normally choose to do. However, this may not distribute the property as the deceased person would have wished.

What happens if I have a will that fails to distribute all of my estate?

If a person leaves a valid will, which fails to distribute the entire estate, either intentionally or by accident, he or she is said to die **partially intestate**. In those circumstances, the will governs part of the estate and the *Devolution of Estates Act* governs the remaining portion of the estate.

Who will receive my property if I die without a will?

It depends on who is living at the time of your death. For example, if you die intestate

- leaving a widow but no children or grandchildren, your entire estate will go to your widow.

- leaving a widow and **one** child, all property that is considered marital property will go to your widow. Whatever property is remaining will be divided equally between your widow and your child*.
- leaving a widow and more than one child, all property that is considered marital property will go to your widow. One-third of any property remaining will also go to your widow with two-thirds to be divided equally among your children*.
- leaving only children, your estate will go to the children* in equal shares.
- leaving no widow, children* or grandchildren, your estate will go to your father and mother in equal shares if both are living, but if either of them is dead the estate will go to the other.
- leaving no widow, children*, grandchildren or parents, your estate shall go to your brothers and sisters in equal shares. If any brother or sister is dead, the children of the deceased sibling will take the share that would have gone to their parent.

* Note: If an entitled child has died leaving a child or children living at the time of your death, these grandchildren will take whatever share their parent would have taken if living.

If I die without a will, is my common law partner entitled to receive any of my estate?

No. The *Devolution of Estates Act* only recognizes certain individuals. The **Act** recognizes the entitlement of a legally married spouse. It does not recognize other relationships such as common law partners. As well, the **Act** does not entitle a stepchild to receive any of your property if you die

intestate. If you wish to benefit your common law partner or stepchildren when you die you must do so in a will.

However, individuals who were dependant on you for support such as a common law partner or stepchildren may be able to obtain a share of your estate under other entitling legislation such as the *Provision for Dependants Act*. This **Act** permits “dependents” to ask the court to order your estate to provide support. Even if you die with a valid will, a dependant can apply to the court for relief if he or she did not receive adequate support in your will. The application must be made shortly after the death.

If am separated from my legally married spouse, what would happen if I die without a will?

A separated spouse is still considered a widow upon the death of his or her legally married spouse. The widow will receive all, one-half or one-third of your estate, including all “marital property” as set out above. However, separation, especially if it lasts a long time, is likely to affect how much of the deceased’s property is considered marital property. The longer the separation lasts the more likely it is that property will become estate property rather than marital property. You should consider consulting a lawyer about the impact a domestic agreement, such as a separation agreement, may have on the distribution of property.

Who distributes my property if I die without a will?

If you die without a will, the court will appoint an administrator. The court makes this appointment upon the application of somebody qualified to act in this capacity.

Usually the person appointed as the administrator is a member of your family, or if you have none, a close friend or even a creditor. However, this may not be the person you would have chosen. The administrator’s job is to distribute your property and assets among those who are entitled to it according to the *Devolution of Estates Act*.

To obtain “*letters of administration*” an application must be made to the court. A lawyer can draft the legal documents and ensure that the administrator has the proper consent or renunciation from others who may be beneficiaries of the estate.

Although the **Act** does not specifically set out a list prioritizing applicants, there is a general order of individuals to whom letters of administration will be granted. The top three are:

1. Spouse of the deceased
2. Children of the deceased
3. Grandchildren of the deceased

However, the court may use its discretion and appoint any person other than those entitled to the estate as an administrator. If there is more than one applicant they must either apply jointly or consent to an appointment. There is no limitation on the number of administrators who may be appointed.

What happens to my debts if I die without a will?

The *Devolution of Estates Act* sets out how your estate will be distributed when you die without a will. The first thing your estate must be used for is to pay off your funeral expenses, the costs of administering your estate and any debts you owe when you die. Only what is remaining will be distributed under the *Devolution of Estates Act*.

Should I have a will?

It is wise to make a will. If you die without a will you do not have a say in who your beneficiaries are or who administers your estate. Certain people that you might have included in your will may not receive any of your property. As well, those who are entitled to receive part of your estate if you die intestate may receive a share that is larger or smaller than you would have chosen. The costs to administer your estate under the *Devolution of Estates Act* are often higher than if you have a will, due to the need to have an administrator appointed and because there are often many more individuals who are entitled. For more information on wills, see PLEIS-NB’s pamphlet, **Making a Will**.

Terms To Know

“**widow**” means a person to whom you were legally married at the time of your death. “Widow” also includes a spouse from whom you are separated but does not include a spouse from whom you are divorced.

“**child**” means a natural child (whether born inside or outside marriage) and an adopted child. However, “child” does not include a stepchild.

“**grandchild**” means a child of your child.

“**marital property**” includes:

Family assets – property which was acquired before or after marriage that was owned by one or both spouses and that was ordinarily used or enjoyed for shelter, transportation, household, educational, recreational, social or aesthetic purposes by both spouses or one or more of their children while the spouses were cohabiting.

Marital property also includes property owned by one or both spouses that is **not** a family asset and that was acquired while the spouses cohabited, or in contemplation of marriage, **except**:

- (a) business assets;
- (b) property that was a gift from one spouse to another;
- (c) property that was a gift from another to a spouse;

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