Exercise Your Will

I can't afford it
I don't have any money to leave anyone
I don't have any children (or minor) children

Those are just some of the excuses people use when they are encouraged to make a Will. As a lawyer, I can tell you that those are very poor reasons for not creating a proper Last Will and Testament ("Will").

You can't afford to make a Will? Can your family afford the high costs of you not leaving a Will? Sometimes, dying without a Will causes problems among family members who may help themselves to, and quibble over, your estate. Sometimes, it causes problems because costly court proceedings are required to settle disputes about the estate. Sometimes, relatives fight over the guardianship of minor children. And the list of possible problems goes on.

You don't have any money to leave anyone? What if you were the winning lottery ticket holder just before you passed away? What if you inherited an estate just before dying and had not been advised? Who is going to receive any proceeds of any death benefits that may be payable? Life is full of twists and turns – never rule out sudden monetary fortune.

You don't have any children or minor children? What if a person were to surface claiming to be an estranged child or a long-lost relative and thereby having an entitlement to your estate? If you have children under the age of majority, how would a court ever officially know your wishes about the care of your children after your death?

The estate of a person who dies leaving a Will is distributed in accordance with that Will (unless there are any legal reasons that prohibit distribution of the estate in the manner set out by the testator (signer of the Will). In contrast, the estate of a person who dies intestate, or without a Will, is distributed according to law, that is, without any consideration whatsoever of the wishes that the deceased person may have had. In Ontario, the Succession Law Reform Act determines how an estate of a person who dies intestate is divided. Here are some examples:

- If the deceased leaves behind a spouse, but no children, the spouse has an absolute right to the estate. Perhaps the deceased left behind elderly parents who could have well been assisted through their twilight years by an inheritance. Perhaps there is a dear family member or friend, or someone else to whom the deceased would have liked to have had as a beneficiary. Without a Will, there is no say.
- If the deceased leaves behind a spouse and one child, the spouse is generally entitled to one-half of the estate and the surviving child the other half. Perhaps the deceased does not wish that the child receives that entire allotment because there is another individual, like an elderly parent, a disabled relative, or someone else who could have benefited from the estate. Without a Will, there is no say.
- If the deceased leaves behind a spouse and more than one child, the spouse is generally entitled to one third of the estate and the surviving children share the other two-thirds. Perhaps there is one child with special educational, health or career needs to whom the deceased would have like to have provided for in greater proportion. Without a Will, there is no say.

- If the deceased leaves no spouse and no children, the estate goes to the parents of the deceased in equal shares, or everything to the one surviving parent if the other one has died. Perhaps the deceased and the surviving parent or parents did not maintain any kind of relationship and the deceased would have rather passed the estate on to a charity or a friend. Without a Will, there is no say.
- If the deceased leaves no surviving spouse, children, parent, brother, sister, nephew, niece or next of kin, the property becomes the property of the Crown. Perhaps the deceased would have liked to leave the estate to a charity, a good friend or a trusted neighbour. Without a Will, there is no say.

Those are just some examples of why the legislation may not be able to make the distribution that you would have otherwise desired and stated in your Will.

The Succession Law Reform Act also, among other things, sets out the law on what makes a will valid. One can make a holograph (handwritten) Will or one can use commercial ready-made will templates. However, if you misunderstand the requirements of either, your Will may be invalid, your efforts wasted, and your estate in jeopardy of being distributed contrary to your wishes. Further, there are certain tax consequences to the ways in which a Will is drafted, so proper wording is important. In addition, there are considerations for other issues such as whether the spouse of your child should have any entitlement to distribution in the event your child divorces.

A lawyer can draft your Will and assist you with estate planning. A lawyer can assess your personal circumstances to see if there are any specific issues that need to be addressed to protect your Will from being challenged. A lawyer can make sure that your Will is properly drafted and witnessed. While it costs you more to see a lawyer, these professional services are irreplaceable and can provide you with a peace of mind.

In life, you make decisions about your property, family and friends. In similar fashion, you can use your will to make decisions about your estate, or you can leave your relatives with the burden, inconvenience and expense of your dying intestate. The choice about the legacy you wish to leave behind is yours and yours alone.