WILLS, INCAPACITY PLANNING & ESTATES

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1. WILLS

You need a Will to ensure that on your death your property and assets will be distributed according to your wishes, by the person(s) you trust to perform that important task. Further, if you have children under the age of 19, you should appoint someone as their guardian. At Mountain Law Corporation we can help you, so ask for your no obligation/no charge detailed questionnaires to get you started. Currently our price structure for most stand-alone Wills is $695.00 for one person, and $895.00 for a couple (including 12% taxes).

Dying without a Will

Dying "intestate" (without a legally valid Will) means that someone must apply to the court to be appointed as your personal representative ("administrator"). Such an appointment can often be complicated, time-consuming, and even contentious (and certainly more expensive), especially if that person, usually a next-of-kin, lives outside of B.C.

If no-one comes forward, then a branch of B.C.'s Ministry of the Attorney-General, called the Public Guardian & Trustee, can intervene. That office's mandate is to protect the assets and legal claims of deceased persons where there is no personal representative. (It also handles similar matters for persons with mental difficulties and for children under the age of 19.)

If there is no valid Will, then your minor children may not be placed in the custody of your preferred choice of person; further, your surviving spouse will usually be obliged to apply to the Public Guardian & Trustee each time the administrator wishes to spend any capital of funds held for minor children.

Distribution

If there is no valid Will and no surviving next-of-kin, then the provincial government will receive all the deceased's assets. They will not go to a favourite charity or group of friends who could have been beneficiaries if there had been an enforceable Will.

Under recently revised intestacy laws, if indeed there are next-of-kin, then the surviving spouse (if there has been no separation) receives all household furnishings and the right to buy out the matrimonial home (if not on title already). Further, now, the first $300,000.00 of assets goes to the surviving spouse (if not separated), and the remainder is split equally between that person and any of their surviving children (half and half). However, if there are children surviving from another relationship of the deceased, the surviving spouse's "preferential" portion is reduced to $150,000.00, with the remainder then split equally between that person and all the surviving children (again half and half).

Should there be no surviving spouse or children (natural or adopted), or further issue of those children, then pursuant to the new "parentelic rules" the deceased's parents receive the estate equally, or the survivor on his/her own. Absent any surviving parents, then siblings of the deceased are next in line (though the children of a deceased sibling receive what their parent would have received, and if no children but grandchildren survive, they would be the ones entitled). From there on, living nephews and nieces would be next, followed by their children, and so on, but if there is no-one of the fourth or lesser degree of relationship surviving the intestate, the estate assets would normally then "escheat" to the government.

For simultaneous deaths, the younger person is no longer presumed to survive the older; instead, each person will be considered as having survived the other. Where property is held as "joint tenants" (with right of survivorship) and there are simultaneous deaths, the property will be treated as if held as "tenants in common" (in halves). Note that if a person does not survive the deceased by 5 days, that person will be deemed to have died before the deceased for all intents affecting the estate.

It is important to understand that even if there is a valid Will, certain assets may not necessarily be included for distribution under your Will and are considered separate from your "estate". Examples would be property held with right of survivorship in "joint tenancy" (subject to exceptions), or held as a trustee, or insurance or registered savings plans with designated succession holders or beneficiaries, or property subject to a third-party claim (for instance, under matrimonial law).

Executor

One of the principal reasons for making a Will is to name the personal representative that the court can confirm is able to obtain legal title of the deceased's assets, so those assets can be determined, debts paid, and the distribution set out in the Will can occur.

You should choose one or more persons who are reliable, aged 19 or older, and preferably resident in B.C. One or more alternates, preferably younger, should be carefully considered as well.

The Executor notifies those named in the Will (and otherwise) as beneficiaries about the death and provides information of the extent of their entitlement. There are numerous other duties for the Executor, such as selling assets, filing tax returns, renewing insurance, etc. Sometimes a corporate trustee such as a trust company may be a preferred choice (though often considered impersonal and expensive, usually charging the full 5% of the gross value of the estate for administration fees).

Unless the Executor is also a beneficiary of a specific gift under the Will (in which case there must be specific mention of entitlement to executor fees), that person can charge up to the 5% mentioned, though it is much more usual to charge between 2 - 3% (depending on the degree of difficulty of the estate and how much work is required).

Requirements

Wills should be in writing (either hand-written or typed), though now electronic Wills are recognized, and also should be signed and witnessed according to the rules set out in B.C.'s *Wills Estate and Administration Act ("WESA")*. Note, however, that with the greater powers that courts have been given under WESA, if a deceased left notes or some other record of desiring change to his/her Will, upon a determination that there was testamentary intent, changes to a Will may be enforced.

Under recently passed legislation it is now possible to have a Will recognized that doesn't comply with those strict requirements. Even Wills signed outside this province are now fairly routinely recognized in B.C. (but get legal advice well ahead of time as to their suitability/ applicability).

Besides setting out the names of one or more personal representatives, guardian(s) if there are minor children, and beneficiaries with the applicable distribution, a Will can also contain many other provisions such as restrictions on the powers of Trustees handling or investing any trust monies, and also funeral wishes.

Someone who is not "of sound mind" who signs a Will most likely will have the validity of that Will successfully challenged. Further, if the maker of the Will is separated, then the appointment of that person's spouse as executor, as well as any gifts in the Will to that spouse in the Will, are void (unless the Will states otherwise). A fairly new provision in WESA requires beneficiaries in a Will, who might be characterized as having been in a position of dominance, to prove that they did not exert undue influence over a deceased concerning that benefit.

The Lawyer's Role

With the increasing prevalence of legal documents available on the internet and through "do-it-yourself" services, the role of the lawyer in preparing Wills and advising on estate matters has never been more important. While initially only a small fraction of the cost of hiring a professional, this "penny-wise, pound-foolish" self-help process could easily go badly awry. The very substantial costs, both psychological and financial, for your personal representatives and the intended beneficiaries, should be avoided by receiving proper professional advice.

Many Will-creation documents and kits do not take into account B.C. specific laws and rules. They do not set up properly the various ways of distributing assets, such as setting up life-interests, creating trusts, or how correctly to leave property to charities.

Experienced lawyers ensure that a Will is flexible enough to address future events which may take place before the Will is effective (on death), such as marriage breakdown or the deaths of executors or beneficiaries. With other professionals such as accountants and financial planners, lawyers can provide advice and can draft specific provisions to take advantage of strategies for reducing taxes on death.

Intelligent and comprehensive estate planning dictates that a Will not be treated in isolation, but that strong consideration also be given to the other personal planning documents (discussed later here), of powers of attorney, representation agreements, nominations of

committee and trusts (at least). Our legal fees for preparing these documents, except trusts, are generally under $500.00 for each.

2. REPRESENTATION AGREEMENTS

Though available as a legal tool for planning since 2000, many rules governing the making and use of Representation Agreements ("RA's") were changed in 2011. The changes do not affect pre-existing RA's. However, an RA for financial affairs can now only be made for "routine" management of such matters, thereby increasing the importance of Powers of Attorney (be sure to read our discussion about Powers of Attorney carefully in conjunction with this explanation).

An RA gives someone you name the legal authority to assist you to decide or to represent you regarding decisions you can no longer make on your own. One can make a reasonably simple RA for routine financial matters or health care decisions under s.7 of the revised *Representation Agreement Act*, or a more complex one covering your personal care and health only, under s.9 of that Act.

As with Powers of Attorney, anyone at least 19 years old in B.C. can make an RA, unless incapable. However, note that a s.7 RA can be made even if an adult cannot manage his or her own affairs.

Naming the Representative

A Representative must be at least 19 years old, and it is usual to select a family member or trusted friend. The new rules prohibit anyone from being named who is paid to provide personal care or health services to you, and that includes employees working at a facility where you reside (except if that person is your spouse, child or parent).

Duties of Representatives

As with appointments under the *Power of Attorney Act*, the representatives must act honestly and in good faith, exercise the care, skill and diligence of a reasonably prudent person, only make decisions which they are authorized to make, and must keep good records of decisions made.

You should discuss frankly with your representatives your expectations, and be sure that they are comfortable with both your plans and their statutory obligations. More than one representative can be appointed (a dispute resolution mechanism is then recommended), and one or more alternates should be carefully considered for back-up purposes (with the precise circumstances when they act being outlined).

You can give different people authority to make different decisions with an RA. You can also appoint more than one Representative if wanting to keep wishes for different matters separate. Note that all representatives are entitled to be reimbursed for their proven reasonable expenses, but a representative or monitor (discussed hereafter) cannot be paid for making health care decisions for you. The RA can spell out remuneration for any other areas, which must be approved by the courts.

Formalities of an RA

In order to be effective, an RA needs to be signed and witnessed according to the new Act. Though two witnesses are normally required, if a lawyer or notary is the witness, that person alone will fulfill the requirements. Each representative must also sign (though that can be done at a different time), and unlike Powers of Attorney, these signatures do not need witnessing.

As with Powers of Attorney, your representative cannot be a witness, and a witness cannot be the representative's spouse, child or parent. Additional certificates will need to be signed for a s.9 RA.

Termination of an RA

Like a Power of Attorney, your RA continues to be effective until you revoke it or die. Some other ways that the RA will no longer be valid is if your marriage (or marriage-like relationship) ends and your representative is your "spouse", unless the RA states otherwise; your representative and all alternates are unwilling or unable to act or are disqualified; a condition set out in your RA occurs, or a court orders it. Note that an RA is suspended and the representative cannot act if the RA is for management of routine financial affairs under s.7 and the Public Guardian & Trustee is appointed Committee under a Certificate of Incapability.

The above also holds true if a monitor is required and that monitor and any backup is no longer able or willing to act. However, the Public Guardian may be able to appoint one so that the representative can continue to act.

Monitor

A monitor is sometimes appointed in an RA and has the power to ensure the representative is fulfilling his or her duties, and if not, the monitor is expected to inform the Public Guardian.

For a s.7 RA, a monitor must be appointed unless there are two representatives who must act together, or your representative is a spouse, a trust company, credit union or the Public Guardian.

3. POWERS OF ATTORNEY

A new *Power of Attorney Act* came into effect in 2011, and it is that legislation which allows for the creation of two different types of Power of Attorney. The first is called a "general Power of Attorney", which permits the appointment of someone you trust to handle your financial and legal affairs as you direct, or on your behalf if you are not available. It can also be "limited" in terms of being specific to a particular task, matter or time period.

Unlike the second type, called an "enduring power of attorney" ("EPA"), a general power of attorney ends when the maker is incapable.

An EPA survives mental or physical infirmity, but can also be effective when you are capable. You can set out when and under what circumstances that authority can be triggered. You must be 19 years of age to make one, and capable of understanding the nature and

consequences of the document (using the criteria set out in the new Act). However, as with the general power of attorney, it does not address health or personal care issues (see our discussion under “Representation Agreements”).

Powers of Attorney made before September 1, 2011 are still valid, but the rules surrounding their preparation, execution and use are now very different. As a consequence, the attorney (or donee) may no longer be able to fulfil all of your wishes. For example, unless the EPA specifically outlines it, your attorney is restricted from making loans, gifts and donations. Additionally, there are new duties for attorneys, and the procedures for revoking EPA’s have changed.

Naming the Attorney

Though the word “attorney” is used interchangeably with the word “lawyer” in the United States, that is not the reference here. Normally you would choose a family member or friend, though the person named could also be a professional advisor. If the person is not yet 19 years of age, then that person cannot act until that time.

The new rules dictate that you cannot choose someone who is paid to provide personal care or health care services to you, including any employees at a facility where you live which provides those services. The exception is if the person you name is your spouse, child or parent. If you choose a trust company you would normally need to set out compensation levels, so be sure to ask beforehand.

Duties of Attorneys

Attorneys must act honestly and in good faith. They must exercise the care, skill and diligence of a reasonably prudent person, and keep careful records. Not only must they follow your directions as set out in the EPA and elsewhere, but also the rules set out in the new Act. There are restrictions on making or changing your Will or beneficiary designations in investment vehicles, such as insurance policies and RRSP’s.

You should discuss frankly with your attorneys your expectations, and be sure that they are comfortable with both your plans and their statutory obligations. More than one attorney can be appointed (a dispute resolution mechanism is then recommended), and one or more alternates should be carefully considered for back-up purposes (with the precise circumstances when they can act being outlined).

Most attorneys will not want to be paid, but if you wish to do so then that entitlement must be set out in the EPA. Note that all attorneys are entitled to be reimbursed for their reasonable proven expenses.

Formalities of an EPA

To be effective, an EPA needs to be signed and witnessed according to the new Act. Though two witnesses are normally required, if a lawyer or notary is the witness, that person alone will fulfill the requirements. Each attorney must also sign (though that can be at a different time), and have their signatures witnessed.

Note that if the EPA is to be used for real estate, then a lawyer or notary must be the witness for you and the attorney (though not necessarily the same lawyer or notary). Further, your attorney cannot be a witness, and a witness cannot be the attorney's spouse, child or parent.

Termination of EPA

Your EPA continues to be effective until you revoke it or die. Some other ways that the EPA will no longer be valid is if your marriage (or marriage-like relationship) ends and your attorney is your "spouse", unless the EPA states otherwise; your attorney and all alternates are unwilling or unable to act or are disqualified; a condition set out in your EPA occurs, or a court order ends it. Note that if you have a post September 1, 2011 EPA, it is suspended and the attorney cannot act once the Public Guardian & Trustee is appointed Committee of the Estate.

Again, if your Power of Attorney is not determined to be an "enduring" one (that is, one that survives your mental or physical incapacity), then when you become incapable it is no longer effective.

4. NOMINATIONS OF COMMITTEE

Many people choose to create a "Nomination of Committee", as part of their personal planning documents. This legal document sets out your preference for someone to be strongly considered as your Committee in the future, if required. It should be signed and witnessed in the same way as Wills.

Committees are persons who are court appointed to handle the financial affairs of adults who are incapable of managing their affairs. If the incapable adults are also not able to handle themselves, then the appointment may extend to give power to make personal and health care decisions.

Generally, the courts follow the nomination which had been preferred by the now incapable adult, though that nominated person needs to demonstrate his/her willingness and suitability. Sometimes the Public Guardian and Trustee is appointed, if the nominated person is deemed inappropriate and no one else steps forward.

5. PROBATE & ADMINISTRATION

Executor/Administrator's Duties

Administration of any estate principally involves the collection of the deceased's assets, the payment of debts and claims against the deceased (as well as the expenses of administration), and the distribution of the balance of the estate amongst those entitled.

If the deceased died with a Will and appoints an executor (if female, an executrix), it is the person so appointed who is responsible for the administration of the estate. The appointment of the executor is confirmed by the Supreme Court by a Grant of Letters Probate. Probate is the court procedure by which the Will is proven to be the valid last Will of the deceased. Note that if the person so appointed does not wish to accept that responsibility, he or she may renounce the appointment.

If the deceased died without a Will, if the Will does not appoint an executor, or if the person appointed has predeceased or renounced the appointment (and there is no alternate), then the Supreme Court must appoint an administrator (if female, an administratrix), by a Grant of Letters of Administration, to be responsible for the administration of the estate.

In the performance of the Executor's or Administrator's duties, you must act in good faith and for the benefit of the beneficiaries or next-of-kin. You will be expected to conduct the administration of the estate in the same manner as an ordinary prudent person of business would conduct his or her own affairs. Therefore, if you make mistakes and cause loss to the estate, unless the court finds that you acted honestly and reasonably, you may well be personally liable and will be obliged to make good that loss out of your own pocket.

Executor's Fees

In British Columbia, the *Trustee Act* provides that an Executor may be allowed a fee not exceeding 5% of the gross aggregate value (capital and income) of the assets. If there is more than one Executor, the Executors must share the above fees.

The fees prescribed by the *Trustee Act* are maximum fees and are not necessarily the actual fees that will be allowed an Executor for administering a particular estate. Several factors are usually taken into consideration, especially the size and complexity of the estate.

If the beneficiaries or next-of-kin are not prepared to approve your fees, you will be required to "review your accounts" before a Registrar of the Supreme Court of B.C.

Probate Fees

The value of the estate's assets determines the probate fees payable. Besides the initial court filing fee of $200.00 (waived if the estate is worth less than $25,000.00), what is payable before a Grant is issued is the sum of $6.00 for every $1,000.00 by which the estate value exceeds $25,000.00 up to $50,000.00, and $14.00 for every $1,000.00 by which the estate value exceeds $50,000.00. Land and other "hard assets" outside B.C. are not included in the calculation, and mortgages on land reduce the probate fee payable.

Lawyer's Role

Generally, the lawyer advises the Executor/Administrator on all legal matters in connection with the administration of the estate and assists that person in making proper decisions.

Specifically, the legal work in the administration of an estate involves first making the search of B.C.'s Vital Statistics Agency for a Wills Notice. The Wills Search Certificate which is received back will state the location of any Will and must be filed with the Court. The lawyer reviews the Will and advises as to its validity and effect. If the deceased died without a Will, the lawyer advises as to who are the next-of-kin and deemed beneficiaries.

The lawyer usually arranges the advertising for creditors and advises as to claims which are to be disputed. The lawyer also conducts title searches for any real property in the estate and advises as to the state of title.

From the information provided to the lawyer by you, including the inventory of the deceased's assets and liabilities, the lawyer prepares the Affidavits and other court documents required to be filed on the Application for a Grant of Letters Probate or of Letters of Administration. The lawyer attends on the execution of these documents by you and the filing of them in the Probate Registry of the Supreme Court. If necessary (though rare), the lawyer appears in Supreme Court Chambers on the hearing of the Application.

After the Grant is received, the lawyer prepares the documents necessary to transmit the assets of the deceased from the deceased's name to your name as Executor/Administrator, attends upon the execution of these documents by you and files them with the transfer agents (in the case of securities) and the Land Title Office (in the case of real property). Once the assets are in your name as Executor or Administrator, you may then transfer them to the beneficiaries or the next-of-kin.

The lawyer assists you in preparing your accounts and prepares Releases for the beneficiaries or next-of-kin to execute. By executing the Releases, the beneficiaries or next-of-kin acknowledge receipt of their respective shares of the estate, approve your accounts, and release any claim that they may have against you or the estate. If it is necessary to pass your accounts as mentioned above, the lawyer prepares and files in the Supreme Court Registry the necessary Affidavits and court documents, and attends in Supreme Court Chambers and at the hearing before the Registrar.

Lawyer's Fees

The fees which the solicitor may charge for the above services were formerly prescribed by the tariff under the Supreme Court Rules which were as follows and continue often to be a benchmark:

Aggregate Value of Estate	Fee (Maximum)
On the first $500,000	2%
On the next $1,500,000	1%
On the next $8,000,000	1/4%
On amount which exceeds $10,000,000	1/8%

If the estate is of modest value or if you wish the lawyer to do not only the legal work in the administration of the estate, but also to perform all or some of your work as

Executor/Administrator, the lawyer may agree to provide legal services on an hourly charge or on a percentage for the legal work plus an hourly charge for your work. If you are not satisfied with the lawyer's bill for fees when it is rendered, you may require the lawyer to have his of her bill reviewed before the Registrar of the Supreme Court, who will determine if it is reasonable.

6. ESTATE PLANNING

Elsewhere on our website, we have reviewed "Succession Planning" under our Business Law section. The focus there was on the business, but in this case it is about the family.

As is clear from the topics covered in the rest of this section, comprehensive planning is a necessary tool to address the many uncertainties and challenges life presents to you and your family.

By investing the time and spending some money on professionals now, you can minimize the anxiety and cost for your family later. Contact us at Mountain Law Corporation so that we can assist you in this process.

7. WILLS VARIATIONS

It has become increasingly difficult to "disinherit" a spouse or child in a Will by leaving that person a token dollar! WESA incorporated the prior provisions of the *Wills Variation Act* of B.C. in providing that a spouse (including common-law and same-sex) or child (including "adopted", but not "step") of the deceased with authority to apply to the courts to vary the Will's terms to provide adequately and fairly for the applicant. Factors to be taking into consideration by the courts are the standard of living enjoyed by the applicant while living with the deceased, the size of the estate, the relative needs of all parties involved, and any special circumstances (such as gifts made to the claimant during the deceased's life-time). The test for adequate and proper maintenance and support under the Act was recently neatly summarized by the B.C. Courts as an objective analysis of whether the deceased was "acting in accordance with society's reasonable expectations of what a judicious parent [spouse] would do in the circumstances by reference to contemporary community standards".

There is a strict time limit in the Act for commencing an action for contesting a Will, being within six months after probate (so long as prior notice of the application for probate was given). Each individual case will be decided on its own merits, and even experienced lawyers cannot be sure of an end result in most cases. Generally though, the obligations owed to a spouse are given greater weight and will be addressed by courts in priority to obligations of adult children who are not dependent.

It does help, sometimes considerably, to set out in writing (preferably at the time of making a Will), the reasons for the disinheriting decision. Be sure to get expert legal advice though, because recent court decisions have overruled the deceased's reasons if they are inaccurate or if they are contrary to public policy (such as disinheriting a child due to his/her sexual orientation).

8. TRUSTS

A trust is created when someone (a "settlor") transfers ownership (legal title) or property to someone else (called a "trustee"), usually with directions as to how that property is to be used for the benefit of a third party (the "beneficiary"). Note that the settlor and trustee are frequently one and the same. The trustee is the legal owner of the property covered by the trust and controls the management decisions and files tax returns for the trust. In short, the trustee has a duty to act in the beneficiaries' best interests. Testamentary trusts in Wills are only effective on death; inter-vivos or living trusts are created when one is alive.

Inter-Vivos / Living Trusts

There are many good reasons to set up these trusts. They include the benefit of confidentiality, incapacity planning, ensuring funds are used specifically for education (RESP's are an example), taking advantage of tax benefits (such as charitable remainder trusts, which give an instant tax credit from assets to be donated to charities at a later time), protecting assets from matrimonial claims (though now significantly restricted in B.C.), minimizing probate fees payable on death, and initiating an "estate freeze". If you are at least 65 years of age, you can set up what are called "alter ego" or "joint partner" trusts.

An estate freeze is an extremely effective way for business people to reorganize their share capital so that the possible capital gains exempt status on existing shares is "frozen", allowing future growth to accrue to new shares, for example benefitting other family members. Through the trust the new shares can be held by the business owner, while still controlling the business.

There are disadvantages though, in that such trusts are taxed as if they were distinct legal entities, at the top marginal tax rate (though there are exceptions, such as where the beneficiary is disabled).

Testamentary Trusts

Trusts created by a Will, however, get much more preferential tax treatment after probate fees are paid. They are most commonly specified in a Will whereby a parent desires to give property to a child setting out terms and conditions governing that transfer. For example, the trust can stipulate how and when the child receives the property or money; also, how much can be spent on educational, medical and other expenses.

Persons under 19 years of age are characterized as being under a "legal disability" and therefore any property or money left to them may need to be paid to the Public Guardian & Trustee of B.C. to be managed until they are "of age", when everything gets transferred or paid into their names. However, Wills can allow for the naming of a trustee to administer the property or money, thereby avoiding that procedure.

Testamentary trusts are also used by parents to ensure their children inherit their estates eventually, but only after spouses (of these parents) have benefited during their lifetimes. Other uses include creditor-proofing, seeking protection from matrimonial claims (though now limited in B.C., as mentioned), and for persons with reduced mental capacity.

Note that under Canada's *Income Tax Act*, a trust is deemed to have disposed of its property 21 years after it was set up. That means that the advantages of tax deferral cannot last forever, because after the 21 years tax is then payable as if the trust had sold its assets at fair market. Various strategies can be implemented to mitigate this drastic consequence, such as rolling the property into another trust vehicle, or distributing the property to the beneficiaries before the expiry of the 21 years. The latter option results in a delay of the tax payment until the death of each beneficiary.

9. MEDICAL ASSISTANCE IN DYING

Medical assistance in dying ("MAID") provides certain legally eligible persons the option to end their life with the assistance of a doctor or nurse practitioner. This new Canadian law stipulates that those at least 18 years of age experiencing intolerable suffering due to a grievous and irremediable (incurable) medical situation, even if natural death is not reasonably foreseeable (though in that case often with a period of assessment of at least 90 days), can end their life with the aid of drugs, following strict processes designed to ensure an informed decision is made, and to protect vulnerable people.

You must be able to make decisions about your health and provide "informed consent" to receive MAID. If you are at risk of losing your capacity to provide such consent, a waiver of final consent is now possible.

Starting March 2023, Canada will become one of the very few nations in the world to allow MAID for mental illness.