

## WILLS

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When a person dies without a will, their estate passes according to legislation called the *Estate Administration Act* under the guidance of a court appointed administrator. Although this system does work, many people wish to have greater control over the direction of their assets and the management of their estate and thus prepare a will. Wills provide certainty not only for the person making the will, but also for family members and friends.

### ***a) Executors***

The person making the will, the testator, must consider various things. First, he or she must consider who will be named as the executor, the personal representative charged with administering the estate. The person should be willing to act, as executors have the power to renounce their appointment, and preferably be familiar with the estate. Also, for tax reasons, it may be simpler if an executor resides in BC. If an executor does not have any experience in such matters, the testator may provide the executor with the power to hire other professionals to assist him or her. The testator must also consider whether the executor will be remunerated for acting and whether the executor will be receiving anything under the will. If the executor is receiving something, without wording to the contrary, anything that the executor receives will be deemed to be in lieu of compensation.

### ***b) Beneficiaries and Testamentary Gifts***

The testator must also consider who he or she wishes to name as beneficiaries, the specific persons whom the testator designates to receive his or her assets. The beneficiaries may receive certain assets by way of a specific gift, receive a specific cash legacy, or receive a portion of the estate remaining after all specific gifts have been made, which is called the residue. Because it may be difficult to predict the specific assets or amount of cash which you will have in your possession at the time of your death, it may be preferable for testators to leave a beneficiary a proportion of the residue of their estate unless they are certain that they wish to leave him or her

a specific item or cash amount. Testators should also consider what they wish to happen to their personal effects and household items and whether they want their executor to be able to convert them to cash. Another consideration involves whether a testator wishes to make any charitable gifts.

According to provincial legislation called the *Wills Variation Act*, legal spouses and children of a testator have the right to commence an action to vary a will if they are not adequately provided for. A testator who wishes to 'disinherit' a child or spouse should explicitly state in the will or a separate document his or her reasons for giving nothing or little to that specific person. In British Columbia, the court is not bound by the testator's wishes and may alter the will to adequately provide for a spouse or child; however, a reasonable explanation may result in the court exercising its discretion in closer conformity with the will.

#### ***c) Trusts***

Testators may also set up any trusts in their wills. Pursuant to such trusts, a specific person, the trustee, holds legal title to something for the benefit of another person, the beneficiary. Although the executor is the trustee for all beneficiaries under the will during the term of the administration of the estate, the testator can set up specific trusts to continue for much longer. This may be useful in order to provide for minors or incapable adults, or to prevent a person from wasting or squandering the estate. Professional trustee companies may take on this role; however administration costs should be considered before this option is chosen. As there are specific rules in relation to trusts, a testator can greatly benefit from legal advice and direction in this area.

#### ***d) Funeral Directions***

Testators may also wish to include funeral directions in their wills; these may assist the executor in ascertaining and following their wishes. Such directions are not legally binding on the executor, who has an obligation to preserve the estate's assets for the benefit of the beneficiaries. However; as long as the funeral directions are reasonable, the executor should be able to bring them to fruition.

***e) Guardianship of Children***

For those who have children, another consideration is the naming of a guardian for the children until they reach the age of 19. According to the *Family Relations Act*, the mother and father of a child are joint guardians of the child as long as they live together, unless a court has ordered otherwise. If one joint guardian dies, the other guardian automatically continues as the sole guardian. However; when one parent dies and the surviving parent is not a guardian, that parent can not become a guardian without applying to the court. Accordingly, it is prudent to appoint a guardian in your will if you are a sole guardian. If you are a joint guardian, you should provide for the event that joint guardian of your children predeceases you. Guardianship directed in a will is generally effective; however the court retains the jurisdiction to remove a guardian appointed in a will if the court does not consider it to be in the best interests of the child.

***f) Validity of Wills***

By law, a will must meet certain requirements in order to be valid. In British Columbia, the validity of wills is governed by a piece of legislation called the *Wills Act*. The will must be in writing and signed by the testator; however, it can be signed by another person in certain circumstances, such as when the testator is unable to sign. This signature must be at the end of the will and in practice, the testator should initial each page. The will must be attested by two witnesses, who must both witness the testator sign the will and then sign in the presence of the testator. A will that is prepared and signed in B.C. without meeting the formal requirements set out in the *Wills Act* is not valid.

Additionally, a will is automatically revoked by a subsequent marriage unless it is expressly made in contemplation of that marriage. A divorce which occurs after the making of a will does not nullify the whole will, but any specific gifts or appointments made to the former spouse will be interpreted as if that spouse had pre-deceased the testator. This however, is subject to the express writing of the testator that a gift is intended to survive divorce.

***g) Assets Passing Outside of the Will***

Part of estate planning is determining not only what will pass inside your will, but what will pass outside of it. For example, real estate commonly passes outside of estates by virtue of being

registered in joint tenancy. When one joint tenant dies, the surviving joint tenant automatically becomes the sole owner of the property. This is in contrast to the default designation of co-owned property in British Columbia, tenancy in common. A tenant in common can give his or her portion of property by will to a beneficiary. These concepts can also apply to other types of assets; for example, joint bank accounts operate on the concept of joint tenancy and thus pass outside of estates. Additionally, various forms of trusts, corporate reorganizations, and property transfers can result in significant assets passing outside of one's estate and thus have tax implications.

Other items which may pass outside of a will include money in registered retirement savings plans (RRSPs), registered retirement income funds (RRIFs), insurance policies, and pension plans. The terms of such plans or policies may specify that designation of a beneficiary may only be made directly with the plan and not by will. It is therefore important to check the terms of any of your plans and confirm that you have validly designated a beneficiary.

### **Multiple Wills**

If you have assets located outside of BC or Canada, it is important to recognize that this may have legal and tax consequences. For example, if you have assets in the United States, these assets may be subject to U.S. taxes. Also, if you own real estate outside of B.C., your executor will have to take extra steps in order to have legal authority to deal with those assets. If you do not leave a will, this can also affect the status of extra-provincial real estate.

In addition, the rules surrounding conflict of laws are still fraught with many uncertainties, thus making effective multi-jurisdictional estate planning an inherently difficult process, especially when someone has properties in differing jurisdictions and countries. This is because the interpretation of a will relating to one's personal property will usually be governed by the law where the person was domiciled at the time of its creation, however with respect to one's real property, the interpretation will generally be governed by the law where the real property is located. Thus, using a single will to achieve one's estate planning objectives may be practically impossible where assets are located in different locations because of these uncertainties.

Practically speaking, the most practical and effective estate planning strategy in this sense is to execute multiple wills, each dealing with the distribution of property located in that particular jurisdiction. For example, one could prepare a will where his or her is domiciled at death disposing of their property in that jurisdiction, and also prepare separate wills disposing of assets located in jurisdictions other than where they are domiciled. Alternatively, where one is confident as to the impact of the conflict of laws rules on his or her intended estate plan, one single will could be prepared in that person's domicile at death dealing with all of their personal property and separate wills could be prepared in each jurisdiction where one owns real property. Obviously this is a more complicated procedure than simply executing one single will dealing with one's property, however there are several advantages and some disadvantages that one needs to consider when they own assets in different jurisdictions.

*a) Advantages*

Where separate wills are created and each is prepared in conformity with the particular succession laws of the jurisdiction, there will be a greater chance that one's overall estate planning objectives will be achieved. Further, because each will would deal with property located in different jurisdictions separately, the disclosure of one's global assets will be minimized. For example, using a separate will which deals with only those assets located in BC would only require disclosure of these assets when applying for a grant of probate and details of assets located outside of BC would not need to be disclosed, thus eliminating the possibility the assets located outside BC will be available for public scrutiny and probate fees as it will be unnecessary to provide an inventory of all worldwide assets. This reduced disclosure would in turn minimize one's exposure of their global assets to the claims of creditor's, dependants, spouses and taxing authorities, including probate fees.

Another advantage includes the fact that the administration of one's estate is generally less difficult. For example, where one has a single will, it must first be probated in the particular foreign jurisdiction where it was created and once probate has been granted, this foreign probate order must then be submitted to the local jurisdiction for a further probate grant. This two step process invariably leads to greater delays in administering one's estate. In addition, wills prepared in different jurisdictions or prepared with respect to foreign succession laws, can lead to

misinterpretation, thus potentially causing further delays and difficulties in administering an estate.

There are also tax minimization advantages. If one jurisdiction levies an estate or probate tax on all property disposed within a will, the use of a single will could expose one's worldwide assets to such local estate levies, thus exposing one to potential double taxation. However, where multiple wills are utilized, the risk of such worldwide tax exposure would be reduced and in effect, local estate levies would be assessed only on property located in the particular jurisdiction if the will disposes only of property located in that jurisdiction. In addition, the use of a local will to dispose of local assets in that jurisdiction may reduce the ability of the particular jurisdiction to discover the existence of other assets comprising one's estate, again reducing exposure to local estate levies.

Finally, the use of a local will disposing of assets in that jurisdiction may be useful in that one may direct in the local will that the laws of that jurisdiction will govern all matters arising from the will. Such a direction may avoid adverse consequences that would otherwise arise if the law of one's domicile were to apply. Indeed, this strategy may shield one's local estate from forced heirship laws of one's domicile.

#### ***b) Disadvantages***

The preparation and execution of multiple wills will generally require the consultation of local advisers, thereby increasing the costs of estate planning in comparison to the creation of a single will. In addition, it may be necessary to appoint local personal representatives to assume the administration of the local will. In addition, each locally created will should be reviewed periodically with local advisers to properly maintain such global estate planning. This will inevitably give rise to further costs and increased documentation and organization issues.

Nevertheless, the process of seeking local advice may give rise to alternative estate planning strategies which do not contemplate on-going review for such local wills. For example, the

disposing of assets by sale or gift prior to death, or the use of local trusts or companies to hold locally situated assets may be acceptable alternative strategies.

*c) Drafting Considerations*

When seeking to create multiple wills, advice should be sought from a local advisor when drafting a local will. The local language, legal terms and style should be adopted in the local will to eliminate the possibility of misinterpretation of one's intentions. In addition, the formalities relating to the execution of the local will should be strictly complied with to the greatest extent possible. Any local legal impediments to one's estate planning intentions should be fully reviewed and addressed. Finally, when considering whether to create a local will disposing of local assets, one will need to consult with their lawyer to consider other issues, such as the following:

- whether the preamble to the will should include a reference to one's domicile;
- whether the inclusion of a revocation clause does not inadvertently revoke any other wills;
- the scope of the will would likely need to be clearly identified so as to confine the will to those locally disposed of assets in the will;
- whether the local will should be drafted to ensure the local assets are not subject to the payment of other testamentary debts and expenses arising from a different jurisdiction by specifically stating that local assets are available only to satisfy local testamentary debts and expenses;
- in certain jurisdictions, the appointment of a local personal representative may be mandatory, or in other cases, the appointment of a local personal representative may give rise to unnecessary adverse tax consequences or added costs, therefore one should consult with their local advisor to determine who can or should be appointed to serve as one's personal representative under a local will;
- whether it may be necessary to expressly identify the law that one intends to govern the will, by doing so it will clearly express one's intentions and thereby enhances the potential for the designated law being confirmed as the governing law; and

- finally, one may consider whether the local will should include a provision that a beneficiary's entitlement under the will is invalidated if the beneficiary challenges his or her entitlement under forced heirship or matrimonial law regimes.