

WILL and ESTATE

PLANNING

(2006 Edition)

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CAVEAT

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SECTION ONE - WILLS

I. INTRODUCTION

The first section of this booklet will describe what a Will is and the important points to remember when making a Will. The second section describes some alternative strategies to will-based estate planning. Finally, the duties and responsibilities of the person appointed to look after your estate will be described. Potential problem areas will also be brought to your attention.

This booklet describes Wills and Estates in very general terms. It is not intended to be an exhaustive analysis of the subject. A more detailed understanding may be obtained from a lawyer. For specific situations it is recommended that legal advice be obtained.

II. WHAT IS A WILL ?

A Will is a legal document setting out a person's wishes that are to be carried out after his or her death. Your Will comes into force only at death. You may change your Will as often as you wish while alive.

The *Wills Act* of British Columbia sets out the formal requirements for a valid Will:

- 1) Must be in written form.
- 2) Must be signed by the Testator (person making the will) in front of two witnesses.
- 3) The witnesses must sign the Will in the presence of the Testator.

A Will is usually drawn by a lawyer. This is recommended because:

- 1) It ensures that the requirements for a valid Will are met;
- 2) It ensures that your intentions are clearly stated; and
- 3) Only a lawyer can advise you about the law regarding Wills and estate planning.

A Will must not be witnessed by a beneficiary or the spouse of a beneficiary. Such a witness will forfeit any benefit in the Will.

A **Holograph Will** is a testamentary document written entirely in the Testator's own handwriting and signed by the Testator. A holograph Will need not be witnessed. A holograph Will is valid in many provinces, but not in British Columbia.

III. WHO CAN MAKE A WILL?

Any mentally competent person who is nineteen (19) years of age or older can make a Will. A person under nineteen (19) years may make a Will if he or she is married, in the Canadian Armed Forces, or a sailor on a voyage.

At the time of making a Will, the Testator must be of sound mind. They must know the extent of their assets; what a Will does; who they should be leaving gifts to; and the effect their particular Will is going to have.

You should feel free from any force, threat, or coercion exercised by someone else over you.

The Court will declare invalid a Will made under circumstances where there is **undue influence**.

IV. DISTRIBUTION OF YOUR ESTATE

The primary purpose of most Wills is to provide for the distribution of individual items of real or personal property. For example, specific **bequests** are used to ensure that heirlooms, household furnishings and personal effects are given to family or friends. Cash gifts are referred to as **legacies**. Gifts of real property (land) are called **devises**.

It is important that detailed descriptions of the specific property be given so that the item will be easily identified. It should also be noted that if such property does not exist at the time of death, the intended **beneficiary** will not receive anything.

Any real and personal property not effectively disposed of by way of a bequest or devise falls into the **residue**. The residue of the estate is divided up in the residuary clause of the Will, which clause often divides the residue of the estate into percentage shares among the named residuary beneficiaries.

Provision may also be made for a **trust**. In a **testamentary trust**, property is left in the care of one person for the benefit of another. Such trusts are often used in relation to minor children, adult children receiving disability benefits, spendthrift family members and in second marriages. Trusts are also a means of preventing inheritances from falling into the hands of a child's spouse upon their separation or divorce.

Your Will should provide for distribution of your assets in case of various circumstances. Generally, you provide for your entire estate to go to your spouse if he or she survives. If your spouse does not survive you, then provision is made for distribution to your children. If your spouse and children do not survive you, provision is then made for your estate to pass to someone else. Each individual Testator has his or her unique circumstances to consider.

If certain of your property is not disposed of by your Will, the *Estate Administration Act* of British Columbia applies to that item's disposition. This is referred to as a **partial intestacy**.

If you die without a Will, all of your estate will be distributed according to the rules and scheme set out in the *Estate Administration Act*. This is referred to as an **intestacy**. The Act does not take into account your wishes or the wishes of your family. You have no say in what happens to your property.

a) Can I Will my Property To Anyone?

Subject to the following exceptions, you may choose anyone to be the beneficiaries under your Will.

The ***Wills Variation Act*** of British Columbia requires that you make adequate, just and equitable provision in your Will for your spouse (including common-law partners) and each child. If your dependants are unable to adequately support themselves, or are self-sufficient but simply didn't receive a fair share of your estate, they are entitled to apply to the Supreme Court of British Columbia to have the Will varied.

The application must be made within six (6) months of the date upon which the Court has issued a grant of probate. The Executor of your estate (the person responsible for administering the estate) is obligated not to distribute the assets of your estate until six (6) months after the grant unless he or she has the consent of all those entitled to apply under the Act or is authorized to do so by Court Order.

You can exclude dependants in your Will if you wish to. However, ensure that you have a good reason for doing so (ie. your child's conduct has led to the breakdown of their relationship with you). A memorandum of your reasons should be prepared along with the Will in case the Will is challenged after your death. There is, however, no guarantee the Court will honour your decision.

It should also be noted that there is property which is not disposed of under a Will. **Jointly owned property** (land, bank accounts, etc.) generally includes a right of survivorship. This means that ownership passes upon the death of one joint tenant to the surviving joint tenant(s), and a Will has no effect.

Beneficiary designations made in **insurance policies** and **RRSP's** take effect outside the Will. Funds from these sources go directly to the named beneficiaries.

Shares in a **business** are often subject to the terms of a shareholders agreement and therefore may not be distributed through a will. Proceeds from their redemption can, however, be dealt with in a Will.

b) Special Considerations

There are many circumstances where you may wish to make a Will to deal with special considerations. A few examples are as follows:

- 1) You may wish to include a **step-child** as a beneficiary of your estate.
- 2) You may wish to name one or more **charities** or institutions as beneficiaries.
- 3) You may wish to provide for a **disabled** child or a child with an **addiction**.
- 4) You are **separated** but not divorced. (Despite the fact that you are separated, a gift to a spouse in your will remains valid.)
- 5) You may wish to split the benefits between more than one person.
- 6) You may have reason to give the capital of the property to specific beneficiaries, although you wish someone else to enjoy the benefit or the income of certain property during his or her lifetime.

A typical example is the case of an individual who is in a **second marriage** later in life. The husband wants his property to go primarily to the children of his first marriage upon the death of his second spouse. In this instance, his Will may be drawn to allow his spouse to receive the income from the total of his estate (or a portion of it) until his spouse's death. The property will then go to the capital beneficiaries (the children) upon her death.

V. ACTORS IN A WILL

a) **Testator (Testatrix)**

The Testator is a male person who makes a Will. A Testatrix is a female person who makes a Will.

b) **Executor (Executrix)**

The person who will carry out the terms of your Will is your Executor. There may be more than one Executor. If that person is female, she is referred to as an Executrix. In your Will, you designate the person who you wish to carry out the terms of your Will and the trusts, if any, established through your Will. In addition to the number of Executors you choose, you must also decide whether or not to choose a professional executor (a lawyer, accountant or Trust Company) or a family member or a friend.

Choosing the person who will be responsible for looking after your business and family affairs may be one of the most important decisions you will ever make. Carrying out the terms of your Will may in some situations be a long-term job.

Choosing Your Executor

Your Executor must be an individual who is responsible and willing to carry out your wishes as stated in your Will. He or she must also be a person of sound judgment who is able to make sound decisions, and consider the advantages and disadvantages of various courses of action. Your Executor must be trustworthy and competent.

To avoid complicated tax situations, it is preferable that your Executor lives nearby. However, modern transportation and communications have made long distances easier to overcome.

Your Executor should be a person who is the same age or younger than you, but old enough to be responsible and make all the necessary decisions.

If you are married, normally your spouse will be your Executor if he or she survives you. However, an alternate Executor should be named in case of a common disaster. Your oldest adult child or a trusted friend could also be chosen. Larger and more complex estates might benefit from the use of a corporate trustee such as a trust company.

Duties of Your Executor

It is important that the person you select be prepared to take on the job of Executor (you cannot compel anyone to be your Executor). Your Executor stands in your place upon your death. Legal title to your property passes to your Executor if he or she accepts the appointment. If your Executor refuses to accept the appointment, the Court must appoint an Administrator. Your Will still applies and governs the disposition of your estate. It is wise to appoint an alternate Executor or a Co-Executor in order to avoid this complication.

An Executor's duties commence immediately upon the death of the Testator. The Executor applies to the Court for approval of the Will and, once approval of the Court is received, then he or she is granted **Letters Probate**. The Will is then considered to be probated.

You can assist your Executor immensely by preparing an informal **letter of wishes** (and placing the letter with the original copy of your Will) detailing such matters as:

- 1) Whether you wish to be buried or cremated;
- 2) Where your bank accounts and investments are located;
- 3) Which companies hold life insurance policies;
- 4) Where important documents are located;
- 5) Where your safety deposit box is located; and
- 6) Instructions concerning disposition of heirlooms, household furnishings and personal effects (if relying upon a letter as opposed to a Will or Codicil). Such instructions may not be binding.

c) Guardians

It is important for the Testator who has minor children to consider who would be an appropriate guardian for the children. Both parents have the right to appoint guardians for their minor children. When one parent dies, custody will normally go to the surviving parent. In your Will, you should designate the person whom you would like to be the guardian of your minor children if you both die. Without a Will, you have no way of expressing your wishes.

Choosing a Guardian

In choosing a guardian, you must consider the attitudes of the proposed guardians towards the education and religious upbringing of your children. Your attitudes, values, and wishes with respect to the raising of your children should be somewhat like those of your proposed guardians. You must also consider their financial ability to raise your children. Satisfactory arrangements should be made in your Will for the financial maintenance and support of your children.

It is a good idea to discuss your choice of guardians with the person or persons you are considering appointing in your Will to ensure that they are agreeable to acting as guardians in the event of your death.

Duties of a Guardian

If you have appointed guardians and they have consented to act, they are then responsible for the care and upbringing of your children in the event that you and your spouse die. In your Will, you should provide for financial assistance to the guardian to assist with the cost of raising your children. Your Executor is usually given specific direction in the Will to provide this financial assistance.

No appointment of guardians is final for all purposes. The Court will always have jurisdiction to review the appointment of guardians or to review the custody of the children at any time. Concerned relatives or individuals may apply to the Court for such a review. The test utilized by the Court is "the best interests of the child". The designation of guardians in your Will is not binding upon the Court, but it is generally respected. Note

that children over 12 are required to consent to the appointment at the time the Court makes it.

VI. REVOKING OR CHANGING A WILL

You can cancel or change your Will at any time. The last Will you make before you die is binding. You may revoke your Will by doing any of the following:

- 1) Physically destroying your Will with the expressed intention of revoking it;
- 2) Some writing indicating you are amending or revoking your old Will (**a codicil**) - this must be signed by the Testator and two witnesses;
- 3) Getting married (unless the Will is made in contemplation of marriage); and
- 4) Making a new Will.

Changes can be made to your Will at any time. Minor changes are usually done by way of a **Codicil** and executed in the same manner as a Will. If a change is made directly on the Will, the change must be signed by the Testator and two witnesses in order to be valid.

Divorce

Divorce does not revoke a Will. However, the *Wills Act* of British Columbia stipulates that if a spouse is appointed as an Executor or trustee, a gift is made to the spouse, or a general or special power of appointment is given to him or her in a Will, and subsequent to the Will, the marriage is terminated by divorce or is declared void or annulled, or an order of judicial separation (which differs from a

separation agreement) is made, then the gift, appointment, or power is revoked.

For example, if you had made a Will appointing your spouse as Executor and had left everything to your spouse and then you and your spouse divorced, your spouse would not be entitled to be Executor of your estate and would not be entitled to any benefit from your estate. The balance of the Will would still be considered valid and enforceable.

VII. ADVANTAGES OF HAVING A WILL

Having a Will means that your wishes with respect to your property survive your death. Also, the complications and expenses related to administration of your estate are reduced.

Without a Will, your estate may not be distributed to the people you want to inherit it. Also, it may take a long time to trace all of your relatives who may be entitled to inherit. Sometimes it is difficult to locate all of your property if you leave no Will. The lack of a Will often creates considerable hardship for your family, friends and business partners since the estate is frozen until an Administrator is appointed.

Powers can be granted to your Executor which are not allowed in the absence of a Will. Such powers include:

- 1) Powers to distribute things in kind.
- 2) Powers to borrow money;
- 3) Powers to retain and administer funds in trust; and
- 4) Power to operate a business.

The administration of an estate is much easier if there is a Will setting out exactly how the Testator wishes his estate to be distributed. Once a Will has been made and the Testator's intentions are known, the estate is usually processed with ease. A Will generally avoids the expense of Court appearances and delays in administration.

VIII. EXPERTISE AND ADVICE

Seeking professional advice in drawing your Will can be one of the most crucial steps you take. It is rare that a person knows exactly what he or she wants to put in his or her first Will. Most people need some advice and direction on the preparation of their Will.

After the Testator has a Will drawn, he or she is often much better prepared when making changes and improvements to the Will. The drawing of a Will usually educates the Testator about estate planning generally. For example, he or she may decide to put certain properties in joint names so that the property passes by way of survivorship, thereby avoiding Probate fees and legal expenses. Your lawyer may also be able to

recommend alternative estate planning methods such as those discussed below.

SECTION TWO -ESTATE PLANNING

IX. WHAT IS ESTATE PLANNING?

Estate planning is more than just having a Will. It is the organization of your affairs such that upon your death, taxes and probate fees are reduced and certain goals such as charitable giving are achieved. Estate planning can be Will based or non-will based (i.e. by using trusts, insurance products, or other such methods). It should also involve a plan for managing your affairs if you should become incapacitated. Estate planning often involves a team of professionals including a lawyer, accountant, insurance agent and investment advisor.

One of the more beneficial aspects of estate planning is tax planning. Often the absence of a proper and professionally prepared estate plan results in extra tax being paid. Often this can be avoided by simple estate and tax planning. Sometimes, tax can be deferred for several years.

There are many tax concessions granted by the *Income Tax Act* of Canada, a few of which are:

- 1) Ability to roll property over to a spouse with tax deferred, which means that no capital gains will be incurred upon death;
- 2) Ability to defer capital gains to the next generation through estate freezes;
- 3) Ability to split income between different beneficiaries; and

- 4) Ability to tax income in the hands of a trust at graduated tax rates.

Estate planning from a tax perspective generally involves the use of a **trust**. The intention is often to split income between persons who do not earn other income or to tax the income in the hands of the trust. (Asset protection may also be a driving force.)

There are two basic types of trusts: **testamentary** and **inter vivos**. Testamentary trusts are found in a Will and do not come into effect until the Testator's death. They are often used to provide for minor children or to reduce future taxes payable on assets which would otherwise pass directly to a beneficiary. The latter objective is achieved by taxing income earned on the trust assets in the hands of the trust and taking advantage of the graduated tax rates available only to testamentary trusts. Inter vivos trusts are set up during your lifetime. That are primarily used to split income and benefits between a number of people. Sometimes they are used to protect assets or avoid probate fees and *Wills Variation Act* challenges.

X. PLANNING OUTSIDE YOUR WILL

Estate planning outside the will often has one or more of the following objectives in mind:

- 1) Reduction of income tax payable upon death;
- 2) Avoidance of probate fees;
- 3) Avoidance of Wills Variation Act claims; and
- 4) Charitable giving.

There are several opportunities to plan for the distribution of your estate outside your Will and avoid Probate Fees. Advice should be sought as to the legal and financial implications of such planning. One of the more common methods used involves the designation of beneficiaries to **insurance policies and RRSP's** outside the Will (ie. in the policy itself.) Be aware though, that such designations result in outright ownership of these funds by the designated beneficiary. The terms of your Will are not followed.

An increasingly common occurrence today is the transferring of homes and bank accounts into **joint ownership** with children. While this usually avoids Probate Fees it can create other problems. Jointly held property becomes subject to attack by creditors of your children and may be divisible upon the breakdown of their marriage. Depending on the nature of the property, capital gains tax may be payable since gifting is a deemed disposition under the *Income Tax Act*. Finally, one child may end up getting a greater share of your estate than the others. In some instances probate fees still apply despite the joint ownership.

Insurance trusts can be used to pass money outside the will but still control its use and disposition. The insurance monies are left to a particular individual (the Trustee) pursuant to the terms of a trust declaration. The Trustee then distributes the money pursuant to the terms of the trust. The money can be distributed immediately or held for several years for a specific purpose. Probate fees can be avoided and the insurance monies are not subject to creditors or a *Wills Variation Act* action.

Recent changes to the *Income Tax Act* now allow for those 65 years of age and older to establish **Alter Ego Trusts** and **Joint Spousal Trusts**. Such trusts allow for the disposition of an estate upon the same terms as a Will, but since it is a trust and not a Will, challenges under the *Wills Variation Act* can be avoided along with Probate Fees.

A popular means of estate planning is the use of a **Family Trust**. This is a mechanism used during your lifetime to allow for the early distribution of some of your property, as well as income splitting. The key advantage of a family trust is that it reduces the taxes payable on your death. This is done by placing ownership of the assets in a trust which is for the benefit of others; usually your spouse and children. (Recent changes to the *Income Tax Act* have reduced the ability to use family trusts to benefit minor children. Family trusts remain, however, an excellent tool for splitting income with a spouse and for benefiting children over 18 years of age.) By using a trust a fair degree of control can be retained over those assets. This method of estate planning most benefits those individuals who own their own business, although other high net worth individuals can also benefit from it. Careful and professional planning is required to properly implement such a plan.

XI. PLANNING FOR INCAPACITY

An important aspect of prudent estate planning is planning for the situation where you may be alive but incapable of managing your affairs due to accident or illness. This is usually done by way of a **Power of Attorney**. This is a document which allows someone else, usually a family member or trusted friend, to act in your place should you become incapacitated. It pertains only to financial matters, and limits can be placed on the powers granted. Should you become incapacitated without a Power of Attorney, your family will have to go through the time consuming and costly process of having a **committee** appointed. A Power of Attorney is especially important if you have volatile assets or a business which requires quick decisions to be made. Without it, such decisions may be delayed and important opportunities lost. Upon your death, the Power of Attorney ceases to have any effect and your assets are governed by the terms of your Will.

Another tool for incapacity is a **Representation Agreement**. Representation Agreements can be made to appoint someone to make health care decisions for you or, if you lack the capacity, to make a Power of Attorney. In this latter case, persons in the early stages of dementia and other degenerative disease can appoint someone to assist them with their affairs in a limited scope.(Land cannot be dealt with under a s.7 Representation Agreement).

You should discuss the pros and cons of Representation Agreements and Powers of Attorney with your legal advisor to ensure that the right one is chosen for your situation.

A **Living Will** (also known as a Health Care Declaration) is a means whereby you can communicate your wishes regarding certain medical procedures you wish/do not wish to have performed (ie. resuscitation and life support). A lawyer can help you draft a Living Will so that your wishes are clearly known. Living Wills are not legally binding unless they form part of a Representation Agreement. The terms of a Living Will are often incorporated into a Representation Agreement.

SECTION THREE - ADMINISTRATION OF ESTATES

XII INTRODUCTION

The Supreme Court of British Columbia governs matters relating to the administration of estates, whether there is a Will or not.

It is safe to say that administering an estate of a moderate or large value is a rather complex duty. It is wise to seek the assistance of a lawyer for guidance in the preparation of the required documents, and to provide legal advice and opinions on the administration of the estate so as to avoid problems and unwarranted expense.

There are legal fees that will have to be paid for this service; however, the value of taking the proper steps under legal advice will become obvious as the administration of the estate commences and decisions have to be made.

When a person dies, there are many matters which must be taken care of. If there is a Will, the person looking after the affairs of the deceased will know what the deceased's intentions were concerning his or her property. If there is no Will, the property of the deceased is distributed according to the rules set out in *Estate Administration Act*.

If you have been appointed an Executor or Executrix in someone's Will, or if you have applied to the Court to be appointed as the Administrator of the estate of an individual who has died intestate, you must fulfil your duty to administer the estate. Specifically, you have a duty to pay the debts of the deceased, to distribute the estate according to the Will or intestacy law, and to make an accounting of all of the estate.

An Executor's duties and powers commence immediately upon the death of the Testator, whereas an Administrator's duties and powers do not commence until he or she is appointed by the Court. An Executor often knows that he is the Executor of the estate, and can begin to act immediately to protect the estate by maximizing the assets and lessening the losses.

XIII. LETTERS PROBATE

In the case of an individual dying testate (with a Will) and naming you as an Executor, a number of forms will have to be prepared in order to apply to the Court for Letters Probate. The Grant of Letters Probate is the Court's recognition and approval of your appointment as Executor, enabling you to take all steps necessary to administer the estate.

The basic documents required for the Grant of Letters Probate are the following:

- 1) **Affidavit of Executor** - a document sworn by the Executor containing promises to properly administer the estate, to which is attached the Original Will and a **Disclosure Statement**. The Disclosure Statement outlines in detail all of the known assets of the deceased which will be administered by the Executor, and their estimated value at the date of death.

- 2) **Affidavit Re: Notice** - a document sworn by the Executor identifying those persons who have been served with Notice of the application for a Grant of Letters Probate, as required by s.112 of the *Estate Administration Act*.

Letters Probate are not always required to administer the estate. Lawyers practising estate law will be able to assist you in determining if Letters Probate will be necessary. If the deceased merely possessed a small bank account, the bank may accept an indemnity agreement in lieu of the Grant of Letters Probate.

XIV. LETTERS OF ADMINISTRATION AND LETTERS OF ADMINISTRATION WITH WILL ANNEXED

Where there is no Will, or where a Will exists but no Executor is named in the Will, or where the named Executor is unable or unwilling to act, similar documents to those needed for a Grant of Letters Probate are filed. In these cases, however, the application to the Probate Court is for:

- 1) Letters of Administration - where there is no Will;
or

- 2) Letters of Administration With Will Annexed - where there is a Will, but no Executor is named or the Executor is unable or unwilling to act.

XV. RESPONSIBILITIES OF EXECUTOR OR ADMINISTRATOR

Generally speaking, the duties of an Executor are to carry out exactly what the Testator stated in his Will. The Executor owes a duty to pay all debts of the deceased, to disburse the gifts in the Will, to distribute the residue according to the law, and to account for all of the property received and distributed.

An Administrator administering the estate of an intestate does not have the benefit of a Will to assist in determining the intentions of the deceased. Therefore, the distribution will be according to the *Estate Administration Act*. The Act sets out in detail how the assets of an estate must be distributed.

Whether you are an Executor or an Administrator, the initial steps of administering an estate are the same:

- 1) Locate the Will, if any;
- 2) Make a list of all assets of the deceased and their value and locate the assets (bank accounts, safety deposit box, inventory of personal property, search of real property);
- 3) Notify various agencies of the death;
- 4) List the beneficiaries and their addresses;
- 5) File claims for life insurance, pension plans, death benefits;

- 6) Obtain the appropriate Court Order - Letters Probate or Letters of Administration;
- 7) Provide notice to the Public Trustee if there are any infants or mentally incompetent persons who will have an interest in the estate;
- 8) Advertise for creditors;
- 9) Call in the estate - assemble all the assets which are not specifically bequeathed to a named beneficiary, arrange for the orderly sale of the assets, and place all monies from all sources into an estate bank account;
- 10) Pay the debts of the estate;
- 11) Transfer the title to all real property (land) to the estate;
- 12) Transfer real property to the beneficiaries or sell the real property;
- 13) Complete Income Tax Returns and obtain a Clearance Certificate allowing the Executor or Administrator to complete the distribution of the estate;
- 14) Obtain appropriate releases from the beneficiaries allowing the Executor or Administrator to complete distribution of the estate;
- 15) Account to the beneficiaries in normal instances or arrange for the passing of accounts in the event of disputes amongst the beneficiaries. The Probate Court will then give approval to the manner in which the Executor or Administrator has administered the estate; and

- 16) Distribute the estate in accordance with the terms of the Will or in accordance with the *Estate Administration Act* if there is no Will.

XVI. MUST I ACT AS EXECUTOR?

In some instances, a person may be named as Executor of a Will without first granting his or her permission to the Testator. You may not wish to be an Executor if your other commitments will not enable you to devote the necessary time and attention to the administration of the estate. You may wish to have a lawyer assist you in investigating the estate in order to identify potential problems and help you decide if you wish to accept the appointment.

If you do not wish to act as Executor, you may sign a **Renunciation** thereby giving up your appointment. There is nothing to compel you to act as Executor if you do not wish to. This Renunciation form will allow the alternate Executor named in the Will to apply for Letters Probate, and it will confirm his appointment as Executor.

If no alternate Executor is named, then a beneficiary or other interested party who has standing under the *Estate Administration Act*, may apply to the Court for Letters of Administration with Will Annexed.

XVII. WHO ACTS AS ADMINISTRATOR?

If no Will exists and administration of the estate is necessary, a beneficiary or interested person (such as the next-of-kin or a creditor), may apply for Letters of Administration. It is important to note that the Administrator seeking this Court approval requires the renunciation of all other persons who have greater or equal right to apply (according to the order of priority set out in the *Estate Administration Act*). It is possible for Co-Administrators to jointly apply for the administration of an estate.

An Administrator is often required by the Court to post a bond. Consent of all beneficiaries is usually obtained if bonding is to be dispensed with. The bond is obtained through an insurance company and filed with the Probate Court.

XVIII. WHAT IF THE DEPENDANTS OF THE DECEASED ARE NOT PROPERLY CONSIDERED IN THE WILL?

In the event that dependant persons of the deceased (ie. wife, husband, children) are not considered in the Will, or the gifts to these people are clearly not enough to properly support them, any of these individuals may apply to the Court under the *Wills Variation Act*. In this case, they would be attempting to have the terms of the Will reviewed and a greater share of the estate given to them by Court Order. Separated spouses can still benefit from the provisions of the Act, however, the terms of a separation agreement will be taken into account and may be a bar to relief. Common law spouses can now apply for relief under the Act. Spouses (including common-law) and children excluded in a Will should seek legal advice regarding their rights as soon as possible after the Testator's death.

The Executor or Administrator of the estate may not distribute the assets of the estate for a period of six (6) months after the grant of probate, because dependants are allowed a period of six (6) months in which to apply to Court under the *Wills Variation Act*.

If an Executor or Administrator disregards this time period and distributes the estate, he or she may be personally liable to the dependants of the deceased. However, the dependants may give their consent for earlier distribution of the estate.

It is advisable for the Executor to obtain legal advice on all matters pertaining to possible dependants of the deceased. Circumstances in each case will determine whether the *Wills Variation Act* applies.

XIX. WHAT TAX ISSUES DOES THE EXECUTOR HAVE TO WORRY ABOUT?

The Executor is responsible for filing not only income tax returns for the deceased's "Terminal Year", but also those for the estate. The Executor will be faced with choices such as whether or not to elect out of a "Spousal Roll-over", whether or not to file an optional "Rights and Things" return, and when to choose a year-end for the Estate. Professional advice should be sought on these issues.

Above all the Executor will have to be concerned with how to pay the taxes owing. Under the *Income Tax Act* (Canada) there is a "deemed disposition" upon death of all the deceased's property at fair market value. This has the potential to create a sizeable tax liability. Assets will likely need to be liquidated to pay the taxes owing. That could result in a significant decrease in the size of the estate which will be passed on to the beneficiaries. Proper tax planning (ie. inclusion of a spousal trust in the Will or use of a Family Trust) can help reduce overall tax liability.

XX. WHY IS AN INCOME TAX CLEARANCE CERTIFICATE IMPORTANT?

It is important for the Executor or Administrator to obtain an Income Tax Clearance Certificate prior to distributing any or all of the assets of the estate. When the whole estate is distributed before a Clearance Certificate is obtained, and it is later determined that there is still some income tax payable to Canada Revenue Agency, the Executor or Administrator may be personally liable for the payment of tax owing.

XXI. HOW WILL THE ESTATE BE DISTRIBUTED IF THERE IS NO WILL?

If you die without a Will your property will be distributed according to the rules set out in the *Estate Administration Act*. The Act does not take into account your wishes or the wishes of your family. You are considered to have died **intestate** - without a Will.

This is the order in which your estate will be distributed:

- 1) Surviving Spouse - If there is a surviving spouse and no children, the entire estate will go to the surviving spouse.
- 2) Surviving Spouse and Child(ren) - If the deceased leaves one child, the spouse and the child each will receive one-half (1/2) of the remaining estate after \$65,000 is given to the surviving spouse. If there is more than one child, the surviving spouse will receive one-third (1/3) of the remaining estate plus the first \$65,000, and the rest will be divided among the children.
- 3) Children and No Surviving Spouse - The entire estate is shared equally between the children. If one of the children has died but has left children (grandchildren of the deceased), then such grandchildren will by representation receive their deceased parent's share.
- 4) No Surviving Spouse or Children/Grandchildren - The surviving parents will inherit in equal shares.
- 5) No Surviving Spouse, Children, Grandchildren, or Parents - The surviving brothers and sisters of the deceased will inherit in equal shares. If a brother or sister dies before the deceased, then his or her children by representation will take what would have been his or her share.

- 6) None of the Above Relatives - The nieces and nephews will inherit the estate in equal shares.
- 7) No Surviving Nieces or Nephews - the surviving next-of-kin will inherit.
- 8) No Kin Can be Found - The estate is placed under the care of the Court. If at a later date a relative is discovered, he or she can apply to the Court for his or her share of the estate. Once the Court is satisfied that there are no relatives who will be applying for a portion of the estate, the assets of the deceased pass to the provincial government under the *Escheat Act*.

Common-law spouses may apply under the *Estate Administration Act* for support from the deceased's estate.

XXII. WHAT HAPPENS IF PROBLEMS ARISE IN THE ADMINISTRATION OF MY ESTATE?

All sorts of possible problems can potentially arise. For example, a dependant claims that he or she has not been properly cared for in the Will; a dispute arises with respect to the guardianship or custody of infant children; beneficiaries feel that the Executor's or Administrator's fees are too high or not appropriate; a dispute arises over the sale of property or a personal asset; a creditor alleges that a disputed debt is owed to him; someone refuses to turn over an asset belonging to the estate; and so on.

If the problem cannot be worked out to the satisfaction of the Executor or Administrator on legal advice, an application to the Supreme Court of British Columbia for direction should be made and the problem will finally be determined by Court Order. Remember that each act of the Executor or Administrator is supervised by the Court.

A beneficiary is entitled to receive independent legal advice with respect to any matter dealing with the estate. If one or more beneficiaries disagree with any interpretation of the Will or any other matter, they should seek independent legal advice.

XXIII. WHAT ARE THE COSTS RELATED TO ADMINISTERING AN ESTATE?

Firstly, there are the Probate fees in respect of assets situate within British Columbia presently calculated as follows:

- 1) First \$25,000 - no fee;
- 2) \$25,000 to \$50,000 - 0.6% fee;
- 3) \$50,000 and over - 1.4% fee.

Secondly, there may be payments to the Public Guardian and Trustee's Office, to the Land Titles Office, and to other government agencies which relate to the transmission of assets.

Thirdly, there are legal fees payable to the solicitors who are representing the Executor or Administrator. The legal fees in connection with administration of an estate are negotiated by the Executor and the law firm. The fees are ordinarily based upon the solicitor's hourly rate or are a flat rate.

Fourthly, there will likely be fees payable to an accountant for the preparation of income tax returns. The more complex the estate, the more these fees will be.

Fifthly, the estate may pay the Executor or Administrator fees for acting as the representative in administering the estate. These fees vary in accordance with the difficulty of the estate and the amount of work in administering the

estate which the lawyer handled. Often, fees are paid to an Executor or Administrator based upon the provisions of s.88 of the *Trustee Act* of British Columbia. (A maximum of 5% of the value of the assets plus 0.4% each year the estate is in existence).

Fees of the Executor or Administrator may be determined through agreement with all the beneficiaries, or they may be determined by the Registrar if the Executor or Administrator passes accounts. The Executor or Administrator may waive fees, but he should at least be reimbursed for out-of-pocket expenses. Fees paid to the solicitor for doing things which the Executor could have done, should be deducted from the Executor's fees.

XXIV. CONCLUSIONS

Having a Will means that your wishes with respect to your property will survive your death. Complications and expenses related to the administration of your estate are also much less. The administration of your estate is much easier because your Will sets out clearly what your intentions are as to how your estate should be distributed and whom you want to look after your affairs.

Without a Will, your property may not be left to the people you want to inherit it. Also it may take a long time to trace all of your relatives and your property. Once your Will has been drawn and your intentions are known, your estate can be processed with ease.

XXV. GLOSSARY

- Administrator - a person appointed by the Probate Court to administer the estate of a person: 1) who dies without a Will; 2) who dies with a Will, but fails to name an Executor; 3) whose Executor refuses or is unable to act for the Testator.
- Beneficiary - a person entitled to a portion of the assets of the Testator in accordance with the terms of the Will.
- Bequest - a gift of personal property.
- Codicil - an addition to the Will. Usually only minor changes are made by Codicil. Codicils are executed in the same way as Wills.
- Committee - a person appointed by the Court to manage a mentally incompetent person's estate during his or her lifetime.
- Devise - a gift of real property.
- Estate - a person's property and the assets he or she owns at the time of death.
- Executor - a man appointed by the Testator to carry out the directions and requests of his Will.

Executrix	-	a woman appointed by the Testator to carry out the direction and requests of his Will.
Intestate	-	a person who dies without a Will.
Issue	-	all lawful lineal descendants (children, grandchildren).
Joint Tenancy	-	ownership by two or more persons in which each person owns an undivided interest. Upon the death of one, his or her interest passes automatically to the survivors (called the "right of survivorship").
Legacy	-	cash gift of a specified amount left to a beneficiary.
Personal Property	-	money, goods, and generally all other chattels not included in the definition of real property.
Probate	-	a Court's recognition of official proof of a Will. Probate means that the Will of a Testator was registered and proved in Court. After being registered and proved in Court, the Executor, Executrix or Administrator appointed by the Court is able to administer the estate.
Real Property	-	land with buildings situated on it, including estates and interest in land.

- Residue - the part remaining in an estate after all debts have been paid and all specific bequests have been made.
- Tenancy in Common - ownership by two or more persons. Each person may do what they wish with their half interest. No right of survivorship upon the death of one of the co-owners.
- Testate - having made a Will.
- Testator - a man who makes a Will.
- Testatrix - a woman who makes a Will.

XXVI. ABOUT THE AUTHORS

The law firm of Cleveland Doan LLP was established in January, 1995, when Dale R. Doan left the firm Douglas, Symes & Brissenden in Vancouver to join Richard A. Cleveland in White Rock, who has practised in White Rock since 1985.

Cleveland Doan LLP provides a wide range of legal services: Wills, Trusts, Estate Planning, Powers of Attorney, Representation Agreements, Shareholder Agreements and corporate planning, Committeeship applications, probate and administration of estates, legal actions as to the validity of a Will and actions pursuant to the *Wills Variation Act*.

Will Planning and Estate Administration

Shawn M. Smith graduated from the University of Manitoba in 1998 and became a member of the Law Society of B.C. in May 1999. He is a partner at Cleveland

Doan LLP. Shawn is a member of the Canadian Bar Association - Wills & Trusts Subsection and focuses a large portion of his practice on estate planning. He frequently lectures to groups and has appeared on the radio to discuss estate planning issues.

Estate Litigation

Richard A. Cleveland became a member of the Law Society of B.C. in 1984 after graduating from U.B.C. Richard has lectured on the subject of Wills, estate planning and administration for the Public Legal Education Society of B.C. and on behalf of numerous financial institutions. Richard's particular area of interest is estate litigation.

Corporate Planning

Dale R. Doan is a member of both the B.C. and Saskatchewan Bar. Dale became a member of the Law Society of Saskatchewan in 1980, and the Law Society of B.C. in 1991. Dale has written and lectured on the subject of corporate planning, and is an active practitioner in this area of law. Dale's particular area of interest is planning for corporate executives and business people.

Brent Ellwyn was called to the British Columbia Bar in 1998 and practices primarily in the areas of business and real estate law. He has experience in a variety of matters, including buying and selling businesses, drafting agreements, advising lenders and borrowers, commercial transactions and advising clients on general business law and real estate matters. Brent is a member of the Business Law, Banking and Real Estate subsections of the Canadian Bar Association.

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