The Importance of Assistance

Plan Ahead

Even though we live in the same country, the regulations that apply in the event of mental or physical incapacity, or when settling an estate can vary from province to province. This is why it is so important to know the regulations of the province where you live, to make sure your loved ones are aware of your healthcare wishes should you no longer be able to make your own decisions and to clearly establish how your assets will be distributed after your death.

Prudent planning not only ensures that your choices are respected, it also saves your beneficiaries a lot of stress when it comes to expenses, delays and possible conflicts concerning your incapacity or death.

Plan ahead, don't leave room for chance.

If You Die Without a Will

If you die without a will in British Columbia, you are considered to be "intestate," which means that your estate will be distributed to your "next of kin" according to the laws of British Columbia. Depending on your situation, your assets will be divided as shown in Tables 1 and 2 below. In addition, if you have real property in a province other than British Columbia, the distribution rules of that province will apply to that real property.

An unplanned estate could result in more expenses, delays and conflict for your beneficiaries.

Table 1 – Dying without a will, leaving a spouse and children	
Spouse or common-law partner ("CL") only*	All to spouse or CL partner (if there are two or more individuals who meet the definition of spouse or CL partner, then they will share the spousal share as they agree or, if they cannot agree, as determined by the court).
Spouse or CL partner, relatives, no children	All to spouse or CL partner.
Child or children only	All to children in equal shares. If any child is deceased, then the deceased child's portion is divided equally among the deceased child's descendants.
Spouse or CL partner and one or more children from the relationship between the spouse or CL partner and the deceased	First $300,000 and household furnishings to spouse or CL partner (preferential share); half of the remainder to spouse or CL partner and half to children equally. If any child is deceased, then the deceased child's portion is divided equally among the deceased child's descendants. Spouse or CL partner has right to buy spousal home within a specified period.
Spouse or CL partner and one or more children that are not from the relationship between the spouse or CL partner and deceased	First $150,000 and household furnishings to spouse or CL partner (preferential share); half of the remainder to spouse or CL partner and half to children equally. If any child is deceased, then the deceased child's portion is divided equally among the deceased child's descendants. Spouse or CL partner has right to buy spousal home within a specified period.
No spouse or CL partner or children	See Table 2.

* Two persons are spouses or CL partners if they were married to each other or they lived in a marriage-like relationship for at least two years immediately prior to the time of death.

Table 2 – Dying without a will, leaving no spouse or children	
Father and mother	100% divided equally between father and mother, or wholly to the survivor of them.
Father and mother are deceased, survived by the deceased's siblings	100% divided equally among the siblings (or if a sibling is deceased, then the deceased sibling's share is divided equally among his or her children).

If the intestate dies leaving no spouse, children or descendants, parents, siblings, nieces or nephews, then the estate must be distributed as follows:

a) half to grandparents on one side or all to the survivor, or if no surviving grandparent to descendants of the grandparents; and

b) half to grandparents on other side or all to survivor, or their descendants in same manner as (a) above.

Incapacity Management

In British Columbia, incapacity planning includes:

- Enduring Powers of Attorney for financial and legal matters;
- Representation Agreements for personal and health care matters;
- Advance Directives to provide guidance to health care practitioners on your wishes for medical treatment if you are not able to express your wishes at the time of need; and
- Nomination of Committee.

An Enduring Power of Attorney authorizes the attorney to make financial and legal decisions on your behalf. Your attorney can do anything with your property that you could do when capable, with certain restrictions such as making or altering a will or making gifts or loans above certain amounts on behalf of the donor. Further restrictions on the authority of your attorney may be set out in the Enduring Power of Attorney document. The Enduring Power of Attorney only applies while you are alive and ceases to be effective upon your death. It is important that the attorney is someone that you trust and someone who has the skills to manage your property. In addition, for older adults, it is essential to appoint a younger person, possibly as an alternate to act if the first person selected cannot fulfill his or her duties. In some cases, it may be appropriate to appoint a trust company, such as National Bank Trust as your attorney for property.

A Representation Agreement gives the authority to your representative to make health and personal care decisions on your behalf. The representative should be someone who respects your philosophy of life and whom you trust to honour your wishes regarding your health and personal care. Discussing your wishes ahead of time with your representative will help him or her understand the type of care you wish to receive and will make it easier for your representative to make health and personal care decision for you when the time comes.

An Advance Directive is a document that provides written directions to health care providers regarding your health and medical care. The health care providers must comply with those directions if it is reasonable to do so.

In circumstances where you do not have an Enduring Power of Attorney or Representation Agreement and you become incapable, a close family member or friend may apply to the British Columbia Supreme Court to be appointed as your committee to make personal, medical, legal and financial decisions for you. If there is no family member or friend available, or if there is a dispute about who should act as committee, the Court may appoint the Public Guardian and Trustee of British Columbia to act as your committee. So that there is no dispute about who should be acting as your committee, you should sign a Nomination of Committee to appoint someone to act as your committee if you become incapable. If you have signed a Nomination of Committee, the Court must appoint the nominee unless there is good and sufficient reason not to do so.

Your incapacity plan and estate plan should be prepared in coordination with your spouse. You should seek legal advice to ensure that both plans work together and your overall wishes are implemented.

Probate Facts

Probate is the process by which an executor applies to the Supreme Court of British Columbia for confirmation that your will is valid under the laws of British Columbia. The court will confirm that your will is valid under the laws of British Columbia by issuing a "Grant of Probate."

In British Columbia, probate fees are charged to your estate along with a $200 court filing fee upon the application for probate. The fees are calculated on a British Columbia resident's real and personal property as set out in Table 3.

Table 3* – Probate fees in British Columbia

Estate value	Fee
Under $25,000	N/A
$25,000 to $50,000	$6 for every $1,000 (or portion thereof) + $200 flat fee
$50,000.01 and more	$150 + $14 for every $1,000 (or portion thereof) + $200 flat fee

* As of December 2016.

These fees can be minimized in a variety of ways, including:

- Gifting during your lifetime
- Designating beneficiaries for benefit plans such as RRSPs, RRIFs, TFSAs, pension plans and for life insurance policies or products
- Transferring real property into joint tenancy
- Adding joint owners to bank and investment accounts; and
- Transferring property into a trust during your lifetime

Please note that the above techniques do not replace the need to have a will in place. They are merely additional tools for transferring assets.

There are significant advantages and disadvantages with each of the planning techniques presented here. If you focus too much on avoiding probate fees, your plan may have unintended consequences. For example, you may create trusts in your will and also designate beneficiaries for your major assets such as your RRIF and insurance policies. The end result may be that your estate avoids probate on these assets, but there may be insufficient assets with which to establish the trusts because the assets are no longer part of your estate that is subject to the terms of your will. In many of these cases, the probate fees saved will be less than the potential benefits of trust planning and proper will drafting. In addition, transferring property into joint ownership can lead to reduced control over your assets during your lifetime and potential disputes among your heirs after your death.

We strongly recommend that you have a discussion with your legal advisor before implementing any of these options to ensure they fit with your overall estate plan.

Should you have any questions,
do not hesitate to contact us.

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