Parkinson Society British Columbia
Société Parkinson Colombie-Britannique

You Are Not Alone.

LEGAL SERIES

Estate Planning and Trusts

Caution: *This help sheet is designed to provide general legal information only. It is* ***not*** *designed to provide specific legal advice and cannot be relied on as any definitive statement of the law. For information specific to your personal circumstances, please seek legal advice.*

What is estate planning?

Estate planning is the process of deciding how your property will be distributed when you die. Although it typically involves making a Will, it may be more advantageous for you to distribute your property in other ways (such as creating a trust). In order to determine the most advantageous way to distribute your property, you may wish to seek legal advice.

What is a Will?

A Will is a legal document in which you explain what you want done with the property you own when you die (or your "estate"). These assets typically consist of real estate, money, investments, and other personal or household belongings such as jewelry and books.

What property will not be covered by a Will?

A Will does not cover all property. For example, it may not cover property you own with another person, such as a house owned in joint tenancy or a joint bank account. Nor will it cover a life insurance policy or an RRSP if you have already designated a beneficiary.

Why is it important to make a Will?

A Will gives you control over what will happen to your estate when you die. By making a Will, you can make sure that the things you own go to the people you want to have them. A Will can also be useful for people who outlive you, who can be sure they are carrying out your true wishes.

A Will also allows you to choose an "executor" who will be responsible for administering your estate. An executor can be a family member, a friend or a professional.

What happens if I die without making a Will?

If you die without making a Will, the burden of administering your estate may fall on a family member, such as your spouse, who will be required to get permission from a judge to administer your estate and distribute your property.

A Will allows you to explain what you want done with your property when you die. If you die without a Will, your property will be divided in accordance with the procedure set out in the *Estate Administration Act*, RSBC 1996, c. 122.

Although the procedure for the distribution of assets is very complicated and beyond the scope of the present paper, a person's property will generally be shared by his or her spouse and children, with his or her spouse getting a "life estate" in the spousal home and the first $65,000, and the remainder of the estate being shared by the spouse and children.

Another important point to consider is that the *Estate Administration Act* will soon be replaced with the *Wills, Estates and Succession Act*, which, to some extent, changes the procedure for the distribution of assets when a person dies without a Will.

How is a Will different from a Power of Attorney or Representation Agreement?

A Will takes effect only after you die. A Power of Attorney and a Representation Agreement are two types of authority you can give someone to act on your behalf when you are still alive and cease to have effect when you die.

What is an executor?

An executor is a person you name to settle your affairs and carry out the instructions in your Will. He or she will gather up your property, pay your debts, file your final tax return and divide what remains of your property to the people named in your Will.

It is very helpful if your executor is a good bookkeeper and communicator. If you have a complex estate or need someone to take over the operation of a company after your death, it is a good idea to name a professional executor like a trust company.

A person may designate more than one person as co-executors and it is a good idea to appoint an alternate executor in case your primary executor is unable to act.

What happens if I have minor children?

A person who has children under the age of 19 should appoint a guardian to look after his or her children. If you are a single parent, it is especially important to name a guardian or the court may appoint someone you do not want looking after your children.

If you are separated or divorced and your spouse will look after your children, you may want to appoint a guardian to look after the funds passing to your children.

Why is it important to seek legal advice when making a Will?

No matter how simple the Will, there are rules that must be followed or the Will may not be valid and your property may not be distributed according to your wishes. An experienced lawyer will know about the rules that apply to Wills and can help with estate planning so as to save money for your beneficiaries. And you will have the peace of mind knowing that your Will is properly drafted and valid, and your estate will be paid out according to your wishes.

Can my Will be changed after my death?

If your Will does not properly provide for your spouse or children, they can make a claim under the *Wills Variation Act*. The B.C. Supreme Court has the power to change your Will to give them a share of the estate where, in its opinion, it is just and equitable to do so. If you are thinking of leaving a spouse or child (even a self-sufficient adult child) out of your Will, or giving them less than they might reasonably expect, be sure to consult with a lawyer.

What about taxes?

Although there is no succession tax in British Columbia, there are some assets that may be subject to capital gains tax. If so, the executor of your estate will have to pay tax on those gains before paying out the remainder of the estate to the people named in your Will. If you have other types of assets (such as shares in a company), they may also be subject to taxes. An experienced lawyer may be able to help you reduce or eliminate these taxes.

What are probate fees?

Probate is the process by which the executor applies to the B.C. Supreme Court to confirm that a Will is legally valid. A person who leaves an estate worth over $25,000 is required to pay probate fees. The fees vary according to the value of the estate.

When should I consider other forms of distribution?

A person may be able to reduce or eliminate taxes and probate fees by distributing property in other ways (i.e. outside of a Will). By disposing of assets outside of a Will, a person may also be able to protect themselves against a *Wills Variation Act* claim. Although anyone can dispose of assets outside of a Will, it is especially important for those with a large estate or a complicated tax or financial situation.

What are the most common methods for distributing property outside of a Will?

A person can distribute property outside of a Will in a variety of ways. A few of the most common are outlined below:

Joint Tenancy

If you own property with one or more persons as "joint tenants", your share in the property will pass to the other owners when you die. For example, if you and your spouse own a house as joint tenants, your share of the house will pass to your spouse outside of your Will. No probate fees will be payable and if the house is your principal residence, you may not be required to pay tax on the transfer.

Note, however, that there are exceptions to the general rule that your share will pass to the other co-owners when you die. If you own property with someone other than your spouse or a minor child and you want the property to go to that person when you die, you should specify that you want the property to go to that person.

For example, if you and your adult son open a bank account together and you want the money to go to your son when you die, you should leave a written declaration to that effect. Otherwise, the money may be included as part of your estate.

In other circumstances, the joint tenancy can be severed, in which case your share in the property will be included as part of your estate. A joint tenancy can be severed where the joint owners reach an agreement to that effect, where a joint owner transfers property to himself or another person or where there has been a "triggering event" for the purposes of the *Family Relations Act* (such as a divorce).

Designated Beneficiaries

In some cases, a person can designate a beneficiary to receive a particular benefit, such as the proceeds of a life insurance policy or a retirement savings plan. If a valid designation is made, the benefit will not form part of the estate and probate fees will not be payable (although there may still be some tax consequences for the beneficiary).

Trusts

Depending on the size of your estate, you may want to establish a trust before your death. Property that forms part of a trust does not pass through your estate and probate fees will not be payable. Having said that, there may be other fees and expenses associated with establishing a trust and you should seek legal advice on whether it is worthwhile.

How often should I review my estate plan?

A person should review their estate plan whenever there is a significant change in their personal or financial circumstances. For example, if you made a Will when your children were young and named your parents as guardian and executor, you will no longer need the guardian clause and you may want to make one of your children (or a sibling) the executor.

A person who has had a change in marital status should also review their estate plan. If you marry or re-marry, your Will is automatically revoked unless the Will explicitly says it is made in contemplation of your new marriage. If you divorce, the portions of your Will that involve your ex-spouse may no longer be valid.

Why not make a donation to Parkinson Society British Columbia?

A person making a Will can donate some or all of his estate to charity. Why not consider a donation to Parkinson Society British Columbia? If you choose to do so, please ensure that the correct name of the organization is used in your Will to avoid the expense and inconvenience of an application to the court for advice and directions. Donations should be made to "**Parkinson Society British Columbia**".

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