

Larry McCrea Law Corporation

Barristers & Solicitors

#109 Coach House Square, Highway 97

P.O. Box 549, 100 Mile House, B.C. V0K 2E0 Canada

Larry L. McCrea
Barrister & Solicitor

Telephone: (250) 395-1151
Facsimile: (250) 395-1153
E-mail: office@lmccrea.com

WILL INFORMATION BOOKLET

Careful planning will ensure that your Estate is administered and distributed according to your wishes and will avoid results that are costly and unintended.

This booklet is not intended to be exhaustive. Some aspects will not be relevant to your particular situation. This information is intended as a source of general legal information only and should not be relied upon to address any particular legal issue. Also, it assumes that only the laws of British Columbia apply to you, your property and your intended beneficiaries. In addition, the law is constantly changing. We urge you to seek legal advice for your situation.

PLANNING YOUR WILL

What is a Will?

A Will is a legal document made by you to take effect upon your death. It gives instructions about how your affairs are to be handled after your death and directs how your possessions are to be divided among the persons you name.

Who Can Make a Will?

Before you can make a valid Will you must be at least 19 years old, unless you have been legally married, are a member of the Armed Forces on active duty or are a seaman at sea or in the course of a voyage.

In addition to this age requirement you must have **testamentary capacity**. In other words, you must know what a Will is and understand that it will be legally binding upon your death. You must also know what property you own and its approximate value. You must also understand to whom you owe a legal or moral obligation to look after if you should die.

**Words highlighted throughout this booklet are defined in the
Glossary of Terms starting at page 10**

What Makes a Will Invalid?

Your Will must reflect your wishes. Therefore your Will, or a portion of it, may be invalid if anyone has forced you to make your Will a certain way. Your Will is also invalid if, at the time you make it, you lack **testamentary capacity** as mentioned in the preceding paragraph.

Also, if you marry after you make your Will, that marriage makes your Will invalid unless your Will was made in contemplation of that marriage and the Will specifically says so.

Why Do You Need a Will?

A Will serves various functions, such as:

1. appointing a personal representative (your **Executor/Trustee**) to look after your affairs after your death, including funeral arrangements;
2. appointing a **guardian** for any of your children under the age of 19 years;
3. selecting the **beneficiaries** of your assets;
4. ensuring that your **beneficiaries** receive their inheritances in the manner and at the age you feel is appropriate;
5. avoiding the provincial laws which automatically determine who will receive your estate if you die without a Will, (see "Distribution of your Estate"); and
6. reducing the cost of administering your estate.

When Do You Need To Revise Your Will?

You should review your Will whenever there has been a material change in your affairs such as a birth, death, marriage or marital breakdown in your family, a death or change in circumstances of a guardian or **executor-trustee** named in your Will, or a substantial change in your assets or liabilities.

Your Will should also be reviewed periodically even if you are not aware of any changes in circumstances which may affect the Will. This will allow you to re-examine the provisions in your Will for young beneficiaries as they mature, to consider whether a change of executor may be appropriate and whether your Will reflects your current wishes.

What Does a Will Cost?

The cost of a Will is generally based on the time spent by your lawyer in obtaining instructions and preparing the document. The completion of a Will Instruction Questionnaire (available from our office or online at <http://www.lmccrea.com>) prior to your appointment will reduce the time spent at the appointment and assist you in organizing your wishes. If you call our office, you can obtain our current flat rate fee for a basic Will. Complex Wills, such as those with Trust clauses to manage money for children beyond the age of 19 or Wills that require custom drafting will be billed at our normal hourly rate.

Drafting Your Will

The first step in preparing your Will is to make an appointment and bring the information sheet, completed as best you can. We can assist you with any information you are uncertain about.

After the first office appointment, we will prepare a “draft” will, and phone you to make an appointment to review the draft. Usually with a few minor changes, your Will is ready. You can then sign your Will in the presence of witnesses at our office, and it is done.

The draft Will contains our standard Trustee powers clauses. These are designed to give a broad power to the Trustee so he or she has the ability to carry out their job under a wide range of circumstances. It is important that you appoint a Trustee that you really trust.

All names in the will should be proper legal names. A nickname should also be included after the name such as Robert (aka Bob).

We will provide you with the only original Will, which should be kept in a safe place such as a safety deposit box at a financial institution. In the event of your death, the Trustee must have the original of your Will to apply to the Supreme Court of British Columbia for a Grant of Probate.

WHAT HAPPENS IF YOU DIE WITHOUT A WILL?

If you die without leaving a valid Will, the administration and distribution of your estates in British Columbia is governed by the laws of this Province. Those laws provide rules and procedures for the appointment of an administrator of your estate, the distribution of your property and the guardianship of any infant children who survive you.

Appointment of an Administrator

If you do not have a valid Will, have not named an executor in your Will, or if the executor named in your Will is unwilling or unable to act as your executor, somebody, usually one of your next-of-kin, must apply to the court to be appointed the administrator of your estate on your death. The administrator may be required by the court to post a bond to ensure that your estate is administered and distributed according to law. If no one applies to be appointed administrator of your estate, an Official Administrator may be appointed. While the powers and duties of an administrator may be much the same as those of an executor, the process of administration where there is no Will is more time consuming and costly.

Distribution of your Estate

The *Estate Administration Act* sets out the distribution of your estate if you die without leaving a valid Will. Your **spouse** and **children** will receive your estate and if you do not have a spouse or child, your estate is distributed in order of priority, to your parents, brothers and sisters, nieces and nephews and then to your closest blood relatives.

"Spouse" includes a common law spouse, meaning any person of the opposite or same sex with whom you cohabited for at least two years in a marriage like relationship immediately before death.

The following table sets out how, in most cases, your assets would be distributed.

If you die leaving a **spouse** but no **children** or other lineal descendants such as grandchildren surviving you:

Your entire estate goes to your spouse.

If you die leaving a **spouse** and **children** or other lineal descendants surviving you:

Your spouse has the right to use and occupy the matrimonial home for his or her life; receives all household furnishings; and the first \$65,000 value of your remaining estate.

If you leave only one child surviving you, your spouse receives 50% of the balance of the estate and your child receives the other 50%. If you leave two or more children, your spouse receives one-third of the balance of the estate and your children equally share the other two-thirds (if one or more of your children has already died leaving children, your grandchildren will have their deceased parent's share of your estate).

If you die leaving **children** or other lineal descendants surviving you but no **spouse**:

Your entire estate goes to your children and if any child has died his or her children shall take the portion that their parent would have received if he or she had survived.

If you die leaving no **spouse**, or **children** or other lineal descendants surviving you:

Your estate goes to your mother and father equally or to the survivor if one of them has already died. If they have both died before you, your estate will be divided equally among your brothers and sisters. If a brother or sister has already died, his or her children will share their parent's share.

If you die leaving no **spouse**, **children** lineal descendants, parents, brothers or sisters or nephews or nieces:

Your estate goes equally to your next-of-kin who are closest in blood relationship to you.

If you die leaving no next-of-kin surviving:

Your estate passes to the Provincial Government.

Guardianship of Children

If you die without a Will appointing a **guardian** for your children under the age of 19 years and no surviving parent has legal custody of your children, the Public Guardian and Trustee and the Superintendent of Family and Child Services become the guardians of your children. In order for a relative or other person to become guardian of your children, that person will have to apply to the Courts for an order appointing him or her as guardian.

If there is a suitable relative wanting to look after your children, the Ministry of Children and Family Development will keep the children in foster care until the relative can be investigated. This could take weeks or even months.

If a court order is required, that could take months as well.

WHAT PROPERTY CANNOT BE DEALT WITH IN YOUR WILL?

Your Will does not deal with all the property which you may own at your death. For example, the following property which you might own would not be part of your estate governed by your Will:

1. Any property you own jointly with another person as true joint tenants;
2. Any property such as an RRSP or life insurance policy in which you have designated as a beneficiary;
3. Any trusts established while you are still living.

The properties which cannot be dealt with by your Will are generally not subject to the claims of creditors nor can they be affected by a court order under the *Wills Variation Act*.

Joint Ownership

Property can be owned together with another person either in **joint tenancy** or in **tenancy-in-common**.

If you own your property with someone as **tenants-in-common**, each of you owns an interest and on your death your interest will be dealt with in accordance with the provisions of your Will.

Any property which you own in **joint tenancy** with someone else, such as your house, your car, or a bank account, will generally pass by "right of survivorship". By this rule of law, the survivor takes all. Accordingly, if you own your house in joint tenancy with your spouse, when the first of you dies, the survivor automatically owns the entire property.

You should not transfer an asset from your name into the joint names of you and another person (be it as joint tenants or tenants in common) without seeking advice as to the consequences.

If the asset was your principal residence and it increases in value after the transfer, you may have lost the principal residence exemption with respect to part of that increase.

You are also, of course, giving away 1/2 of the asset and exposing it to the perils of that other person's life. Creditors of the other owner could get a court order for sale of the property and you would get 1/2 of the sale proceeds but effectively lose your house.

The law also provides that if joint owners die together and it is impossible to tell which one of them died first, the younger is presumed to have survived the older. If you own your home jointly with your spouse who is younger than you, and if you die together and it is uncertain who died first, your joint property will all pass to your spouse and then be dealt with, along with the rest of his or her property, as directed in your spouse's Will. If your spouse had no Will your joint property would still pass to your spouse and still form part of his or her estate but would be distributed in accordance with the table on page 4.

It is important to know whether or not you hold your property as joint tenants or tenants-in-common so that you know what will happen to your share of the property when you die.

Property With a Named Beneficiary

Most life insurance policies, registered retirement savings plans, registered retirement income funds, annuities, pension benefits and other similar benefits permit you to designate a beneficiary. The asset then transfers directly to the beneficiary on your death. It does not form part of your estate being dealt with by your Will unless you either specifically name your estate as a beneficiary or the designated beneficiary has predeceased you.

THE TERMS OF YOUR WILL

This section is intended to give you a brief review of some basic provisions of a typical Will.

Appointment of an Executor and Trustee

Your **Executor** is responsible for making funeral arrangements, safeguarding your assets and carrying out your wishes under the terms of your Will. Your **Trustee** is responsible for administering any trusts which you set up under your Will. Usually, the Executor and the Trustee are the same person.

Your choice of executor must be given careful consideration. Your executor will make crucial decisions and it is important that he or she should have good judgment and business sense as well as be able to relate well with the members of your family. You should also consider such factors as availability, willingness, age, health, residency, trustworthiness, impartiality and financial stability.

Your spouse or child over 19 years of age can be appointed executor. It may be appropriate to discuss the appointment of your executor with him/her and familiarize your executor with your affairs. It is helpful to make a current list of assets and attach it to your Will, updating it on a regular basis. You can also attach a memorandum to your executor as to how you want non-valuable personal effects given to specific beneficiaries.

You may appoint more than one executor to act together and should appoint at least one alternate executor.

Appointment of a Guardian

As a parent you may, in your Will, appoint a **guardian** for any of your children under the age of 19. That guardian would be responsible for your children's upbringing after you died.

You should always consult with the person you plan to appoint as guardian to determine if that person is prepared to assume the responsibility.

As well, you should provide for alternate guardians in the event the person you have appointed is unwilling or unable to act.

Disposition of Property

The other major function of your Will is to dispose of your property

Usually the **residue** of your estate would be given in shares to your beneficiaries as the exact contents and value of your estate is unknown when you draft your Will. An example of that would be if a testator leaves the **residue** of the Estate to a spouse or alternatively equally to children. Provision is also made if a beneficiary dies before you; such as that deceased beneficiary's share being divided among the beneficiaries surviving children.

You may also leave particular items of property or amounts of money outright to certain individuals or organizations.

You may also set up **trusts** in your Will. A trust permits your executor to manage a portion of your estate for a period of time while using it for the benefit of your spouse, child or other person such as a disabled beneficiary.

Your Will might also contain a provision disposing of the balance of your estate not disposed of in any other way, such as the balance of a failed trust.

Wills Variation Act

If you have a spouse or a child, it may be necessary for you to make adequate provision for that person in your Will. If you do not make that provision your estate may be involved in litigation after your death.

“Spouse” includes not only a husband or wife of a lawful marriage, but also someone living and cohabiting with another person (of the opposite or same sex) in a marriage-like relationship for at least two years.

“Child” includes a birth child of the testator, an adopted child, and also includes an adult child. Child does not include step-children, children that are taken in and raised by the testator or a birth child that has been adopted by a third party.

The *Wills Variation Act* of British Columbia permits a **spouse** or **child** of a **testator** to apply to court after your death for a share or a larger share in your **estate**. The court will take into account numerous factors in considering the application and may grant the application if it feels that you have not dealt fairly with that person under all the circumstances.

Special Provisions in Your Will

If a **beneficiary** does not have the capacity to manage his financial affairs, it may be appropriate to leave your property to that person by way of a **trust**, rather than outright.

A **trust** may help preserve the property and may avoid the need for the appointment of a **Committee** to manage it for your beneficiary.

If you do wish your beneficiaries to inherit at some age other than the age of majority (19 in British Columbia), your Will needs to create a trust with a gift over to other beneficiaries if a beneficiary dies before the age they are to inherit.

Registered Retirement Savings Plans (RRSP's)

Generally, on the death of an individual, the entire amount of any RRSP is taxed as income of that individual. However, special rules apply where the individual's spouse is the designated beneficiary under the plan permitting deferral of any tax. Where the RRSP of the individual has not matured prior to death, the amount may generally be contributed to the spouse's RRSP and an offsetting deduction may be claimed.

Other rules may permit a deferral of that tax. Professional advice should be obtained in this area.

Funeral Wishes

Pursuant to the *Cremation, Interment and Funeral Services Act* enacted July 4, 2004, a written preference respecting the disposition of your human remains or cremated remains, expressed in your Will is binding on the executor named in your Will, provided compliance with the preference would not be unreasonable or impractical or cause Hardship.

Probate Fees

When an application is made to Court to probate a Will (or apply for a Grant of Administration when there is no Will), a fee is payable to the Minister of Finance. That fee is based on the fair market value of the assets passing by the Will (or on the intestacy) at the date of death.

The fee is currently \$208 plus \$6 for each \$1,000 on the value of assets over \$25,000 but not over \$50,000, and if the assets exceed \$50,000 in value, \$14 for each \$1,000 by which those assets exceed \$50,000.

Income Tax Consequences

We do not give advice with regards to tax planning or tax consequences related to the disposition of property pursuant to your Will. We are able to help you find a tax lawyer to help with tax planning, if necessary.

POWERS OF ATTORNEY

A Power of Attorney is a legal document that grants another person the power to conduct your financial affairs while you are alive.

The person granting the Power of Attorney and the Attorney appointed must be at least 19 years old on the date of the appointment and mentally competent. The Power of Attorney can be for either specific or general purposes. A specific Power of Attorney gives authority to do a certain thing. For example, it may authorize someone to sell a piece of property. A general Power of Attorney is a broad authorization for someone to conduct all your financial or business affairs.

Unless your Power of Attorney specifically provides that it is to continue to be effective notwithstanding your subsequent mental incapacity, the document will cease to be effective should you become mentally incapable. A Power of Attorney which continues to be effective is commonly referred to as an "enduring Power of Attorney" and may delay or avoid the need to have a Committee appointed to manage your financial or business affairs.

A Power of Attorney cannot be used to transfer real property after three years from the execution date unless there is an express exclusion of the operation of the *Land Title Act* in the Power of Attorney.

A Power of Attorney may be cancelled at any time by the person who granted it assuming he or she is still mentally sound.

The typical Power of Attorney is in effect immediately upon execution. The person appointed will not be supervised if you lose your capacity to supervise him or her. You should, therefore, seek your lawyer's advice with respect to the making of a Power of Attorney and carefully consider who you choose to appoint as your attorney.

"LIVING WILLS"

While there are many different forms of "Living Wills", generally the document indicates that the person signing it either refuses, in advance, a specific medical treatment or any treatment at all if the treatment is therapeutically useless and hope for recovery is gone.

British Columbia legislation requires medical professionals to follow wishes about your health care that you expressed while you were capable. In situations where a patient is terminally ill and no person has been appointed **Representative** or **Committee**, a "Living Will" will be helpful in making a decision by providing evidence of your wishes.

A person customarily provides copies of the "Living Will" to their doctor, close family members and any other individual who may be involved in decisions relating to his or her treatment.

A Living Will must be available to each Health Care Provider to be effective and the first Health Care Provider may be a paramedic.

There is a form of Living Will available free of charge on our website <http://www.lmccrea.com>.

REPRESENTATION AGREEMENTS

A Representation Agreement gives someone else the power to make decisions for you or help you make decisions about your financial affairs, your legal affairs, your health care or your personal care or any combination of these. This Agreement is governed by the *Representation Agreement Act*.

A Representation Agreement ends on your death or, if your representative is your spouse, on your divorce or on the termination of your marriage-like relationship. The Representation Agreement also ends if your representative resigns, becomes incapable, or dies. If a Committee is appointed by the court, any Representation Agreement also ends.

COMMITTEE

A Committee is a person who is given authority to manage a persons personal and/or financial affairs by the Supreme Court of British Columbia pursuant to the *Patients Property Act*.

The Committee may be a relative, the Public Guardian and Trustee or any other person appointed by the Court.

The application requires affidavits of two medical doctors stating the person is mentally incapable of managing personal and/or financial affairs as well as a complete list of assets and income that is to be managed.

These documents must be reviewed by the office of the Public Guardian and Trustee prior to the Court application. The current fee charged by the Public Guardian and Trustee to review these documents is \$535.

The Committee must provide the Public Guardian and Trustee with detailed accounting on an ongoing basis.

The costs of such an application to the Court (including legal fees) is usually in the \$5,000 range.

Pursuant to the *Patients Property Act* you may, in advance, prepare a Nomination of Committee which although is not binding on the Court, is a expression of your wishes that the Court will in all likelihood follow.

The *Patients Property Act* was to be replaced by new Provincial legislation (the *Adult Guardianship Act*), but it now appears unlikely that the Provincial Government is going to proceed with that new act. If they do, new documents will likely have to be prepared.

GLOSSARY OF TERMS

Administration - When used with reference to an estate, administration means the actions of the executor in managing the assets of the estate and carrying out the terms of the Will.

Age of Majority - In B.C. the age of majority is nineteen years. Once a child reaches this age his or her parents or other legal guardians cease to have any legal control over the child.

Beneficiary - A person entitled to receive a gift or benefit under a Will, insurance policy, RRSP, trust deed or other similar document.

Bequest/Legacy - A gift made by Will.

Child or Children - A child or children of any age, whether the parent's natural or adopted child.

Codicil - A legal document which amends a Will.

Committee - A person(s) appointed to make decisions regarding the person, financial affairs, or both, of a person who is incapable of managing his or her affairs, person or both. The appointment can only be made by the Supreme Court of B.C.

Discretionary Trust - A trust in which distribution of income and capital to the beneficiary is solely in the discretion of the Trustee. It is often used in Wills when making provision for minors or disabled persons. The beneficiary has no absolute right to any of the trust moneys.

Estate - A person's Estate consists of all the property which he or she owns at death and which can be disposed of by Will.

Executor/Trustee - A person appointed by a Will to carry out the administration of the estate. The Executor's function is to probate the Will, settle any debts and distribute the estate. The Trustee's function is to carry out the terms of any ongoing trusts. Typically, the Executor and the Trustee are the same person and often the terms are used interchangeably.

Guardian - A legal Guardian is a parent living with and supporting his or her child, or is a person appointed by the Court to be the Guardian, or is a person appointed in the Will of

the child's parent or legal guardian to be the Guardian of that child. Guardianship ceases once the child reaches the age of majority.

Intestate – Indicates the person did not have a valid Will at the time of death.

Joint Tenancy - Property owned jointly by two or more persons with a right of survivorship by which the surviving joint tenants automatically become the owners of the entire interest in the property when one joint tenant dies. See also Tenancy-in-Common.

Mentally Disabled Person - Under the *Mental Health Act*, a "**Mentally Ill Person**" is defined as a person who is suffering from a disorder of the mind

- (a) that seriously impairs his or her ability to react appropriately to his or her environment or to associate with others; and
- (b) that requires medical treatment or makes care, supervision or control of that person necessary for his or her protection or welfare or for the protection of others.

Under the *Patients Property Act*, "**patient**" means:

- (a) a person who, because of mental infirmity arising from disease, age or otherwise, is described as incapable of managing his or her affairs in a certificate signed by the director of a provincial mental health facility or the officer in charge of a psychiatric unit as defined in the *Mental Health Act*, or
- (b) a person who is declared by the Court to be incapable of managing his or her affairs, person or both.

Probate - The procedure by which the Court declares the deceased person's Will to be valid. A "Grant of Probate" is the executor's proof of capacity to act as executor.

Property - "Property" includes both real property (real estate) and personal property (all property other than real estate and including cash, securities, cars, furniture, jewelry, shares in a Company, etc.).

Public Guardian and Trustee - The Public Guardian and Trustee is the Official Guardian and the Official Administrator for British Columbia. The Public Guardian and Trustee is empowered to protect the estates and financial interests of minors and mentally disordered or handicapped persons and to administer the estates of deceased persons where no other person is competent or prepared to act. The Public Guardian and Trustee may also be appointed committee of persons lacking capacity.

Residue - The "residue" of an estate commonly refers to the remainder of an estate after all debts and administration expenses have been paid and all specific gifts of property and cash legacies have been given out.

Representative - The person named in a Representation Agreement to make decisions regarding financial and legal matters or health and personal care matters, or both, for an individual.

Revocation - The act of canceling an existing Will or other legal document, either in whole or in part.

Spouse - As used in this booklet, "spouse" means not only a husband or wife of a lawful marriage, but also, since the *Definition of Spouse Amendment Act*, 2000 became law on July 6, 2000, a common law spouse. "Common law spouse" for most purposes means a person of the opposite or same gender who has cohabited with another person for at least two years in a marriage-like relationship.

Tenancy-in-Common - Usually describes property owned by two or more persons. On the death of one tenant-in common, his or her interest is included in his or her estate. The property does not automatically pass to the surviving tenant-in-common as it would if it had been owned in joint tenancy. See also Joint Tenancy.

Testamentary Capacity - The mental ability which is recognized in law as being sufficient for the making of a Will.

Testate – Indicates the person had a valid Will at the time of death.

Testator/Testatrix - A person who makes a Will.

Trust - In a Will, a portion of an estate that is to be held for a period of time on behalf of a beneficiary. The Trust may contain a variety of provisions with respect to how and when the beneficiary is to receive the income and/or capital in that portion of the estate.

Will - A legal document made by a person in accordance with certain formalities. It takes effect on the death of that person and disposes of his or her property. It must be signed by the Testator in the presence of two competent witnesses, both present at the same time. The witnesses must not be a beneficiary, or spouse of a beneficiary.

Wills Variation Act - An Act allowing a spouse or child (or the Public Guardian and Trustee on behalf of an infant child or a mentally disabled person) to apply to the Court to vary a Will with respect to the provisions made for that spouse or child in the Will. The Court will consider such factors as need and fairness and will generally recognize both the moral and legal obligations of a parent to provide for a child and those of a spouse to provide for a spouse.