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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 who will manage your affairs after your death including the making of funeral arrangements and also directs how your assets are to be divided among the persons you name. It must be signed by the Will maker 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. A beneficiary is a person entitled to receive a gift or benefit under a Will.

Who Can Make a Will?
Before you can make a valid Will you must be at least 16 years old.

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 who you owe a legal or moral obligation to look after if you should die.

What Makes a Will invalid?
Your Will must reflect your wishes. Your Will 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. Your Will could also be invalid if you have written any changes on the original.

Why Do You Need a Will?
A Will serves various functions, such as:

1. appointing a personal representative of your choice (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. avoiding the provincial laws which automatically determine who will receive your estate if you die without a Will, (see "Distribution of your Estate");
5. specifying your wishes with respect to funeral arrangements.

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 assist you in organizing your wishes in advance. 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.

Wills Registration and Safe Storage of the Original Will
In B.C., you can register your Will with the Department of Vital Statistics. It is much like registering the birth of a baby. You don't send the baby. What is registered is the fact you made a Will, the date you made your Will and where it can be found (ie: Bank safety deposit box). The cost of registration is currently $18.68. Registration does not ensure the safe keeping of your Will. It is important that you take steps to safely store your original Will and ensure it can be located when needed. We do recommend that the original Will be kept in a Safety Deposit Box. We do discuss registration and safe storage of the original signed Will at the Wills instruction appointment**.**

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.

The most important item for you to fill out on the information sheet is names. You need to use each person's full proper legal name when making a Will. That includes first name, middle name and last name, as the case may be. It is important that full legal names always be used on legal documents, on identification documents and with respect to ownership of items such as bank accounts, insurance policies, vehicles, real property etc. It is a good idea to check to ensure that all of your assets and identification are in you proper legal name.

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 at our office.

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.

ACTING FOR MORE THAN ONE PERSON

We often act for two people jointly when drafting Wills. We are allowed to act jointly for clients only when their interests are not in conflict. Usually their interests are not in conflict; however it is possible that those interests could diverge or even conflict in the future.

The rules of the Law Society of British Columbia require that, before we represent people jointly, we must raise certain issues and obtain consent from both clients as to the course to be followed if a conflict arises. The following applies to our joint representation when drafting Wills:

(a) We owe each person a duty of undivided loyalty. This means that we must act in each person’s best interests at all times and must not favour the interests of one person over interests of the other, or allow anything to interfere with our loyalty to each person or our judgment on both people’s behalf. If we are unable to fulfill this duty of undivided loyalty because of a conflict of instructions, we will have to withdraw.

(b) No information we receive when acting jointly can be treated as confidential between both clients. This means that, as long as the joint retainer continues, we must disclose relevant information to both of you. However, should we receive information from any source that makes it clear we are in a conflict by acting jointly, we must cease acting for both clients in the matter. In that event, however, we would not be permitted to disclose any information.

(c) If a conflict arises, we may be permitted to assist in attempting to resolve the conflict. If it is resolved, we may continue to represent both clients.

(d) If a conflict arises that is not resolved, then we will cease to represent both clients.

(e) Although joint representation of a number of clients by a single lawyer or law firm has some advantages, there are aspects of joint representation that could lead to the potential problems we have outlined above. For that reason, we ask clients to consent to the potential course of action we have outlined before we commence acting for clients jointly. We recommend clients obtain independent legal advice before giving that consent.

(f) If, subsequently, only one of you wishes to change your Will or revoke your Will without the other of you and provides me with instructions to change your Will, that would be treated as a new matter with no joint component. I would be obliged to hold that communication confidential including not disclosing to the other

spouse/partner. However, I would have a duty to decline to act solely for one of you with respect to redrafting your Will unless your marriage or relationship had permanently ended (such as divorce, permanent separation or death) or the other of you was informed of the new instructions and agreed to me acting on the new instructions.

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 person appointed by your Will to carry out the administration of the estate. The Executor's function is to probate the Will, settle any debts, distribute the estate and 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 of your Will and the Trustee of any Trusts credited by the Will is 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 or 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. 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.

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. 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 bequests or gifts of property and cash legacies have been given out.

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. 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.

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
If you have a spouse or a child, it may be necessary for you to make adequate provision for that person in your Will.

The *Wills Estates and Succession Act* of British Columbia permits a spouse or child of a Will maker 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 or her 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 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.

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, providing that compliance with the preference would not be unreasonable or impractical or cause hardship.

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 or disabled child 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 or child's RRSP and an offsetting deduction may be claimed.

It is generally not appropriate to designate a beneficiary of your RRSP other than a spouse or

disabled child. If you do so, the beneficiary gets the gross amount of the RRSP and the Estate is liable for the taxes so unintended consequences can occur and the amount available in your estate will be reduce by the amount of taxes payable with respect the RRSP.

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

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.

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. Probate refers to 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

The fee is currently $200.00 plus $6.00 for each $1,000.00 on the value of assets over $25,000.00 but not over $50,000.00, and if the assets exceed $50,000.00 in value, $14.00 for each $1,000.00 by which those assets exceed $50,000.00.

WHAT PROPERTY CANNOT BE DEALT WITH IN YOUR WILL?

Your Will does not deal with all the property which you may own immediately prior to your death. For example, the following property 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 a beneficiary other than your estate;

The properties which cannot be dealt with by your Will are generally not subject to the claims of Estate creditors or subject to a Wills Variation Act claim by a spouse or children.

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.
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 upon your death.

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 and does not form part of your estate.

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, 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 are much the same as those of an executor, the process of administration where there is no Will can be time consuming and costly. The authority of an executor to act arises upon death whereas the authority of an administrator does not arise until the court order is granted which can cause significant delay.

Distribution of your Estate
The *Wills, Estates and Succession Act* (W.E.S.A) 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 children your estate is distributed in order of priority, to your parents, your brothers and sisters, your nieces and nephews and then to your grandparents, parents siblings or their children, great grandparents, their siblings or their siblings children. "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. “Child or Children” refers to natural or adopted children only and does not include step-children, children that are taken in and raised by the Will maker or a birth child that has been adopted by a third party.

The following is how, in most cases, your assets would be distributed if you did not have a Will

(1) If you die leaving a spouse but no children or other lineal descendants such as grandchildren surviving your entire estate goes to your spouse.
If you die leaving a spouse and children or other lineal descendants surviving you your spouse receives the first $300,000.00 plus 50% of the balance of your estate and your children receive the other 50%. Except if you have children that are not your spouse’s children then your spouse receives the first $150,000.00 leaving a larger share for your children.
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.

(2) 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 parents share.

(3) If you die leaving no spouse, children lineal descendants, parents, brothers or sisters or nephews or nieces your estate goes equally to your grandparents or direct descendants and then to your great grandparents or their direct descendants.

(4) Failing that 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.

NEW RULES OF SURVIVORSHIP UNDER THE WILLS, ESTATES AND SUCCESSION ACT IN FORCE APRIL 1ST, 2014

The *Wills, Estates and Succession Act* requires a person to survive for at least 5 days in order to receive a gift under a Will. Most professionally prepared Wills require a spouse beneficiary to survive the Will Maker for a period of 30 days to inherit under the Will in any event.

Section 5 of the W.E.S.A. deals with scenarios where people die at the same time or in circumstances where it is uncertain which of them survived the other; for example, a car accident.
There is a general presumption that each person has survived the other. This is a change from the long standing rule in the *Survivorship and Presumption of Death Act* which presumed a younger person has survived an older person.

There are two advantages for presuming that each person has survived the other:

1. First, it ensures that the estate will go either to the person's contingent beneficiaries (if there is a will) or to their family in accordance with the intestacy rules in W.E.S.A.

2. Second, this presumption resembles the presumptions set out in sections 83 and 130 of the *Insurance Act,* which will lower the chances of insurance proceeds and the decedent's estate being treated inconsistently and should reduce disputes.

The presumption may be displaced by contrary intentions expressed in a Will or the specific rules that are set out in W.E.S.A..

In the event of the simultaneous death of two joint tenants, W.E.S.A converts the joint tenancy into a tenancy-in-common so one half of the joint property would go to each estate

If a Will has provisions that provide for an alternative disposition if a person dies before another, and there are circumstances where it is uncertain which person survived the other, it is deemed that the person to whom the provision applies has died before the other and the alternative disposition provision applies.

W.E.S.A. generally carries forward the old rule found in the *Estate Administration Act* concerning successors who are conceived but not born at the time of the intestate's death. Successors are treated as if they had been born at the intestate's death and therefore are entitled to inherit. W.E.S.A. addresses the possibility of a person's child being conceived after their death (i.e., assisted reproduction using the person's genetic material).

There is the potential for such a posthumous conception occurring years after the person's death. Therefore, W.E.S.A. sets out rules to balance the rights of a child conceived after death with the interests of living beneficiaries who wish to see an estate administered within a reasonable period of time.

- Notice must be given of the intent to conceive a child using the deceased's genetic material within 180 days of the grant of probate or administration being issued.
- The child must be born within two years of the person's death (and survive for five days).

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 and 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 section 56(1) 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 representative, 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.