



## Estate Planning

Includes:

- Incapacity Planning
- End of Life Planning
  
- Can also include family law planning (Co-habitation and Marriage Agreements);and
- Business Planning (Shareholder Agreements)

## Incapacity Planning

1. Enduring Powers of Attorney
  - Manage Legal and Financial Affairs
2. Representation Agreements
  - Manage Health Care and Personal Care Decisions
3. Advanced Directives - new
  - Set out health care wishes

## New Incapacity Legislation

- Bill 29 (parts of which were brought into force September 1, 2011) makes many amendments to BC's existing tools for planning ahead:
  - enduring powers of attorney
  - representation agreements; and
  - add a new third option: advance directives

### **Highlight of Changes for POAs effective September 1**

- Old enduring clause repealed; extensive new provisions for enduring POAs
- Existing enduring POAs grandfathered
- Capacity presumed
- Springing POA allowed, need to specify if active now

### **A few POA Highlights, con't**

- Attorney must now sign before witnesses
- Two witnesses for adult and attorney required unless one is a lawyer or notary – witness cannot be employee or agent of attorney

### **A few POA Highlights, con't**

- Not dispose of property gifted by Will unless necessary
- POA disposing of property in Will – beneficiary receives equivalent amount from estate
- May not make a Will

### **A few POA Highlights, con't**

- Payment of attorney - no compensation unless expressly allowed and sets amount or rate, but reimbursed for expenses
- POA ends: attorney dies, incapable, bankrupt, convicted of proscribed offence or if adult victim or at end of marriage or marriage-like relationship

## **New Legislation - Advance Directives**

### *Health Care (Consent) and Care Facility (Admission) Act*

- New Part 2.1: new provision for Advance Directives
- Gives legal effect to Living Wills
- Rep Agreements override ADs
- Must be signed before two witnesses unless one witness is a lawyer or notary

## **Legislative Changes re Representation Agreements**

### *Representation Agreement Act*

- Section 9 repealed and new provisions - no longer need consult lawyer
- Cannot make Sec. 9 RA for finances
- Existing Sec. 9 RAs grandfathered

## **Legislative Changes re RAs – cont.**

- Notaries can be sole witness to Sec. 9 RAs
- Rep has access to adult's information
- Remuneration must be in RA and approved by Court

## **What to do if there is no POA or RA**

If there is not an enduring Power of Attorney and/or a Representation Agreement in place, and a person becomes incapable of making their own health care or financial decisions, the person's loved one may find themselves in a difficult and costly position, especially if there is family conflict

## Committeeships

- A committee is a way of protecting the interests of a dependent adult who is incapable of managing his or her affairs, his or her person, or both
  - Possible to have separate or joint committees
- Currently, the *Patients Property Act* is the statutory framework for appointing a committee for an incapable adult

2 (1) The Attorney General, a near relative of a person or other person may apply to the court for an order declaring that a person is, because of

- (a) mental infirmity arising from disease, age or otherwise, or
- (b) disorder or disability of mind arising from the use of drugs,

incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs.

## End of Life Planning

### Will

- Appointment of Executor
- Beneficiaries of Assets
- Appointment of Guardian for Minor Children
- Trusts for Minor Children or Disabled Beneficiaries

## End of Life Planning

### Trusts in Wills

- Tax-reducing trusts – tax savings for beneficiary through income splitting
- Spousal trusts – second marriages
- Spendthrift trusts – black sheep
- Disability trusts – ensure entitlement to government benefits is preserved

## End of Life Planning

### Non-Will Planning

- Joint Tenancy with right of survivorship (eg. House, Bank Accounts)
- Life Insurance – designate beneficiary
- RRSP, RRIF, TFSA - designate beneficiary (spouse preferred)
- Family Trusts

## WESA Background

- *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 (the “WESA”)
- proclamation date TBA (AG advises sometime in 2011)
- Reflects report of the BCLI: “Wills, Estates and Succession: A Modern Legal Framework” BCLI Report No. 45, June 2006

## WESA OVERVIEW – cont -

- Consolidates into a single statute, many existing statutes or statutory provisions, including:
  - *Wills Act*
  - *Wills Variation Act*
  - *Survivor and Presumption of Death Act*
  - *Estate Administration Act*
  - *Law and Equity Act*
  - *Probate Recognition Act*
  - *Escheat Act*

## TERMINOLOGY

Old	New
• Testator	• Will Maker
• Intestate heir	• Intestate successor
• Matrimonial home	• Spousal home (includes co-op housing and mh)
• Grants of probate & letters of administration	• Representation grant

## SURVIVORSHIP RULES

### COMMON DISASTER - OLD

- Presumption that older died before younger (subject to contrary intention in will)

### COMMON DISASTER - NEW

- Presumption that each survived each other (subject to contrary intention in instrument)
- Joint assets severed and held as tenants in common (subject to contrary intention in instrument)

## SURVIVORSHIP RULES - cont -

### SURVIVAL CLAUSES - OLD

- Wills might provide that beneficiary must survive 15/30/45 days to receive benefit

### SURVIVAL CLAUSES - NEW

- Beneficiary must survive at least 5 days or such longer period as provided in instrument
- If less than 5 days, then conclusively deemed to have died before deceased

## INTESTATE SUCCESSION

### OLD

- **Degrees of Kinship**
- the intestate estate passes to the closest kin
- Degrees of kin are counted upward from the deceased to the nearest common ancestor and then down to the relative

### NEW

- **Parentelic system**
- where the deceased has no spouse or children, the estate passes to the parents of the deceased and their descendants (the deceased's siblings, nieces, nephews, etc.), and, if there are none, to the grandparents and their descendants and so on until an heir is found.

## INTESTATE SUCCESSION – cont.

- under the new parentelic system, the descendants of the nearest common ancestor take from the deceased's estate before descendants of a more remote ancestor
- This system will allow a more even division between the two sides of an intestate's family

## INTESTATE SUCCESSION – cont.

### OLD

- Spousal share
  - Household furnishings
  - First \$65,000
  - 1/2 or 1/3 residue
  - Life interest in home

### NEW

- Spousal share
  - Household furnishings
  - \$300,000 & ½ residue
  - OR
  - \$150,000 & ½ residue if descendants not common
  - Spouse has right to acquire home within 180 days of death

## FORMALITIES OF WILLS

### OLD

- Age 19 or married or in military
- Subsequent marriage invalidates a will
- Gift to witness void
- Gift of land includes mortgage unless otherwise stated

### NEW

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- Automatic revocation of Wills by a subsequent marriage of willmaker is abolished
- Gift to witness not automatically void
- "purchase money security interest" passes with property

## NEW PROVISIONS FOR WILLS

- Undue influence (if will-maker was in a position of potential dependence on or domination of another person, then in proceedings alleging undue influence over the will-maker, the onus of establishing that a gift was not obtained by undue influence is on the person who wishes the gift to be upheld)
- Expanded rectification powers given to court
- Abatement rules (both land and personal property are to be reduced together. Property charged with a specific debt abates first, followed by residue, then general legacies, then specific legacies)
- Extrinsic evidence, including evidence of intent, is admissible

## Common Law Presumptions Abolished:

- Gift to child is an advance of that child's inheritance
- Legacy in Will is revoked if will-maker made a gift during his/her life of the same amount to that beneficiary
- Debt owed by will-maker is satisfied by a legacy equal to or greater than the debt (under WESA, debt continues to be enforceable against the estate)

## Family Law Planning

- Starting point - equal division of assets if married
- Can be rebutted where unfair
- Marriage agreement
  - Second marriages
  - Unequal assets
- Constructive claims where common law
- Attorney General White Paper

## Business Owner Planning

- Sole shareholder corporation or proprietorship (eg. professional)
- Family Business
  - Consider estate freeze
- Business involving 3<sup>rd</sup> party
  - Shareholder/partnership agreement
  - Life insurance



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Thank you!

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