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# Current Issues in Estate Planning

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# Introduction

- In 2012, the Lawyers' Professional Indemnity Co. (insurers for Ontario lawyers) estimated that the majority of Canadian adults (56%) do not have a signed will. 71% of Canadian adult do not have a power of attorney.
- In 2016, CIBC Economics published a study saying that the intergenerational transfer of wealth over the next decade will be approximately \$750 billion. An increase of over 50% that was passed on in the previous decade. It is expected that the following 10 years will be significantly greater.

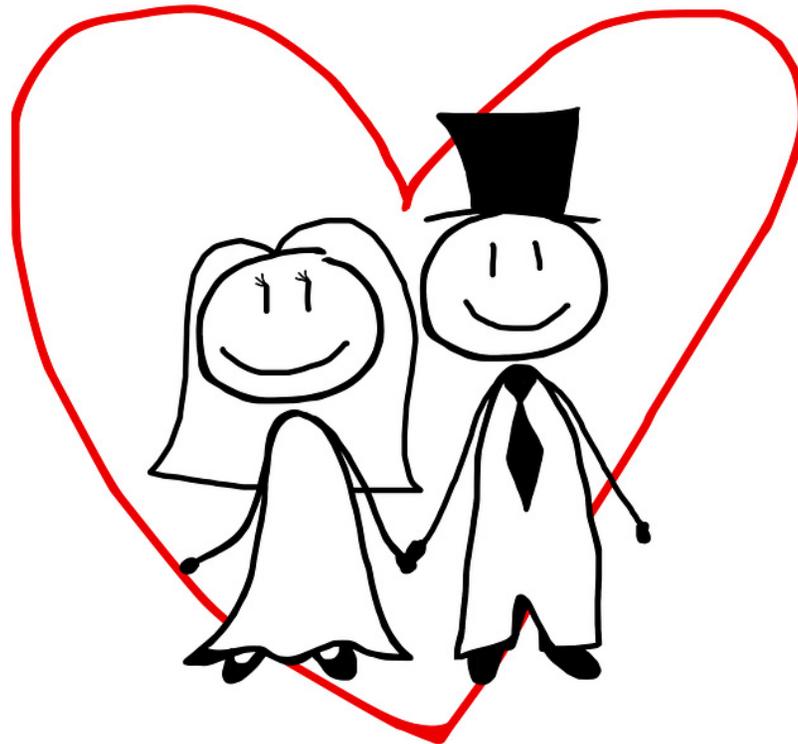


# Agenda

- Who is a Spouse?
- Challenges with US executors, attorneys and beneficiaries
- Update on family law considerations
- New planning to avoid BC probate fees



# Who is a Spouse?





## Who is a Spouse?

*Wills, Estates and Succession Act* (British Columbia) (“WESA”)- came into force March 31, 2014

- defines spouse for estate planning purposes
- Spouse means:
  - a married spouse
  - Two persons (same sex or otherwise) who have lived together for two years in a marriage like relationship immediately before death.



## When do they stop being Spouses?

- Persons cease to be spouses:
  - If they are married, when they separate
  - If they are in a marriage like relationship- one or both of them terminates the relationship



## Reconciliation

- Spouses are not considered to have separated if within one year of separation:
  - They begin to live together again for the purpose of reconciliation
  - They continue to live together for one or more periods totaling at least 90 days



## If a Person is a Spouse

- The Person has rights under the WESA as follows:
  - if there is an intestacy- i.e. no Will
    - share of spouse \$300,000
    - Unless it is a “blended family”- then spouse’s share drops to \$150,000
    - Spouse gets one-half of remainder, regardless of the number of children; children receive the other one-half equally
    - Spouse has right to “spousal home”- spouse has right to buy home out of his or her share
  - Right to bring a claim under the WESA to vary the Will



## Variation Rights- WESA

“Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court’s opinion, make adequate provision for the proper maintenance and support of the will-maker’s spouse or children, the court may, in its discretion, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker’s estate for the spouse or children.”

## If the Person is not a Spouse

- The Person has no rights under the WESA
  - No rights on intestacy- if there is no Will
  - No rights to vary the Will
  - If named in the Will as an executor or beneficiary, deemed to have predeceased- therefore no rights under the Will
- All the Person's rights are under the *Family Law Act*



## **Recent Case- June 2017**

Connor Estate- *2017 BCSC 978*



## **U.S. executors, attorneys and beneficiaries**



## U.S. executors, attorneys and beneficiaries

- Issues with US persons as executors and attorneys for Canadian assets
  - Convenience & accessibility - availability to carry out day-to-day requirements (pay bills, sign documents, visit bank, etc.)
  - More complex issues:
    - If grantor or deceased has securities in a Canadian investment portfolio, the advisor cannot take instructions from a U.S. attorney, unless properly licensed by U.S. regulators
      - Federal plus state-specific registration
  - If U.S. attorney has “signing authority” over Canadian accounts, reporting requirements under the *Bank Secrecy Act* apply

## **U.S. Persons as Attorneys for Canadian Assets – Solutions**

- Use separate, concurrent powers for U.S. and Canadian assets
- Appoint joint Canadian-resident and U.S.-resident attorneys
- Give Canadian-resident attorney power to perform certain financial decisions and functions when instructions can only be given by Canadian resident
- Give Canadian-resident attorney sole signing authority
- Consider a corporate attorney with a presence in the relevant jurisdictions



## US Person as Executor of Canadian Estate

- All estates are trusts
- Residence of a trust determines:
  - If trust is subject to tax on its worldwide income or only on its Canadian source income
  - In which province the trust is subject to provincial tax
  - Tax return and reporting obligations
- Residence is a question of fact determined according to the common law
  - Residence of trustee(s) only one factor
  - “Central management and control” test



## U.S. Person as Executor of Canadian Estate

- Why does it matter?
  - Rollover of capital property to a spousal trust applies only if the property is transferred to a Canadian-resident trust
  - Flow-through of the source of income applies only to a Canadian-resident trust
  - In order to make a preferred beneficiary election, both the trust and beneficiary must be Canadian-resident
  - Section 116 imposes withholding tax on the sale of certain of property by non-residents
  - “Departure tax” payable upon ceasing to be resident in Canada

## U.S. Beneficiaries

- Should seek cross border advice to determine the best way to provide for persons who are or are likely to become US Persons
- Is the beneficiary living in the US a “US Person”?
- If so, they may be subject to US estate tax on their estates based on the value of their world wide assets at death.
- Tax is payable if the value of the worldwide estate exceeds \$5.49 million USD for 2017
- If the anticipated exposure to the US Person’s estate exceeds the amount that can be sheltered, consider setting up a bypass trust under your will for their benefit in order to protect the assets they inherit from US estate tax
- Beware of gift tax on gifts to US Persons



# Update on Family Law Considerations





## Update on Family Law Considerations

- *Family Law Act*- March 18, 2013
- Family property (which is split 50/50) is
  - all property that either spouse owns on the day they separate
  - that does not qualify as “excluded” property; and
  - property acquired after the date of separation derived from family property



## Excluded Property

- Property owned by a spouse before the relationship began
- Gifts and inheritances
- Settlement and damage awards from tort claims
- Non-property related insurance proceeds
- Property referred to above that is held in trust for a spouse
- Property traceable back to excluded property



## When to Divide Excluded Property

- When it increases in value during the relationship  
– then the increase is divided
- If family property/debt located out of BC can't practically be divided
- It would be significantly unfair not to divide excluded property on consideration of:
  - the duration of the relationship, and
  - a spouse's direct contribution to the preservation, improvement, operation or management of excluded property



## Keeping Excluded Property “Excluded”

- What happens if you come to an relationship with “excluded property” and use it to buy a joint asset, like a house
- *K.R. v J.D.* (2017)- if a spouse contributed excluded property, which can be proven and traced, to a jointly owned family home, the amount of money they contributed remains excluded property



## Keeping Excluded Property “Excluded”

- Therefore, you need evidence that it was excluded property and evidence that you put it into the home
- V.J.F. v S.K.W. (2016)- if family home is registered only in spouse’s name, court might find that the excluded property you contributed is a gift to the spouse. As a result, home is not excluded property and is split equally.



# New Planning to Avoid BC Probate Fees





## Probate Fees- Multiple Wills Strategy

- Technique for probate fee avoidance.
- Not all assets require a probate grant for transmission to a beneficiary.
- Real estate, accounts at financial institutions (e.g. bank and brokerage accounts) will require probate.
- Shares in a closely held company, articles such as art often do not require probate



- Strategy is to create a general will which deals with assets requiring probate and a restricted will that deals with assets that do not require probate.
- Save probate fees on the assets in the restricted will.
- Need different executors for the wills.
- Can be complex. Need to consider advantages/disadvantages.



# Review the Estate Plan Regularly

- At every major life event:
  - Relationship – marriage or common law
  - Breakdown of relationship – separation or divorce
  - Births in family
  - Death in family
  - Marriages in the family
  - Increase in assets
  - New assets
  - Inheritances
- Recommend that client reviews at least every 3 years.



# Questions?

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