

Wills & Estates

National Association of Federal Retirees

January 15, 2025

Keith Sabey

keith.sabey@sabeyrule.ca

Megan Vu

m.vu@sabeyrule.ca

Legal Disclaimer

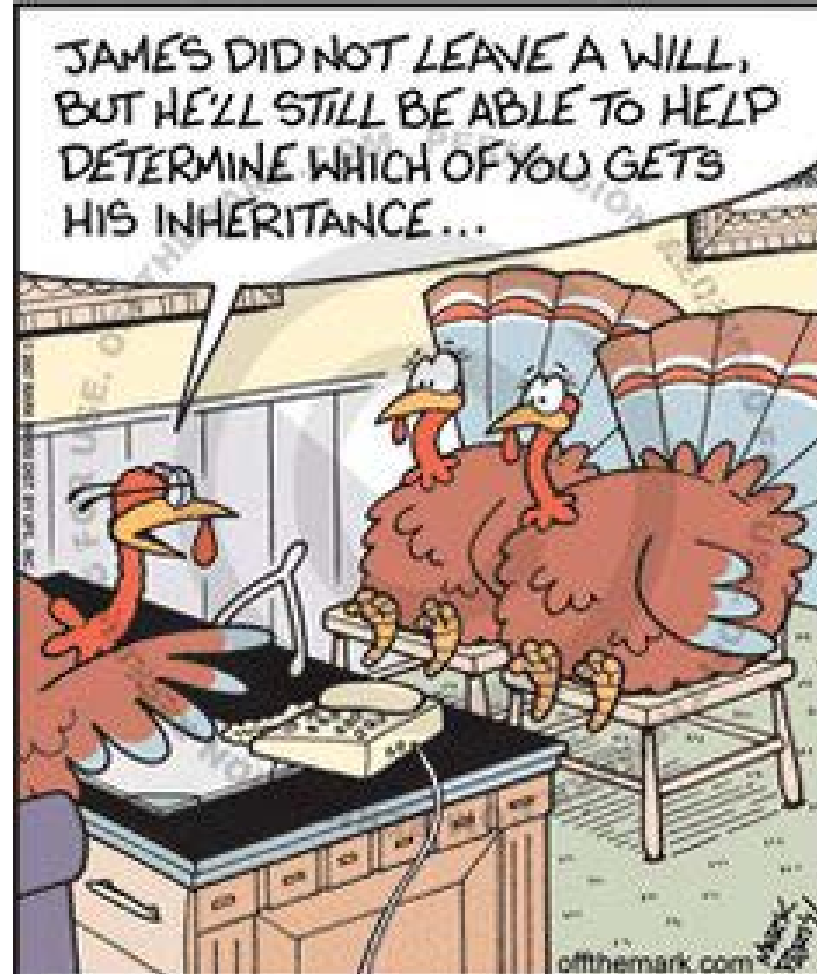
The information in our presentation is provided for **informational purposes only** and does **not constitute legal advice**. If you need legal help, contact a lawyer.

Agenda

- Common Estate Planning Documents
- Jointures/Beneficiary Designations
- Medical Assistance in Dying (MAID)

Common Estate Planning Documents

off the mark.com by Mark Parisi

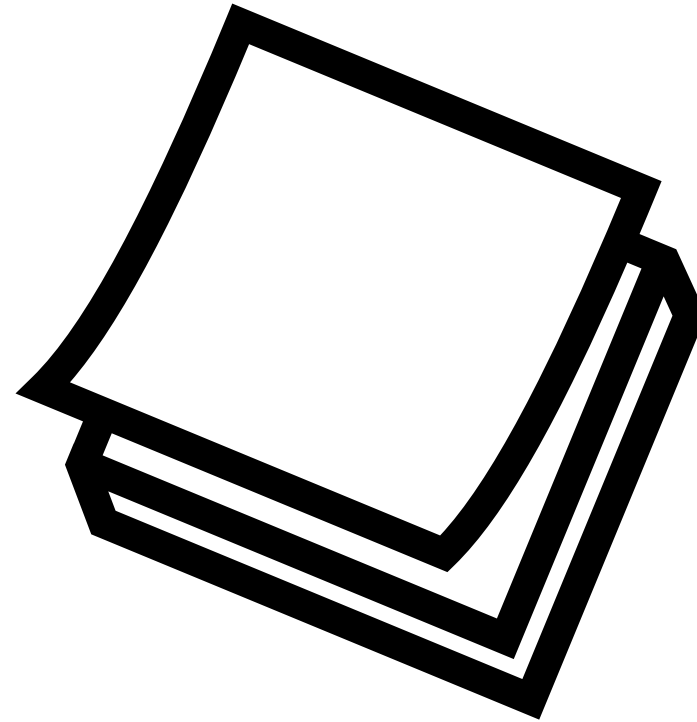


Why have an estate plan?

- 56% of Canadians aged 55 years and older do not have an estate plan in place
- Estate planning allows you to organize your financial and personal affairs to ensure your wishes are fulfilled both during your lifetime and upon your passing

Common Estate Planning Documents

- Will
- Power of Attorney
- Representation Agreement



Will

- Legal document detailing how your assets should be distributed upon your death
- Without a Will, the distribution of your assets will be determined by provincial laws, which may not reflect your wishes
- Without a Will, your administrator may lack certain important trustee powers such as the ability to retain real property without selling it, i.e. use as a rental during a down market, manage funds for minors or mentally incapacitated persons, etc.

Formal Requirements for a Valid Will

- A valid will must be:
 - a) In writing,
 - b) Signed by the will-maker in front of at least 2 witnesses at the same time, and
 - c) Signed by the 2 witnesses in front of the will-maker
- In BC, ability for courts to cure non-compliant wills

Capacity Requirement for a Valid Will

“I became insane, with long intervals of horrible sanity.”

— Edgar Allan Poe

Capacity Requirement for a Valid Will

- To have capacity, you must:
 - a) understand the act of making a will and its effects;
 - b) understand the nature and extent of your property;
 - c) appreciate who would naturally expect to inherit from your estate; and
 - d) not have any delusions that can influence your decision of making a will

What can you do in your Will?

- Appoint an executor to wind up your affairs
 - Funeral
 - Taxes
 - Collect assets
 - Pay debts
 - Distribute your estate
- Guardianship – if you have minor children
- Set out distribution of your estate

Undue Influence

- Consists of imposing **pressure** that causes someone to perform a legally significant act, such as making a will, that does not reflect the genuine wishes or intentions of that person but rather those of the influencer
- If someone is unduly influenced into making a will, all or part of the will can be set aside

Wills Variation in BC

“Where there’s a Will, I want to be in it”

Wills Variation in BC

- If your will does not adequately provide for your spouse or your child, they can apply to the court to vary your will
- Child includes adopted children, independent adult children, but does not include step-children
- Spouse includes being
 - a) Married to each other, or
 - b) Having lived with each other in a marriage-like relationship for at least 2 years

Enduring Power of Attorney

- Legal document that allows you to appoint someone to look after your **finances**
 - Attorney does not have authority to make personal or health decisions
- Often includes powers to sell your assets or invest your funds
- Usually effective on signing, but intended for management of finances if you become incapable

Requirements for Enduring Power of Attorney

- To be valid, it must be in writing and signed and dated by
 - The adult in the presence of 2 witnesses, and
 - Both witnesses in the presence of an adult
- Only one witness is required if witness is a BC lawyer or notary
- If the Power of Attorney is to be used for dealing with real estate, it must be witnessed by a BC lawyer or notary

Capacity for Enduring Power of Attorney

- To have capacity, you must understand:
 - The property you have and its approximate value;
 - The obligations you owe to your dependents;
 - That your attorney will be able to do anything on your behalf relating to your financial affairs;
 - The value of your business and property may decline;
 - That your attorney might misuse their authority; and
 - That you can revoke your POA if you are capable

Who can be an attorney?

- An individual, other than someone who is
 - a paid caregiver, or
 - an employee of a facility where the adult lives and receives care
- However, there is an exception for a child, parent or spouse of the adult
- Make sure it is someone you trust

*“Trust everybody, but cut the cards.” — Finley
Peter Dunne*

Duties of an Attorney

“Every one suspects himself of at least one of the cardinal virtues, and this is mine:

I am one of the few honest people that I have ever known.”

— F. Scott Fitzgerald, The Great Gatsby.

Duties of an Attorney

- Legal duty to:
 - Act honestly and in good faith
 - Act in your best interests, taking into account your current wishes when managing your financial affairs and making financial decisions
 - Keep records and produce them for inspection at your request

Representation Agreement

- Legal document that allows you to appoint someone to look after your **personal and health care** decisions
- 2 kinds
 - Section 9: requires higher capacity, wider authority of decision-making (includes end of life decisions)
 - Section 7: requires lower capacity, lower authority such as routine financial and personal decision-making

Representation Agreement

- Allows representative to make personal and health care decisions if you become incapable
 - Where will you live?
 - Who will be your doctor?
 - Should you get a specific operation?
- May include provisions allowing you to select someone who will decide to terminate life support and/or refuse health care

Importance of a POA and RA

- Avoids an expensive committee application (like adult guardianship) to the court if you become incapable
- Ensures your financial, personal and health care affairs are managed by someone you trust and who has your best interests in mind
- Without these documents in place, your loved ones do not automatically have legal authority to manage your affairs

Joint Assets: Accounts, Real Property & Beneficiary Designations

Joint Assets

- Two main ways people can own an asset
 - Tenants in common
 - Joint tenancy
- Most bank and investment accounts with two or more people are joint accounts
 - Right of survivorship
 - Avoid probate fees

Caution

- In most cases, the law is that if one person contributed all of the funds gratuitously, there is a presumption that the other holds the funds on the death of the contributor in **trust** for the estate of the contributor
- Can create an estate litigation dispute
 - Evidence is uncertain, can lead to massive legal fees and family conflict



Example – joint account (*Campbell Estate*, 2022 BCSC)

- Mom had 3 children: Ivan, Arnold and Karen
- 6 months before her death, she gratuitously added Ivan to three bank accounts, and Arnold to another bank account
- Karen claimed the funds Ivan withdrew were held in trust for the estate, the brothers claim mom intended to gift the funds
- Court concluded the funds were held in trust, no evidence the mother intended a gift

Example – real property

- Mom transfers house into joint tenancy with 1 of her 3 children
- Similar problems to joint account
- Can create additional problems
 - Claim by child's creditors
 - Need child's signature to sell the house, may breach mortgage terms, issues refinancing, how to remove child in cases of estrangement, etc.
 - Potential tax issues

Example – Beneficiary designations (*Simard Estate*, 2021 BCSC)

- Mom puts one of her children as beneficiary of her Registered Retirement Income Funds (RRIFs) and Tax-Free Savings Account (TFSA)
- Other children sued the mother’s estate, saying that their sibling was not entitled to the whole RRIF and TFSA, but held in trust for their mother’s estate
- Court concluded the sibling held funds in trust for their mom’s estate
 - Insufficient evidence of her mother’s intention to make a gift

Medical Assistance in Dying (MAID)

Medical Assistance in Dying (MAID)

- MAID is a legal, end-of-life care option in which a MAID provider, doctor or nurse practitioner (NP), helps an eligible person, to voluntarily and intentionally end their life
- Legislated in the Criminal Code in 2016

MAID Eligibility Requirements

1. Eligible for publicly funded health services in Canada;
2. Be at least 18 years old and capable of making decisions about your health;
3. Made a voluntary request for MAID, without any pressure;
4. Give informed consent after being informed of ways to relieve your suffering;
5. Have a grievous and irremediable medical condition.

5) Grievous and irremediable medical condition

- Requirements:
 1. Diagnosed with a serious and incurable illness, disease or disability;
 - a) Currently does not include mental illness
 2. Condition is in advanced state of decline that cannot be reversed;
 3. That illness, disease or disability causes enduring physical or psychological suffering that is intolerable and cannot be relieved under conditions that you consider acceptable

2 Pathways to MAID

1. Natural Death is Reasonably Foreseeable
 - Example - terminal cancer
2. Natural Death is **Not** Reasonably Foreseeable
 - Additional safeguards apply
 - Example - workplace accident that causes chronic pain

Additional Requirements to Receive MAID

1. Person must give consent (not alternate decision-maker or advance directive)
2. Request must be made in writing and signed and dated in front of an independent witness, who must also sign and date the request
3. 2 independent doctors or NPs must assess person to confirm eligibility
4. Person must have opportunity to withdraw during MAID process
 1. Immediately before receiving MAID; and
 2. Must give express consent to receive MAID

Exception to Final Consent - Natural Death is Reasonably Foreseeable

- MAID can be provided if someone has lost all ability to provide final consent if:
 1. Person met all other required eligibility;
 2. Person was informed of the risk of losing capacity to consent and before losing capacity to consent, entered into written agreement that **specifies date** for MAID to be provided;
 - a) In the written agreement, they consent to the administration of MAID on that date
 3. Person lost capacity and does not demonstrate any words, sounds or gestures to resist MAID

Natural Death is Not Reasonably Foreseeable

- Similar requirements, but the differences are:
 - Out of the two independent doctors or NPs assessing the person, one must have **expertise** in that person's illness, disease or disability
 - If neither have it – one must consult with a doctor or NP with that expertise
 - Assessors must ensure all reasonable means available to relieve the person's suffering have been discussed and person gives serious consideration
 - Person must be given a period of reflection of at least **90 days** from date of first eligibility assessment to date MAID is provided, unless risk of losing ability to consent, can have shorter period

Further Information About MAID

- For more information, you can go to the BC Ministry's Health Website: <https://www2.gov.bc.ca/gov/content/health/accessing-health-care/home-community-care/care-options-and-cost/end-of-life-care/medical-assistance-in-dying>
- Talk to your doctor or nurse practitioner to discuss your options or to help you find someone who can help

Questions?

THANK YOU

We hope this presentation has provided useful information about estate planning. If you would like to discuss your specific legal needs, contact us!