

Death and Incapacity Issues for Same-Sex Couples

DISCLAIMER: The information provided in this document is provided as general legal information only and is not intended to be or replace legal advice. The law with respect to wills varies from area to area. If you live outside the Province of British Columbia you should consult a lawyer in your area for specific information about the legal requirements for a will and documents planning for incapacity. Each person's situation is different and a lawyer should be consulted when preparing documents.

A will is one of the most important legal documents which you can have prepared. Your will is your opportunity to determine who will be entitled to inherit your property when you die and who will be entitled to carry out your wishes in the distribution of that property. People in same-sex relationships should take special care when preparing their wills because, although there appears to have been significant advances in the law in the recognition of same-sex relationships, those advances still do not encompass the rules which apply to the distribution of your property when you die. In British Columbia, if a person dies without a will the law will only recognize a same sex partner if they were legally married to the deceased or living with the deceased in a marriage-like relationship for a minimum of two years prior to the deceased's death.

CONSIDERATIONS AND STEPS IN PREPARING A WILL:

There are some essential things you should consider when preparing to give instructions for the drafting of your will. Your particular circumstances may mean that there are additional issues you should put your mind to as well, for example, income tax implications.

1. The state of the law changes from time to time.

You should approach the writing of your will as though it is something that will need to be revised from time to time. It should also be reviewed occasionally in order to ensure that the provisions it contains are still valid under the law and meet your personal needs.

2. Choose Your Executor.

The Executor of your will and Trustee of your estate is the person who is responsible to make sure that the provisions of your will are carried out. Your Executor and Trustee will usually be the same person. Your Executor/Trustee will often be the person to whom you are leaving the bulk of your property - but the person you choose should be someone that you trust to carry out the wishes expressed in your will and who will have the financial resources to be able to pay probate fees (approximately 1.6% of the total value of your estate) to the Court in order to probate your will. Always be sure that the person you wish to name as Executor/Trustee is willing to act in that capacity and have an alternate Executor/Trustee in mind who will be able to act if the first person you have considered is unable or unwilling to carry out the responsibilities involved when the time comes.

3. Make an inventory of your property.

Generally estimate the value of your property including: real estate; vehicles; bank accounts; investments; valuable antiques; collections; art work and the like. You can update this as necessary and inform your Executor where it is kept.

4. Review your insurance policies, pensions, and RSPs to confirm whether you have designated a beneficiary.

Any asset that has a designated beneficiary goes directly to that person on your death and does not become part of your estate. This is also true of any asset that is jointly shared with another person with a right of survivorship such as a bank account, motor vehicle or real property.

5. Think about whether you would like to give any particular items to particular friends or relatives.

If you include instructions about these items in your will, you will need to revise your will every time you change your mind about these items. You may consider whether you could leave a general provision for all of your household effects and personal items to go to one person who you can trust to follow your written suggestions about the distribution of these items.

6. Think about to whom you would want your property to go in the event of your death.

Also consider to whom your property should go in the event that your spouse or partner has died before (or at the same time as) you or the other the people you would first like to get your property do not survive you. If you want to give your property to more than one person, think about the proportion which you would like each person to get.

7. If you have children, consider who should be their guardian when you die.

Make sure you ask potential guardian whether they would take on that role and also think of "back-up" guardians should something happen and your first choice is not able to take on that role.

8. Always bear in mind that there are certain people to whom you must leave some of your property.

You cannot easily disinherit your children or your legal spouse. In some circumstances, a parent who is financially dependent on you for support may also have a claim on your estate.

ATTACKS ON WILLS:

1. Family members or other people may attack the validity of your will if there is suspicion (or allegation) that:

1. *The document is not valid for technical reasons;*
2. *you did not have the mental capacity to write a will;*

3. *someone exerted an undue influence over you in order to get you to write your will the way you did; or*
4. *there were other "suspicious circumstances" surrounding the preparation and signing of your will.*

If you have concerns that someone may challenge your will after you have died, you need to consult a lawyer regarding strategies to protect your will from such attacks.

PROTECTING YOUR PARTNER'S POSITION FROM ATTACKS BY FAMILY MEMBERS AND OTHERS:

1. **Be "Out" - Make sure that your family and the people around you know that you have a partner and not just a "friend" or "room-mate".**
2. **Once your will is completed, keep a letter along with it explaining that your will represents your true wishes and why - this letter may be valuable evidence in the event someone challenges your will's validity after you have died.**
3. **Where appropriate and practical, have ownership of any bank accounts and property registered jointly with your partner. This helps establish the nature of your relationship.**

OTHER DOCUMENTS WHICH HELP IN SITUATIONS OF INCAPACITY:

All of the documents listed below only apply to British Columbia.

1. Powers of Attorney

To give your partner the right to deal with your property, you may wish to grant a power of attorney. Appointing your partner as your attorney gives your partner broad powers to deal with your property and should be used cautiously. Even if you have a representation agreement (see below) that covers financial decisions in addition to medical decisions, you may still want to have a power of attorney.

2. Nomination of Committee

A Nomination of Committee designates the person you would want to be your "legal guardian" in the situation where you are no longer mentally capable of making decisions for yourself. You must be mentally competent at the time you sign a Nomination of Committee. If you did not prepare a Nomination of Committee while you were competent, the court will generally appoint your next of kin as committee. The appointment of a committee will also revoke any pre-existing power of attorney. According to the *Patients Property Act*, if you have nominated your partner to be your committee, the Court must appoint your partner to be your "guardian" unless good reason can be shown to the Court why your partner should not be appointed. If you have signed a Nomination of Committee and you later have an extended period of incapacity, your partner may apply to the Court to become your Committee ("guardian"). This will give your partner over your property. Your Committee acts under the occasional supervision of the Public Trustee of the Province of British Columbia.

2. Representation Agreement

Under the *Representation Agreement Act*, you can appoint someone as your legal representative to handle your personal and health decisions, in addition to your financial and legal decisions, if you are unable to make your own decisions.

A representation agreement creates a contract between you and your representative and it imposes a standard of care on your representative. In general, to ensure that your representative lives up to his or her duties, the agreement must either name another person as a monitor, or state that a monitor is not required.

There are two types of representation agreements. One is a Section 7 agreement, to cover straightforward, everyday decisions. The other is a Section 9 enhanced agreement, to deal with land and complex legal and health matters. The law says you must consult a lawyer to make a Section 9 agreement, but you should actually see a lawyer for both agreements.

The lawyers at Smith & Hughes have extensive experience with the preparation of wills and providing advice to clients who wish to have a will, representation agreement, power of attorney, or nomination of committee prepared. You can contact us by e-mail and we will send you a document instruction questionnaire to complete.

Rob Hughes

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