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Separated? Remarried? Living with Someone New?

Are your Personal Planning documents up to date? Recent changes to family and estate planning laws make it more important than ever to take a few simple legal steps when your marital status changes.

Create/Update your Planning Documents

Estate planning sorts out who will help you with your affairs if you are sick and who gets your things when you die. When your marital status changes, ask your Notary to go through your existing personal planning documents to see what you need to create, replace, or update.

As with everything else legal, don't assume anything. You and your family may be unpleasantly surprised about what happens if you have not made the necessary estate planning documents.

As well, outsiders have no way of knowing what you want unless you (and they) have the documentation to prove it.

Making estate planning documents like the ones set out below will help ensure your wishes are carried out and will minimize family strife.

Your Will

A Will sets out what to do with your assets on your death. It also appoints executors and guardians to help carry out your wishes.

If your marital status changes, it is very important for you to update your Will.

Appointing guardians for your children is an incredibly emotional and difficult decision. It's so difficult that many parents simply ignore it and hope their family will sort it out later.

Match Your Will to Your Marriage Contract and Separation Agreement

Your Will should reflect the terms of any agreement you have with your spouse.

For example, if your separation agreement says you and your spouse will name each other as successor guardians of your children on your deaths, you should confirm that in your Will. You may also need to add directions for your executor about child and spousal support and the division of your family assets.

If you originally left the residue of your estate to your spouse, who gets your estate after you have separated? Your children? Your other family members? Do you need to delete any gifts you previously designated for your spouse's family members?

If the Will you made before you separated appointed your spouse as your executor or gave him a gift, then your Will is to be read as though your spouse has predeceased you—he or she cannot act as your executor and will not receive the gift.

Neither will those gifts and appointments be valid if you and your spouse get back together. Once the gifts and appointments are revoked, they are gone forever.

Choosing Guardians

Appointing guardians for your children is an incredibly emotional and difficult decision. It's so difficult that many parents simply ignore it and hope their family will sort it out later.

Ignoring it is incredibly dangerous for your children. So is making assumptions about who can care for your children if you get sick or die.

If you haven't appointed guardians, under the *Child, Family and Community Services Act*, the Director of Family Services will automatically become the guardian for your children and the Public Guardian and Trustee will manage your estate for your children.

- **Unless you appoint a guardian, the BC Government—not your family—is responsible for the care of your children.**

If you do not specify a guardian, any family member who wants to act as guardian of your children must apply to Court for an order appointing him or her as guardian. That could cost between $2000 and $5000.

If multiple family members are fighting over who should be guardians or there are concerns that your children would not be safe in the home of one of your relatives, your children may spend some time in foster care while the Court decides who will be appointed as guardian. If your children are very young or your family disagrees about who should be a guardian, the expense for the Court application could go up to $10,000 or more.

So who pays for the Court application? The family member that wants to act as guardian for your children would have to pay for the application, with possible reimbursement from your estate if the Judge orders it. If the Judge disagrees that that person should be the guardian, someone else will have to apply. The initial money and time will have been wasted and your child could still be living in foster care. That can all easily be avoided by specifying a guardian now.

It's possible the Director will allow your child to live with a family member while things are being sorted out, but the Director must consider the best interests of the child. The Director can't simply assume your mother is the right person for the job. If your child is old enough, his or her wishes must also be taken into account.

Here are some simple tips for selecting a guardian.

Pick the Perfect Guardian for Today

- Pick the person who would be great for your kids *right now*—not 2 years from now, not 5 years. Choose someone who has the same values you do.
- Ask that person if he or she would act as guardian for your children.
- If the answer is Yes, don't hesitate. Call your Notary and get the process started.

For example, if your kids are very young and your parents would be a great choice to raise them right now, then appoint your parents—assuming that they are willing to take on that role. Don't worry that your parents could get sick, they might die, or they might retire and spend 6 months of the year on the beach in Mexico. If any of those things happen, you can change your Will and appoint a new guardian.

Note: If your parents do end up acting as guardians for your kids, they can—and are encouraged to—name an alternate guardian in case they become ill.

If you do not specify a guardian, any family member who wants to act as guardian of your children must apply to Court for an order appointing him or her as guardian. That could cost between $2000 and $5000.

You can change your Will any time you want to, assuming you are still capable. Your Notary will visit with you to make certain your capacity meets the requirements of the Act and whether there have been any significant changes in your family, assets, or liabilities.

We recommend that most people review their Wills every 5 years and when major life events have happened. If your children are under 10, we strongly suggest you review your Will every 2 to 4 years, to adjust for changes or special needs in your children's lives as they grow up.

Don't Expect the Guardian to Pay to Raise Your Child

Guardians are responsible for the care and upbringing of your children but they are not obligated to pay to do it out of their own pocket. Usually, people ask their Notary to leave their estate to their children in their Will, to be held in trust for them while they are minors.

Your executor will manage the money in your estate according to the terms you set out in your Will and will work out a plan with the guardian about how much money is needed for what. If you don't have a lot of assets to put aside for your children right now, ask an independent insurance broker about getting a life insurance policy that names your children or your estate as beneficiaries.

Your Power of Attorney

A Power of Attorney names someone to help you with your financial affairs while you are alive—paying your bills, possibly selling assets, and so on.

If your Power of Attorney named your spouse as your attorney and you are separated, that appointment ends unless you have specifically said, in writing, in the Power of Attorney document, that your ex-spouse can continue to act for you.

If you have named an alternate attorney in that Power of Attorney, that alternate may be able to act in lieu of your spouse, but when the alternate wants to use the Power of Attorney, he or she may have to provide proof that your spousal relationship has ended. That can be awkward and difficult.

If you never actually get divorced, how will your alternate attorney prove you and your spouse are separated? It would be simpler to make a new Power of Attorney that doesn't reference your spouse at all.

Never assume that banks or other asset-holders or advisors will know you are separated and that they should no longer honour your Power of Attorney to your spouse.

You don't want your former spouse showing up at the investment firm and using that Power of Attorney to clear out your accounts. Just ripping up your Power of Attorney is not enough. There are a few things you need to do to cancel your Power of Attorney, to make sure it can't ever be used.

Examples

- Send written notice of the cancellation to your spouse and any asset-holders to whom you have given a copy of the Power

of Attorney. This notice must be in a special format.

- Ask for the original and any copies of the document to be returned to you for shredding.

Consider whom you will appoint in your new Power of Attorney instead of your former spouse. If you have minor children, ensure that your new Power of Attorney gives the new attorney the powers needed to ensure that child and spousal support are paid according to the terms of any separation agreement you might have.

Note: Your attorney cannot use your money for someone else's benefit without written permission to do so in the Power of Attorney document itself.

- Without a Power of Attorney your spouse cannot sign legal documents for you or deal with your assets. Just because you are married to someone doesn't give that person the right to deal with your affairs if you are incapable.
- Without a Power of Attorney, you must get a Court Order that will allow you to take care of your spouse's affairs. For example, if your spouse has a stroke and you need to sell your jointly owned home, you can't do it unless you can produce a Power of Attorney from your spouse that you can use at the Land Title Office.

Your Representation Agreement for Personal and Health Care

A Representation Agreement for health care—sometimes called a "Section 9 Representation Agreement"—appoints people to make personal care and health care decisions for you.

If you don't have a valid Representation Agreement for health care, then your health care providers will make the decisions about what to do for your care if you cannot speak for yourself. That may not be what you want at all, especially if you have strong or specific beliefs about how your care and treatment should be carried out.

Your representative is a key person in your life. His or her job is to act to follow the wishes you made known while capable and to act in your best interests. That could mean overriding your instructions if you are making bad decisions because you are not capable anymore.

If you don't have a valid Representation Agreement for health care, then your health care providers will make the decisions about what to do for your care if you cannot speak for yourself.

Personal care involves your daily activities. Appointing someone to deal with your personal care means that individual can help you make decisions about things such as these.

- Whether you continue to work after you are sick
  - Do you keep your job as a manager if you can no longer handle it?
  - If you still need to work, do you take a different job, perhaps part-time or less onerous?
- How your dietary needs should be met
  - Is the hospital giving you macaroni and cheese every night when you are lactose-intolerant?
  - Who makes sure alcohol doesn't interfere with your medications?
- How you get around
  - Should you give up your driver's licence?
  - How will you get to your appointments?
- Where you live and with whom
  - Do your kids still get to live with you?
  - Is it time to move into a care home?
  - If you need short-term care (like rehab, after a broken hip), where should you go for that?
  - Should you move in with your daughter, so she can care for you?

The person you appoint to help you with **health care** gets a wide range of powers, such as the ability to

- consult with your health care providers about your illness to learn their recommendations for your care;
- decide which treatments (including medicines, operations, or support care) would be best for your illness;
- arrange appointments for routine health care (dental checkups, annual physicals);
- ensure that your treatment plan reflects your wishes and any cultural or religious needs;
- arrange diagnostic or investigative tests (colonoscopies, MRIs, CT scans) to determine what is wrong with you;
- arrange ongoing treatments for long-term illnesses (dialysis for diabetes or chemotherapy or radiation for cancers); and
- decide about end-life support, if you are truly in an end-of-life situation and will not recover.

Appointing a representative means you have someone who can authoritatively speak for you when you cannot speak for yourself about your personal care and health care.

You must update your **Representation Agreement** when your marital status changes.

If you are separated, your appointment of your spouse ends. In some cases, your entire Representation Agreement could be terminated and you could be left with no one authorized to make decisions for you.

If you have a new spouse, that spouse may not automatically have the rights you want him or her to have about your personal care or health care.

Beneficiary Designations

Carefully review any life insurance policies, pensions, RRSPs, RRIFs, RESPs, tax-free savings accounts, or other accounts where your spouse is a designated beneficiary. Just because you are separated does not automatically mean those

Review your legal documents regularly so you know your affairs are still in order and that your wishes will be honoured.

designations come to an end. Your former spouse could still get all the proceeds under those accounts unless you change the designated beneficiaries for those plans.

If you made a designation in your Will about a policy, you need to update your Will and notify your insurance company.

Ask for Help

Every family is different. While you may be able to do much of this on your own, don't hesitate to ask for help. If legal issues intimidate or confuse you or you think your situation is super-complicated, ask your Notary for guidance or to help you with many of the issues. Your Notary will always refer you to an appropriate specialist for any extra help you need, such as writing a separation agreement or getting a life insurance policy.

Review your legal documents regularly so you know your affairs are still in order and that your wishes will be honoured.

Yes, keeping your legal affairs in order on a regular basis will cost you some money, but it will cost you far less than it will cost your family to deal with your affairs if you are sick or you have died. They will end up spending their money and time on things that are really your responsibility.

This article is for general information only and does not constitute legal advice.

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