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## **A Mariner's Last Will – How Not to Turn in Your Grave**

Mariners at sea, and military servicemen on a mission, are the only two types of people that can swear a valid will without witnesses being present. Mariners and military servicemen are also the only two types of people that can swear a will when they are under the age of nineteen. There are obvious reasons for this unique treatment provided by the B.C. *Wills Act* - both professions can take their victims quickly, in remote areas, and at a young age, and the law acknowledges these enhanced risks with special privileges not given to other citizens who wish to swear a will.

### **Why a Will?**

A proper will is your chance to ensure what is important to you is taken care of – it is your instructions on how to distribute your property after you die. Smart estate planning can help you avoid taxes, and avoid people other than the tax-man getting what you don't want them to have. Despite the importance and usefulness of a will, only half of all Canadians have a will.

### **Surprising Consequence of Not Having a Will**

The importance of having a will is often talked about, but far less often acted on. The consequences of not having one can be surprising. In B.C. the *Estate Administration Act* (“*ESA*”) dictates what will happen to your assets should you die without a will. For example, the *ESA* provides that if you die within one year of being separated from your spouse (someone you were married to or lived with for 2 or more years, such as a girlfriend), that person is entitled to all of your estate if you have no children. If your estate is worth more than \$65,000, that spouse, now an “ex”, receives the first \$65,000 and half of the rest of your estate if you have one child, or \$65,000 and one-third of the rest of your estate if you have more than one child. That your wife or girlfriend might leave you for the neighbor, and then end up getting all your money when you die 11 months later, with none going to your children, siblings or parents, could be an unsettling reality of not having a current will.

### **The Guts of a Will**

The contents of a will are fairly simple. The person whose will it is, is the “testator” (if male), or “testatrix” (if female). A will typically starts by naming a person who takes control of your estate after you die. That person is called an “executor” (if male), or an “executrix” (if female). Naming a second, or back-up, executor is a good idea in case the first one is unwilling, or unable to act. If you do not name an executor, the provincial government (Public Trustee) becomes the executor. The will then typically states all of your property is held “in trust” by the

executor for the benefit of those named in the will, being the "beneficiaries". This provision puts the executor in a position of legal trust that requires them to carry out your wishes according to the will. If the executor does not carry out your wishes according to the will, they can be sued by the beneficiaries of the will.

The will typically then requires the executor to locate and liquidate all your assets, and identify and pay off all your debts. Some assets, such as personal items or cash amounts, might be given to a particular person; for example: "I want Darren Williams to have my antique binnacle". Once personal items are gifted to specific people, and all the remaining assets are liquidated to cash, the will often provides that the remaining cash, called the "residue", is to be divided amongst certain named people. The will might delay the gifting of these amounts until, for example, the beneficiary reaches the age of majority or an older age when they might be more responsible to manage the monies. The will often ends with wishes about how your remains are to be treated, for example: "I wish my ashes to be scattered at sea".

Most wills must be signed by the testator, and witnessed by at least two people (the exception being mariners at sea and military servicemen on duty). Preferably, the witnesses should be people that are not receiving gifts under the will, because sometimes the validity of a will is challenged by saying the testator was influenced by a witness who stood to gain from the will. Technically, a will does not have to be signed by the testator, but can be signed by someone in the testator's presence and at their direction; presumably this would be necessary because the testator has lost the ability to sign their name. Because a testator must have the mental capacity to sign a will (understand what they are signing), their inability to sign would not likely be due to brain injury or mental illness, but rather physical impairment such as the loss of limbs. Fortunately, it is rare that the testator cannot sign the will on their own behalf.

### **Challenges to a Will:**

Even though a will is correctly drafted and properly signed, it can be challenged by certain people who may not have been given part of the estate, or in their view, not given enough of the estate. The B.C. *Wills Variation Act* provides that if the will fails to "*make adequate provision for the proper maintenance and support of the testator's spouse or children*" the court may vary the will and divide the estate as it thinks fair. A spouse includes someone you were married to, or living with for more than 2 years, when you die. Remember from above that if you die without a will and the *Estate Administration Act* applies, a spouse includes someone you were living with for more than two years for up to a year after you no longer live together (such as your ex-girlfriend). "Children" includes adopted children, but not step-children. Spouses and children have 6 months after "probate" of the will is granted to file a law suit to vary the will if they think it is unfair. Probate is where the will is filed with the court and the court issues a document (called a "grant of probate") confirming the executor has authority to carry out the testators wishes.

### **The Lawyer-less Will:**

Although a mariner at sea can prepare their own will without a lawyer, doing so is like navigating by dead-reckoning, versus using GPS and radar; the latter is bound to result in fewer calamities. There are many reasons a will can be challenged and declared invalid if it is not prepared with some care and legal know-how. Many lawyers can take will instructions by phone or email, prepare the will and meet once in order to finalize and sign the will. However, because a will does not need to be witnessed by a lawyer or notary for it to be valid, it is possible, but not preferable, to have a lawyer draft your will and send it to you (for example by fax or email) for signature, and never meet with the lawyer in person. Given the remoteness of some mariner's work sites, this is sometimes necessary, and may be better than having no will at all. A will can cost as little as \$150, and as much as several thousand dollars, depending on the complexity of what you want to happen to your estate; but an average will should cost between \$200 and \$400.

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