

# WILLS & ESTATES

Tips and tools for First Nations clients

# Wills & Estates on Reserve

- Parliament of Canada (INAC) has exclusive jurisdiction in “all matters” to do with “Indians and land reserves for Indians” 91(24)
- The *Indian Act* (sections 42 to 50) and the *Indian Estates Regulations* say how to handle the affairs of a deceased First Nations person who lived on reserve.
- Provincial laws and customary laws (generally) do not apply

# The Will of an Indian living on reserve

- Section 42 (1) of *Indian Act* establishes that the Minister has exclusive jurisdiction and authority re: “matters and causes testamentary” pertaining to property of deceased Indians
- regardless of whether such Indian died with a will or died intestate (without).

# Jurisdiction & Authority

- Minister of INAC has jurisdiction and authority over “all matters and causes testamentary” the Minister can:
  - appoint executors of wills and administrators of estates;
  - authorize executors to carry out terms of a Will;
  - authorize administrators to deal with property of intestates;
  - carry out terms of wills and deal with property himself or herself;
  - make any order, direction or finding he or she feels necessary (ie: transferring estate to provincial court Queens Bench if appropriate)

# Ordinarily resident on reserve?

- INAC has established criteria and must have jurisdiction
- the deceased makes his or her home on reserve. A person may be considered ordinarily resident on reserve, even if they are away from the reserve for a while.
- Ex: deceased resided on reserve all of their life, they got elderly and moved into an off-reserve care facility, they would still be considered an ordinarily resident on reserve, even if they live in the care facility for many years.
- Ex: deceased who is away from home to attend school or do seasonal work is also still considered to be ordinarily resident on reserve.

# Courts may Deal

- Court may do anything the Minister can do with the Minister's consent or direction (Sec. 44)
- Minister also has the authority to transfer authority to a provincial superior court
- No enforcement or orders relating to land on reserve without the Minister's consent in writing.

# Form & Validity of a Will on Reserve

To be valid, a Will must:

- be in writing (can write your own or use forms from various sources)
- be signed by you;
- state your wishes with respect to disposing of at least one of your assets;
- state that it takes effect after your death.
- Governed by the *Indian Act*, not provincial legislation!
- “any testamentary instrument may do”
- Minister has greater supervisory discretion than ordinary Court

# Invalidity of a Will

The Minister may declare an Indian Will void in whole or in part when:

- Duress or undue influence
- Lack of testamentary capacity
- Imposition of hardship on those who testator had a responsibility to provide for
- Disposal of land contrary to the interests of the band or contrary to the *Indian Act*
- Vagueness, uncertainty or capriciousness/unpredictable
- Contrary to public interest (criminal, induces divorce, obstructs marriages etc.)

If declared void, equivalent of intestacy

If void in part, only relevant section(s) lapses



# General Tips

- Date your Will
- Have someone witness the signing of your Will - should be an adult(s) who is not mentioned in the Will.
- Do NOT have your spouse or someone mentioned in your Will (beneficiary) as a witness.
- Change and update your Will to ensure it is accurate and up-to-date.
- Hire a lawyer if necessary
- Put it in a safe place! (safety deposit box, lawyer's office, wills registry) —  
tell someone

# Possession of Lands on Reserve

- Did the deceased have lawful possession?
  - Prior occupation
  - Conduct of the parties
  - Certificate of Possession (CP)
  - Allocation by Band Council
- If Lawful possession, the interest can be transferred (s.24)
  - to the Band
  - to a member of the band
  - Minister must approve

# Inheriting Land on Reserve

- Intentions of the testator?
- Rules of intestate succession?
- No unqualified right to inherit
- The Minister has an overriding discretion to approve or disapprove transmission of an interest in reserve land (Sec. 49)

# Can a Non-Band Member Inherit an Interest in Reserve Land?

- Non-band member may be a beneficiary in a Will or an heir in intestacy
- Entitlement to reside on reserve cannot be acquired by inheriting a right to possess or occupy land on that reserve
- Interest in the land will be offered for sale to the highest bidder entitled to reside on reserve (almost never happens)
- Proceeds of sale are paid to the heir/beneficiary
- If no offer after six months, right reverts to the Band
- The Minister may pay the beneficiary/heir compensation for permanent improvements (extremely rare)

# Challenging or Appealing a Will

- The Minister's exercise of his discretionary powers with respect to Indian Wills and Estates is subject to judicial review in Federal Court
- An appellant has two months from the Minister's decision to issue a judicial review in Federal Court (sec. 47)
- Seek legal services/advice and act as soon as possible

# What happens when someone dies without a Will? (Intestacy)

When there is no Will the *Act* provides for distributing property

- Estate of \$75,000 or less goes to any “survivor” If estate exceeds \$75,000 the first \$75,000 goes to the survivor/spouse
- If no issue, remainder goes to the survivor
- If one child, one half to the remainder of the survivor
- If more than one child, one-third to the remainder goes to the survivor
- Where child dies leaving issue alive at the date of death, the survivor takes the same share as if child had been living

# Intestacy continued...

- Where children are not adequately provided for, Minister can redirect amounts from the survivor to the children
- If deceased occupied reserve lands, the Minister may direct that the survivor has the right to occupy those lands
- No survivor or issue, means the Estate goes to father and mother equally if living or to the surviving parent
- If no survivor, issue or parent, the Estate goes equally to brothers and sisters; children of a deceased brother or sister take their parent's share (per stirpes or per capita)
- If no survivor, issue, parent, sibling and no nieces or nephews, the Estate goes to the next of kin equally among those of equal degree of blood relation

# Estate Administration

- Minister appoints the Administrator of the Estate
- Administrator must take all the appropriate steps:
  - Properly safe guarding assets
  - Calling in all monies due or owing to the deceased
  - Carrying out the wishes of the deceased according to the will if there is one
  - Paying legitimate debts owed by the Estate and obtaining releases or receipts
  - Transfer of ownership of assets or security
  - Sell any real or personal assets



# Key points for Administration

1. **Notice of Death** (Minister receives Notice)
2. **Statement of Inventory** – Minister received itemized statement of inventory showing: Real and personal property; estimated value; debts or claims against the Estate; whether there is a will or not; names of beneficiaries
3. **Application for approval of Will and Executor** – Executor applies for approval of the Will (application for probate) includes value of estate and list of beneficiaries, contains Affidavit of executor confirming willingness to act, Original Will and application are sent to regional estates office for ministerial approval
4. **Letters of Administration** - If no will or will but no executor appointed, or willing and able to act – application for administration or administration with Will annexed to Regional's Estate office for ministerial approval

# Key points continued...

5. **Duties of Executor/Administrator** - Minister approves the will granting letters probate or appointing an administrator and granting letters of administration, Executor's actions are subject to oversight
6. **Tax Clearance Certificate** - Necessary even if the testator was not required to pay taxes or file tax returns
7. **Notice to Creditors** - Claims against the Estate must be filed with the Executor within eight weeks from notice of the death, Notice can be posted at the post office, agency office or other meeting places

# What about First Nations off-reserve?

- If the Will-maker was not ordinarily resident on reserve, the Will must be approved by the provincial Probate Registry
- Provincial law applies to the estate, not the *Indian Act* (CP exception)
- AANDC's written approval of a Will, and the documents given by Probate Registry do the same thing

# What happens if I don't have a Will?

- If a First Nations person who is ordinarily resident on reserve dies intestate, their property is distributed according to the *Indian Act*.
  - 1) Spouses
  - 2) Children
  - 3) Grandchildren
  - 4) Great grandchildren
  - 5) Parents and brothers and sisters can inherit (in that order),
- if the only next-of-kin are nieces and nephews, they cannot inherit an interest in CP land on reserve unless the land is left to them in a written Will

# Choosing an “Executor”

- The person whom you name to look after your estate is called an **Executor**. The executor is your representative, their job is to follow the instructions in your Will.
- The job of executor is important and involves a lot of paperwork. The executor may have to work with a lawyer to get your estate approved and distributed. Choose your representative carefully!
- Ask them if they are willing to do the job
- Always name an “alternate Executor”

Your Executor should be:

- trustworthy and able to work on their own
- in good health (so that they survive you and can do the job),
- able to manage the paperwork involved, and
- able to communicate with and be respectful of all your family and friends (your beneficiaries).

# What does the Executor do?

- Gets your Will approved by INAC; prepares **Statement of Inventory**
- Locates and takes control of your home, vehicles, bank accounts, tools, household goods, and personal possessions, like jewelry, art and crafts.
- Notifies hydro, phone, cable and all other services of your death.
- Looks after your house until it is transferred.
- Notifies your creditors and banks of your death.
- Claims death benefits.
- Makes funeral and memorial arrangements.

# Statement of Inventory

- Following the Notice of Death, the Minister or court is to receive an itemized Statement of Inventory showing the following:
  - 1) all the real and personal property of the deceased;
  - 2) an estimated value of each item;
  - 3) a list of all debts or claims against the estate known at the time;  
and
  - 4) a statement as to whether the deceased left a Will or not and the names of all persons entitled to a share in the estate

# What if there is no Executor?

- If no executor is willing to act or if there is no Will, INAC will write to the beneficiaries telling them they can apply to administer the estate or transfer jurisdiction.
- INAC will then select an administrator from among those who apply or those who are nominated by the beneficiaries.



# Terms

- **Probate** - The Court process of proving that a Will is valid and administering the estate under the supervision of the Courts.
- **Letters Probate** - A court order that is granted when the deceased person left a will and named an executor and that proves the authority of the person or persons named therein to deal with the property of the deceased person
- **Letters of Administration** - A court order that is granted when the deceased person died without a will that proves the authority of the person or persons named therein to deal with the property of the deceased person

# Probating a Will

- The following assets do not require probate. Transfer of these assets occurs through operation of law:
- Any interest in land registered in joint names with right of survivorship. The surviving joint tenant(s) becomes the registered owner(s) of the property upon filing the necessary documents with the Land Titles Registry
- any bank accounts held in joint names with right of survivorship;
- life insurance policies payable to a named beneficiary;
- RRSPs or RRIFs payable to a named beneficiary.

# Probating continued

- The only asset that absolutely requires probate is an interest in land (this includes mineral rights) registered in the name of the deceased alone.
- The property cannot be transferred from the name of the deceased without Letters Probate or Letters of Administration Letters regardless of the value of the property

# Fees

- **Court Fees** - these are the fees paid at the Court House when you file the application for Letters Probate or Letters of Admin. The fee is \$7 on every \$1,000 of value passing through the estate. Fees are not paid on:
  - assets held in joint names with right of survivorship,
  - life insurance policies payable to a named beneficiary, or
  - RRSPs or RRIFs payable to a named beneficiary.
- **Legal Fees** - if you hire a lawyer to do the estate work, there will be fees payable to that lawyer. The fees are set out in the Rules of Court.
- 1,500 plus 1% of the first \$500,000 of the value of the estate, up to a max of \$\$\$

# Fees continued...

- **Land Titles Fees** - if the estate includes an interest in land there will be Land Titles fees to register the transmission and the transfer of the property. You will also have to pay a fee to the Local Registrar's Office (Court House) or the Public Trustee for the Certificate that No Infants are Interested or the Consent of the Public Trustee.
- Additional lawyer fees...

# Duties of an Executor or Administrator

- Although the tasks required to administer an estate will vary according to the exact nature of the estate, the following is a list of the more common duties:
- locate the will, if there is one;
- locate all the assets of the deceased and determine the value of each;
- obtain the death certificate and notify the appropriate agencies of the death;
- prepare a list of beneficiaries and their addresses;
- file claims for life insurance, pension plans and death benefits;
- pay the funeral bills (usually banks will pay funeral bills directly from the deceased's bank account upon production of the bills);
- Obtain Letters Probate or Letters of Administration if required

# Duties continued...

- notify the Public Trustee if there are any dependent adults or children (beneficiaries) under the age of 18 years who may have an interest in the estate;
- advertise for creditors, if necessary;
- call in the estate - gather the assets, transfer title of all real property to the estate, arrange for sale of assets as required; place all monies from all sources into an estate bank account;
- pay the bills of the deceased and the estate;
- file the income tax returns for the deceased and the estate and obtain the Clearance Certificate from Canada Customs and Revenue Agency (CCRA);
- provide an accounting to the beneficiaries with the court within 2 years;

# For people not living on the reserve:

- Provincial laws apply! In Saskatchewan, a Will must be in written form and signed by the testator.
- Unless you make a holograph Will, you must sign your Will in front of two witnesses. Each witness must then sign the Will.
- Witnesses can not be a beneficiary or the spouse of a beneficiary. (Such witnesses will lose any benefit under the Will)
- Witnesses must also be over 19, be mentally competent and;
- If the Will is longer than one page, initial the corner of each page. The witnesses should also do this.



# Do I need a lawyer?

- you own and run a business
- you own land off-reserve
- you own a great deal of property (such as bank accounts or investments), especially if any of it is off-reserve
- you are in the middle of a complicated divorce or child custody case
- you are planning on giving nothing to a close relative and you think they will argue about being left out of the Will.

# Circumstances can affect the validity of an existing will

- If you marry after you make your Will, your Will is void;
- If you divorce after you make your Will, your spouse's designation as an executor and/or beneficiary is void;
- Income and probate taxes may be minimized by the proper gifting of your RRSP's, RRIF's or insurance proceeds or by placing some (not all) assets in joint tenancy;
- Not all of your assets will form part of your estate and be distributed in accordance with your Will: land, bank accounts and investments in joint names may pass to the surviving co-owner by right of survivorship – the benefit of insurance policies, pensions, RRSPs and RRIFs may pass to designated beneficiaries;
- Executing an enduring Power of Attorney along with your Will enables your next of kin to pay your bills, purchase more suitable care or accommodation for you, raise money for necessary surgeries, etc., in the event you become incapacitated

# Health Care Directive

Also called  
a “Living  
Will”

- gives directions about medical treatment to treatment providers
- comes into effect when you are no longer able to make and communicate your own health care decisions
- *The Health Care Directives and Substitute Health Care Decisions Makers Act*, (the Act) came into force in 1997, is the authority
- Without a Health Care Directive, the Act permits health care decisions to be made by: your nearest adult relative; or, if no relative can be located, a treatment provider.
- Can be cancelled or changed at any time by yourself

# Two kinds of Health Care Directives

- The first gives specific directions to treatment providers as to the treatments that you consent to or refuse, should you one day be unable to make a health care decision on your own.
- The second names another person (a "proxy") to make health care decisions for you if and when you cannot make health care decisions yourself.
- Your directive can also be a combination of both these types, including specific treatment directions for certain situations, as well as a proxy named for other health care decisions

# Why would I need one?

The directive lets you make decisions about your future treatment

It makes sure that your wishes will be known and respected.

Any person over the age of 16 who is able to make his/her own health care decisions can write a directive.

A directive is especially useful to terminally ill and elderly individuals who have specific directions about treatment that they would like honoured as death approaches

# What should my Directive say?

- give specific instructions about medical treatment you would or would not want when you are no longer able to make or communicate your own health care decisions.
- make your wishes as specific as possible - especially if you have a serious illness
- discuss with your doctor how your illness will progress and what treatments will be offered to you.
- name a proxy to make health care decisions on your behalf in the event that you would not be able to make or communicate your own health care decisions, or if you have not provided a specific written directive. Your proxy does not need to be a family member.

# Form of Directive

- Your directive can be hand-written or typed.
- You must sign and date it.
- Be clear and as specific as possible. It is difficult for treatment providers to follow directions that are not clear. The Act does not require them to follow directions that are not specific enough.
- If you are naming a proxy, it is a good idea to record his/her full name, address and phone number.

# Examples

- A very common type of Advance Health Directive is a “do not resuscitate” order. This is often made by people who are terminally ill, who do not want to be revived if their heart stops.
- Doctors can sometimes override or ignore an Advance Health Directive. Example, if an unexpected situation occurs that is different than what you intended your directive to cover, or if a new treatment becomes available, they can ignore it.



# Thank you

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