WILLS
PROCEDURE

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EXPLANATION

This chapter deals only with the general flow of the file and explains what is expected from a legal assistant when dealing with a Will file.

Before reading this chapter (and attempting to prepare a Will), read the following chapters:

- **Overview**, and more particularly the **Wills and Will-Makers** section, which explains, among other things:
  - who can make a Will;
  - what constitutes a valid Will;
  - legal effects of a Will;
  - revocations, revival, and changes to Wills by Will-Makers;
- **Wills · Documents,** which explains the actual Will; and
- **Wills · Precedent Clauses,** which contains the precedent clauses (also found on the USB Flash Drive that accompanies the ***Guide***).

PROCEDURE/CHECKLIST

1. Receive instructions from client (meeting, email or telephone conversation)

2. Complete the ***Will Checklist*** form (see **Checklists** – **Helpful Information**)

3. Open file

4. Review ***Will Checklist***

5. Diarize file for two weeks to ensure that the Will is prepared in a timely manner

6. Prepare Will (see the **Wills · Documents** and **Wills · Clauses** chapters)

7. Arrange for the Will-Maker to make an appointment to execute the Will:
   (a) by email/telephone; or
   (b) by letter – see **Wills · Letters** – either:
      (i) ***Letter Requesting an Appointment*** or
      (ii) ***Letter Forwarding Will to Client for Execution***

8. Attend on execution

9. Make at least two notarially certified copies of the executed Will:
   (a) one for the file and
   (a) one for the client

   See ***Notarially Certified Copy*** in the **Post-Application Documents** chapter.

10. Prepare ***Wills Notice***

11. File ***Wills Notice*** (either electronically or by mail – see **Wills · Documents**)

12. Enter the name of the client, the date, and the location of the Will in your data base

13. Report to client (with invoice – depending on your office's policy)

14. Close the file.

WILL CHECKLIST

You will find an electronic precedent of the ***Will Checklist*** in the **Helpful Information** chapter. Its completion and use are explained more fully in the **Wills · Documents** chapter.

The use of a checklist cannot be overemphasized. Instructions written on scraps of paper are risky – they may be lost, unclear and incomplete. Because under WESA, courts have the power to correct a Will if it can be proven that the Will does not reflect the Will-Maker's intention, it is very important that detailed notes of the instructions are taken and kept on file in one place.

Review the ***Will Checklist*** with the supervising lawyer and the client. Some law firms have the ***Checklist*** signed by the client to confirm the instructions.

Ensure that the Will is prepared in a timely manner. Often, clients want to prepare Wills because of an impending trip, medical treatment, or some other change in their life. If you are busy and wait a few months, the client's circumstances may change or he or she may even die before signing the Will. At the very least, such a situation could potentially result in a claim against the supervising lawyer's professional insurance, which would cause expense to the law firm and/or supervising lawyer. It could also lead to expensive and time-consuming estate litigation, drawing in as witnesses your supervising lawyer and any co-workers involved with the file. For those reasons, it is best to confirm in advance with the client the time frame for the completion and execution of the Will and then to ensure that you follow that timeline. Wills should be prepared in a timely manner and clients should be billed forthwith to ensure prompt payment.

PREPARATION OF WILLS – FORMAT

To assist the legal assistant in understanding the format, a sample of a "ready for signature" Will is provided in the **Wills · Documents** chapter. Remember that this is only a fictitious example and often law offices have their own style, which may vary from the one shown here.

Wills are usually prepared on special "Will" paper which is letter-sized, 8.5" x 11" (19 cm x 25 cm), with a double red margin line on the left and sometimes, a single one on the right. It is a good idea to use paper with a coloured line because when the original is photocopied, it may be difficult to distinguish the copies from the original.

It is preferable to use letter-sized paper because, when the Will is ultimately probated, a copy is attached to the grant of probate or administration with will annexed, which is letter-sized. It is obviously easier to handle and make copies when all documents are the same size.

The text in the Will may be single-spaced with a double space between paragraphs, or 1½-spaced with double that space between paragraphs.

We are providing **Precedent Clauses** in the **Wills · Clauses** chapter. These are examples of the paragraphs, which constitute "building blocks", enabling the preparation of an infinite variety of Wills. The clauses provided here are only the basic ones since more elaborately drafted clauses are beyond the scope of this ***Guide***. Most lawyers compile their own clauses and develop their own set of precedents. The legal assistant should understand how and when to use the various clauses, whether from this ***Guide*** or another source.

The attestation clause appears at the end of the Will, immediately following the last sentence of the last paragraph. It is single-spaced. Ultimately, the Will-Maker and the witnesses will sign here.

There are different attestation clauses in special cases (***Attestation or Execution Clause*** – **Wills · Precedent Clauses**) such as when a Will-Maker is blind or does not speak or understand the English language. In any of these instances, consult the supervising lawyer for guidance.

The attestation clause should never appear on the last page by itself – at least the last two lines of the text must appear on the last page with it so that no pages can be inserted between the last sentence and the attestation clause. In these instances:

- draw a diagonal line through the blank space on the second to last page; and
- type the last two lines of the text of the Will and the attestation clause on the last page.

A backing sheet should accompany every prepared Will. The backing sheet not only protects the Will, but it also displays information which allows the Will and the law firm that prepared it to be easily identified (***Backing Sheet*** – **Wills · Documents)**.

Once the Will has been prepared, it is checked by the supervising lawyer. In some cases, it will be necessary to forward a draft to the client for approval; this is often done by email. You should always check with the client to obtain permission to email the draft to them. This can also be done by mail (***Letter Forwarding Will to Client for Approval*** – **Wills · Letters**). This may result in changes to the Will.

EXECUTION

The "Execution of a Will" is the final step in making a Will and refers to the signing of the Will at its end by:

- the Will-Maker; and
- at least two witnesses of legal age.

When the Will is ready, set up an appointment for the client to come into the office and sign the Will. The lawyer may email or phone the client directly or may instruct the legal assistant to do so. Where the client is hard to reach by phone, an appointment may be arranged by letter (***Letter Requesting an Appointment*** –**Wills · Letters**).

Optimally, the Will-Maker should sign the Will in the law firm's office. Alternatively, a lawyer and another person from the law firm may have to attend at the client's residence (or in hospital) to execute the Will.

Before the Will is executed, one has to ensure that two persons are ready to act as witnesses. Some preliminary conditions must be met for a person to be a witness:

- a witness must be 19 years of age or older;
- a witness **cannot** be a beneficiary or spouse of a beneficiary named in the Will (including persons in a marriage-like relationship of more than two-year's duration with a beneficiary);
- a witness must not be a relative of the Will-Maker, even if the relative is not mentioned in the Will;
- if the lawyer (or any other professional) is named as an executor in the Will, the professional (or his/her spouse) must not act as a witness, as the professional may benefit under the Will by charging for professional services.

At the actual appointment, to ensure that the Will is properly executed (**Will Must be Signed** – **Overview** and **Wills and Will-Makers**):

- the Will-Maker must read over the Will before signing. It is not necessary to have the witnesses read the Will, as their purpose is simply to witness the signing of the Will by the Will-Maker;
- if the Will-Maker is blind, the Will must be read to the Will-Maker prior to signing; this must be done in front of both the witnesses;
- if any alterations (corrections, deletions or additions) are necessary (for example, to correct a beneficiary's name that is misspelled), it is preferable to reprint the page. However, if this is not possible (for example, the Will is signed at the Will-Maker's residence or in a hospital) the Will-Maker and the two witnesses must affix their signatures (or initials) near the alterations in the margin or in some other part of the Will opposite to or near to the alteration;
- the date must be completed. If the date is inserted after the Will document has been prepared, the Will-Maker and the two witnesses must affix their signatures or initials near the hand-written date. Note: there is no statutory requirement to date a Will, but it should be dated nevertheless, as otherwise there is no way to determine which Will is the most recent one if there are various executed Wills of a Will-Maker;
- the Will must be signed at its end (in the attestation clause) by the Will-Maker in the presence of two witnesses;
- each witness must sign the Will in the presence of the other witnesses and the Will-Maker. Moreover, not only must all three people be present at the signing, but they must see each other sign the Will. If this is not done, the Will is invalid and shall not be enforceable
- each page of the Will except the last page (which is signed by the Will-Maker and the witnesses) must be initialled (or signed) by the Will-Maker and the witnesses.

In some instances, a Will is sent to the client for signature. Generally, this practice is strongly discouraged because a lawyer cannot accept responsibility for the validity of a Will signed without that lawyer's personal attendance upon signature. However, instances will inevitably arise where the client cannot attend at the law firm, and the Will is sent out for execution (***Letter Forwarding Will to Client for Execution*** – **Wills · Letters**).

SAFEGUARDING THE WILL

Once the Will has been executed, and you have made the requisite copies, place the original in an envelope bearing the Will-Maker's **full** name. It is preferable to use a full-sized envelope (9 1/2" x 12") because the Will can be placed in it unfolded, since folded or creased documents are difficult to photocopy. However, some lawyers prefer that the Will be folded letter-style and placed in a standard envelope.

Each law office must have a consistently followed, formal procedure for safeguarding executed Wills. Some offices store them in an on-premises fireproof vault. Others store Wills off-premises in a bank safety deposit box and others do not retain possession of **any** executed Wills. However, whatever is done with the Will, it must only be stored with the client's consent. In some instances, clients may wish to keep the Will at home or in their safety deposit box or elsewhere. In such cases, only a copy is kept in the office file and the original executed Will is provided to the client for safeguarding.

Regardless of where executed Wills are stored, a law firm should maintain a proper catalogue or data base with details about every Will prepared (i.e. Will-Maker's name, execution date, Will's location and, in some cases, the names of the executors).

There are many different ways to store the information electronically, but sometimes, the simplest works the best. A simple (and effective) system is to make an extra copy of the ***Wills Notice*** (see below) and alphabetically file this copy in a binder. In addition, there are numerous data base systems available to keep track of such documents.

WILLS NOTICES

In order to enable an executor to locate the original Will after the Will-Maker's death, it is recommended (although **not** mandatory) that a ***Wills Notice*** be filed with the Wills Registry (Vital Statistics Agency) when a Will is executed. This Notice identifies the Will-Maker and advises the Registry of the Will's date and location.

The Notice may either be filed **electronically** with the Agency or be filed by mailing a paper copy of the Notice to the Agency.

The Notice may be obtained free of charge from the Vital Statistics Agency (**Addresses and Links – Helpful Information**). For instructions on **how** to complete the Notice, see **Wills Notice –Wills · Documents**.

A separate Wills Notice must be submitted for every event, such as:

- execution of a new Will; or
- revocation of a Will; or
- execution of a Codicil; or
- relocation of a Will or Codicil (see next page).

In due course, the Wills Registry will mail confirmation of the ***Wills Notice***'s receipt. It takes about three to four weeks for the law firm to receive the confirmation.

REPORTING

When all of the foregoing matters have been attended to, it is time to report to the client and forward the statement of account for legal services rendered with respect to the Will (***Letter Reporting to Client on Execution of Will*** – **Wills · Letters**). The report and account are often prepared ahead of time and delivered at the end of the will signing meeting. Attach to the latter a copy of the Will, as well as any documents prepared concurrently with the Will (such as a Power of Attorney or a Representation Agreement). No precedent for an account is provided as each law firm has its own specific style and wording to follow.

CODICIL

Sometimes, months or possibly years after a Will has been executed, the Will-Maker may wish to make changes to it. For example, the Will-Maker may have acquired a piece of jewellery (after the Will was executed) and wish to bequest the jewellery to a particular person. Or the Will-Maker may wish to change an executor or guardian.

Instead of drawing up an entirely new Will, the Will-Maker may execute a **Codicil**. For the precedent for a Codicil and a more detailed explanation, see ***Codicil*** –**Wills · Documents**.

There may be several Codicils to a Will. However, in the interest of clarity, a new Will (as opposed to a Codicil) should be prepared if:

- numerous changes are required;
- the changes are substantial; or
- there have already been several Codicils.

REVOCATION OF WILL

In most cases, a Will is revoked when a new one is made, and a revocation clause is included in the new Will. However, a Will is <u>also</u> revoked when:

- the Will-Maker executes a form of revocation declaring an intention to revoke the Will;
- the Will-Maker, or some person in the Will-Maker's presence and by his or her direction, destroys the Will (e.g. burns it, tears it up or obliterates all the pages) with the intention of revoking Will.

In addition, under section 15 of the former *Wills Act*, a Will was revoked if the Testator (the Will-Maker) married after making a Will (unless a contrary intention appeared in the Will). Part 4 of WESA abolished this revocation. However, if the Will-Maker had married **before** Part 4 of WESA was brought into force (and of course, after making a Will), the Will was revoked by the marriage of the Will-Maker, unless the Will stated that it was made in contemplation of the Will-Maker's marriage to a specific person. Such revoked Will was not revived when Part 4 of WESA came into force.

On the other hand, if a Will was made **before** Part 4 of WESA came into force, and the Will-Maker had married **after** Part 4 of WESA came into force, the Will-Maker's subsequent marriage did not revoke the Will.

One of the most common reasons why a Will-Maker would formally revoke a Will and not execute a new one is that the Will-Maker believes that his or her estate would be distributed fairly pursuant to Part 3, Division 1 of – WESA **When a Person Dies Without a Will**. Therefore, if there is no Will, there is no possibility of an application under the Part 4, Division 6 [Variation of Wills]. In that case, a Will-Maker may execute a ***Revocation of Will*** (**Wills · Documents**).

To be valid, a ***Revocation*** must be prepared, dated and executed in the same manner as for a Will. In addition, a ***Wills Notice*** should also be prepared and filed to advise the Wills Registry (Division of Vital Statistics) of the execution of the ***Revocation***. For practical reasons, the original Will should be either destroyed in its entirety or the word "Revoked" written across each page. If the Will has not been destroyed, the ***Revocation of Will*** should be attached to the Will that has been revoked and stored in the same envelope.

REMOTELY WITNESSED WILLS

The requirement for a Will to be valid, that it must be signed in the physical presence of two or more witnesses, present at the same time, who in the presence of the Will-Maker and in the presence of each other (see page 4, Execution), is now satisfied for Wills while all or some of the persons are in each other's **electronic** presence.

By Royal Assent on August 14, 2020, Sections 1, 3 and 11 of Bill 21 – *Wills, Estates and Succession Amendment* Act, 2020 (the "Amendment Act") came into force, authorizing the electronic or remote witnessing of a Will. These sections have retroactive effect (see below).

Section 1 adds definitions for "**communicate**", "**electronic**", "**electronic presence**" and "**electronically present**".

Section 3 [electronic presence] provides for remote witnessing of physical Wills (i.e., witnessing by persons who each have their own physical copy of the Will and are in each other's electronic presence while in different locations):

- there still have to be at least two witnesses to the Will, and they can both be present electronically, or one electronically present and one physically present with the Will-Maker;
- this does not apply to Wills by members of military forces;
- there can be minor formatting differences to the Wills each person has in front of them, e.g., if the Will was shared by email and then printed out separately by the Will-Maker and witnesses. However, the Wills must have identical wording.

Section 11 [Transitional Provision and Repeal] provides that:

- Sections 1 and 3 are deemed to have been in effect from March 18, 2020 (the date of the declaration of the state of emergency). This means that, if there were urgent circumstances and a Will was made remotely, whether or not in compliance with **the**

Order of the Minister of Public Safety and Solicitor General – Electronic Witnessing of Wills (COVID-19) [1] (the "Ministerial Order M161/2020"), it should be recognized without the need for an application under section 58 of WESA [Court Order Curing Deficiencies] as long as the making of the Will otherwise complies with sections 1 and 3, that is, it has no differences other than formatting and meets the requirements for electronic presence.

The requirement for a valid Will is satisfied if the Will is made remotely during the "specified period" if the Will was made in accordance with section 35.2 of the *Wills, Estates and Succession Act*, as added by section 3 of Amendment Act, whether or not made in compliance with the Ministerial Order M161/2020. The specified period is defined as the period between:

- March 18, 2020 (the declaration of the state of emergency); and
- August 14, 2020 (date of Royal assent).

However, Wills made remotely in accordance with Ministerial Order M161/2020 between May 19, 2020 (the date of Ministerial Order M161/2020) and August 14, 2020, were required to include a statement that the Will was signed and witnessed in accordance with the Ministerial Order M161/2020.

On the other hand, the retroactive effect of sections 1 and 3 means that the references to Ministerial Order M161/2020 are no longer required, and if a Will refers to the Ministerial Order M161/2020, it is still valid and does not need to be updated to remove the reference.

ELECTRONIC WILLS

The probate rules (Supreme Court Civil Rules Part 25) will be amended to set out procedure for filing and giving notice if an application includes an electronic or digital Wills, and the remainder of Bill 21 will be brought into force at the same time as the probate rules are amended."

The remainder of Bill 21 to be brought into force includes:

- the definitions of "electronic signature" and "electronic will" and a related definition to Part 4 of the Act;
- when an electronic record is deemed not capable of being recorded, stored or reproduced;
- application of electronic signature to other section of the Act;
- alteration of an electronic Will; and
- revocation of an electronic Will.

CLOSING FILE

Once the report letter is mailed and the account paid, the file can be closed (following the law firm's procedure), then sent to storage.

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[1] Ministerial Orders ⇨ 2020 – M161 or https://www.bclaws.ca/civix/document/id/mo/mo/2020_m161

Note: Pursuant to the Law Society of British Columbia Rules, a lawyer must retain a record of the information obtained and copies of all documents received for client identification for the longer of:

- the duration of the lawyer and client relationship and for as long as is necessary for the purpose of providing services to the client; and
- a period of at least six years following completion of the work for which the lawyer was retained.

Closed Will files must be treated differently from other files, since they document your work and contain evidence of matters such as testamentary capacity and intention. With respect to the retention of closed files and safekeeping of Wills after execution, refer to the **Practice Resource – Closed Files and Disposition** published by the Law Society of British Columbia (see **Closed Files** in **Addresses and Links – Helpful Information**). Basically, it strongly suggests that:

- the original Wills be returned to clients for safekeeping after execution as long-term storage of original Wills has become a major problem for both large and small firms;
- everything else in the file (a copy of the original will, the ***Will Checklist***, successive drafts, notes, copies of previous wills, and correspondence) be retained until the law firm is advised that the Will-Maker has died; and
- once the Will has been probated, the file be retained for 10 years after the estate assets have been distributed and all trusts (if any) are fully administered.

MULTIPLE WILLS

The use of Multiple Wills has become more popular since the enactment of WESA. The Will-Maker may own assets such as, for example:

- shares in a company and personal items that may be transferred without the requirement of producing a representation grant;

- other assets (such as land and bank accounts) that cannot be transferred without a representation grant.

Multiple Wills are one of many useful tools in estate planning but may not be appropriate in every situation. Preparing Multiple Wills is complex and requires careful drafting by the lawyer to avoid conflicts or confusion. Different options, such as, for example, trusts, should be discussed with the supervising lawyer.

If private company shares are expressly excluded from the will being probated, then the executor of the probated will can apply for probate without disclosing the other assets being administered by the executor of the second will that will not probated. Probate fees are only payable on assets for which a grant is required. Accordingly, in order to save probate fees, and expedite the distribution of certain assets, the client may require that separate wills be prepared:

- one will (the "**Probated Will**" or the "**General Will**"), that shall be probated, to deal with registered assets such as real estate, bank accounts, motor vehicles, boats and other registered assets ("**General Assets**") as a representation grant will be required to deal with such assets; and

- a second will (the "**Non-Probated Will**" or the "**Restricted Will**"), that shall not be probated, to deal with the non-registered assets such as shares of a private corporation, jewellery, art and other household articles ("**Restricted Assets**") as a representation grant may not be required to deal with such assets. However, in certain cases, the Restricted Will may have to be submitted as part of the probate application as a whole.

  Notes When probating the General Will you should attach the Restricted Will to a ***Form P4 Affidavit of Applicant for Grant of Probate or Grant of Administration with Will Annexed (Long Form)*** as another testamentary document that is dated the same date as the General Will but that is not being probated.

  As there may be rules restricting the transfer of shares by a company; it is prudent for the supervising lawyer to review the company's articles as well as any shareholders' agreements before preparing a restricted will gifting shares.

  We have chosen the most common names: **General Wills** and **Restricted Wills** especially in the case of non-probated wills as they may ultimately be probated.

Below are a few important issues that should be considered before using Multiple Wills in BC:

- **Different Executors**. Pursuant to section 122(1) (b) of WESA, an applicant for a representation grant must disclose information as required under the *Supreme Court Civil Rules* concerning all the property of the deceased person, irrespective of its nature, location or value, that passes to the applicant in his or her capacity as the deceased person's personal

representative. Accordingly, different executors must be appointed in separate wills. It also means that eventually different executors must cooperate and work together to administer multiple estates.

- **Additional Costs**. There are several financial advantages of Multiple Wills (such as savings in probate fees) but drafting and administering multiple estates is usually more complicated and may be quite expensive. The lawyer and the Will-Maker may consider other estate planning tools (such as the creation of trusts which are beyond the scope of this Guide). They must carefully evaluate if the savings in probate fees would justify the additional costs of preparing and administering Multiple Wills. Ongoing review of the wills and the estate plan must be completed regularly to ensure the wills remain aligned with the client's intentions.

- **Wills Variation Risk**. Under WESA, a disgruntled spouse or child who decides to challenge the distribution of the assets under the Will-Maker's Will must commence a court action within 180 days of the date that the grant of probate has been issued. Because no grant of probate is being issued for the Restricted Will, the distribution of the Will-Maker's Restricted Assets may be challenged at any time in the future as no 180-day limitation period has been established. This therefore creates an indefinite risk to the executor of the Restricted Will. As a result, in order to start the clock ticking and establish a limitation period, it may be necessary to submit the Restricted Will for probate.

- **Tax Considerations**. The Will-Maker must consider which estate will be responsible to pay the debts and liabilities of the estate, especially if there are different beneficiaries under each Will. Professional tax advice should be sought by the Will-Maker when preparing Multiple Wills. This is an added cost to the Will-Maker but is crucial to understand the tax implications associated with Multiple Wills.

To prepare Multiple Wills, including those in other jurisdictions, see chapter II D – Precedent Clauses -- of the ***Guide*** for additional paragraphs and changes in the master will to become General Wills and Restricted Wills in the following paragraphs:

- Introduction;
- Revocation;
- Appointment;
- Description of property;
- Payment of Debts; and
- Vesting Powers.

In order to avoid confusion with respect to the order in which the Multiple Wills were signed, and to document the sequence of such signing, prepare an ***Affidavit of Witness*** (see chapter II D – **Wills Precedent Clauses**, of the ***Guide*** for an example).

