

LOWER NICOLA INDIAN BAND

WILLS AND ESTATES WORKSHOP FOR COMMUNITY MEMBERS

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WOODWARD & COMPANY

LAWYERS LLP

Agenda

1. What is a will and why have one?
2. Wills under the *Indian Act* & *BC Wills Act*
3. Writing a will
4. What to include in your will
5. Changing, revoking, or voiding a will
6. No Will – The Rules of Intestacy
7. Applicable Laws: Land Code and *Indian Act*
8. Steps to take after Death
9. Reference Materials

What is a will ?

- A legal document
- Instructs what to do with the will-maker's **estate** when they die.
- **Estate** is everything you own, and any debts you owe, on the day you die
- A will comes into force the day the will-maker passes away so it is important it is correct.

Why have a will ?

- Control who benefits from your estate (the "**beneficiaries**") and how
- Decide who looks after your children
- Avoid your property passing to others through a statutory formula
- Choose your **executor** (who will do the administration of your estate)
- Reduce delay and cost for your family.

Things you can't do in a will

- Give away something that isn't yours,
 - Such as the right to live in Band social or rent-to-own housing
- Give away something that you own jointly: there is a "right of survivorship"
- Set tight controls on what others do with your property
- Transfer a Certificate of Possession or Permanent Land Interest to a non-member

Wills and the *Indian Act*

- The *Indian Act* applies to your estate if:
 1. You have registered Indian status, and
 2. You “ordinarily” lived on a reserve or Crown land at the time of death
- **“Ordinarily resident”** means having the intention of residing on reserve in regular life.
 - Includes those away for school, seasonal employment, hunting, or who are living in a nursing home
- If non-status or not living on reserve, the BC *Wills, Estates, and Succession Act* (“**WESA**”) applies

Indigenous Services Canada

- When administering an estate under the *Indian Act*, Indigenous Services Canada ("**ISC**") will need to be informed throughout the process
 - ISC (and it's related body, Crown-Indigenous Relations and Northern Affairs Canada ("**CIRNAC**") have now replaced Aboriginal Affairs and Northern Development Canada ("**AANDC**").



Writing a Will - *Indian Act* vs. *WESA*

There are different requirements for writing wills under the *Indian Act* and the *BC Wills Act*.

Indian Act:

- The will must be in writing, be signed by the will-maker, and clearly state the will-maker's wishes
- Will-maker must be 19 years of age or older (unless married or in the military), must be able to understand the will, and be free from "undue influence"

WESA:

- The will must be in writing, be signed by the will-maker, and be witnessed by 2 people who are not beneficiaries
- Will-maker must be 16 years of age and mentally capable, and free of "undue influence".

What to include in a will

- Name your:
 - **Beneficiaries** – the people who get stuff
 - **Executor** – the person who manages your estate
 - **Guardian** – for underage children or dependent adults
- Directions on how to distribute your assets; this includes:
 - Specific gifts
 - The residue of your estate (everything that's left over after debts are paid and specific gifts are given)

Keep this as simple and clear as possible.

Dependent Adults

- If a will-maker cares for a dependent adult their will should:
 - Appoint a guardian
 - This person will likely have to apply to be appointed a committee for the dependent adult
 - Provide adequately for their care
 - A court may vary a will if the will-maker's spouse or children did not receive an inheritance that is "just, adequate and equitable"
 - Trusts are often used to do this

Choosing an Executor

- Your executor should be:
 - trustworthy
 - healthy
 - younger than you
 - able to handle the paperwork, and
 - able to get along with your family and friends.
- Usually a spouse, adult child, or relative
- Talk to them about it



Changing or Revoking a Will

- You may want to add to a will (with a “**codicil**”) or make a new one when there is a:
 - birth or a death
 - change in residence
 - marriage or a divorce
 - change in property
- A will can also be revoked (cancelled) by a:
 - a later will
 - a written declaration
 - destroying the will
 - any other act by the will-maker that a court determines had a clear intention to revoke the will

Challenging or Voiding a Will

- A will can be challenged or found void if:
 - The will was made under duress or undue influence (pressure)
 - The will-maker lacked capacity
 - Will does not adequately provide for dependents (e.g. children)
 - Will disposes of reserve land improperly
 - Terms of will are vague, or
 - Terms of will are against public interest.

No Will – The Rules of Intestacy

- Dying without a will is called dying **"intestate."**
 - If you have status and live on reserve, then you look to the *Indian Act* rules of intestacy.
 - If non-status, or not resident on reserve, then you look to the *BC Wills, Estates and Succession Act*.

Indian Act Rules of Intestacy

- Section 48 states what happens if you do not have a will
 - ISC will appoint an administrator (executor)
 - Who inherits?
 - If estate is \$75,000 or less, entire estate usually will go to spouse or partner, or if no spouse, be split between children
 - If estate is more than \$75,000, spouse or partner gets \$75,000 and the rest is split between children.

BC Wills, Estates and Succession Act

- Generally, if no will, the spouse gets household furnishings and a preferential share of the estate, and any children share the rest.
 - If no spouse or children, goes to parents, siblings, etc.
- In order to exclude an ex from benefits, you must be:
 - separated, or have shown and communicated to the ex the intention to separate
- Depending on size of estate, **probate** may be required
 - Probate is when a court decides if will is real and meets BC requirements



Applicable Laws

- LNIB's Land Code came into effect April 18, 2016.
 - There is also a LNIB Allotment Law currently being drafted
- Wills and Estates provisions of the *Indian Act* still apply
- *Family Homes on Reserves and Matrimonial Interests or Rights Act* ("**FHRMIRA**")

Interests in LNIB Land

- LNIB's Land Code states that only members can hold or receive a CP or Permanent Interest in the Nation's Lands.
 - Via a will or *Indian Act* intestacy provisions
- If a member gives a right to possess reserve lands to a non-member, the *Indian Act* requires the land to be auctioned off instead
 - Land that does not sell goes to the Band

LNIB's Housing Policy

- Applicable if you are in a rental or rent-to-own home
 - Tenants must be in compliance with rental agreement
 - Home is not yours until the mortgage is paid in full and the ownership has been transferred
 - Possible to indicate who you would like the unit to go to in a will if that person is eligible to have a Rent-to-Own Agreement with LNIB, they apply to take over that agreement, and LNIB agrees.

Custom Family Allotments

- LNIB is currently drafting a law that aims to recognize custom family allotments
 - At this point, these interests cannot be included in a will
- If you have questions please contact:
Brandi O'Flynn, Lands Manager at LNIB.

Bottom line

- You cannot transfer a permanent land interest or CP to a non-member.
- If you wish to leave a temporary land interest to a non-member, you should contact a lawyer to ensure it is done properly as it is more complicated.

Spousal Property

- Non-members can hold certain temporary interests in the Nation's Lands.
 - An option for non-member spouses could be a **life estate** (not defined in Land Code).
- ***FHRMIRA***
 - A non-member spouse / partner is allowed to stay in the family home for 180 days after death
 - The surviving spouse / common law partner gets certain interests in the family property

Exclusive Occupation Order

- If a non-member spouse or common law partner would like to stay in the matrimonial home after the death of their spouse, the spouse or common law partner should apply to a court under the authority of FHMIRA.
- A court may order that the applicant be granted exclusive occupation of the family home for a specified period of time (s. 20(1), FHMIRA).

Bottom Line

- If you are married to a non-member, or who have other non-member beneficiaries, it's important to speak to a lawyer about your will.



Steps to take after death where there **is** a will:

1. Locate will and make funeral arrangements
 - Get an official Death Certificate or Burial Certificate
 - Notify family members
2. Notify Indigenous Services Canada ("**ISC**")
 - Report death to the Indian Registry Administrator at LNIB
 - Include the deceased name, date of death, the name of the First Nation, status number, and the names, addresses and phone number of next-of-kin and the executor named in the will.
 - Send ISC a copy of the Death Certificate and the **original** will
 - Make at least one notarized copy of the will before sending it.
3. ISC will appoint the executor and approve the will
 - Executor can then settle debts and distribute assets according to the will

Steps to take after death where there **is not** a will:

1. Make funeral arrangements
 - Get an official Death Certificate or Burial Certificate
 - Notify family members
2. Notify Indigenous Services Canada ("**ISC**")
 - Report death to the Indian Registry Administrator at LNIB
 - Include the deceased name, date of death, the name of the First Nation, status number, and the names, addresses and phone number of next-of-kin and the executor named in the will.
 - Send ISC a copy of the Death Certificate
3. ISC will appoint an administrator and determine heirs through the *Indian Act*

LNIB's Role After Death

- LNIB may:
 - Help identify beneficiaries
 - Determine if the deceased had any Land Interests
 - Provide the will (if they were given a copy)
- LNIB's Lands Department will also help with land transfers
 - If there is a will, the executor will provide LNIB a copy of the will and submit a Transfer of Land Form
 - If LNIB approves the transfer, a copy of the will and the land transfer documents are filed with the First Nations Land Register.
 - If there is no will, the administrator submits a Transfer of Land Form
 - If LNIB approves, the land transfer is registered.

Costs & Benefits

- Funeral Expenses
 - First Nation Social Assistance Office (On-Reserve)
 - BC Ministry of Social Development (Off-Reserve)
 - LNIB Health Department (See LNIB Funeral Brochure)
- Canada Pension Plan



Preparing for your Appointment

- Make sure to:
 - Bring any previous wills you may have
 - Bring your rent-to-own agreement if you have one
 - Bring any other property documents that may be relevant.

ISC Contact Info

- **ISC – BC Estates Unit**

- Phone: (604) 775-5100
- Toll Free: 1(888) 917-9977
- Email: bcestates@canada.ca
- Website: <https://www.sac-isc.gc.ca/eng/1100100032357/1581866877231>
- Ask for an Individual Land Holdings Specialist

Reference Materials & Resources

- Legal Services Society
 - <http://www.lss.bc.ca/publications/subject.php?sub=19>
- ISC
 - Estates Services: <https://www.sac-isc.gc.ca/eng/1100100032357/1581866877231>
 - Administering an Indian Act Estate: General Information for Administrators. Online: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-BR/STAGING/texte-text/br_es_adminAestate_1336489606902_eng.pdf
 - Contact the BC Region Estates Unit of ISC at 1-888-917-9977 or by BCestates@canada.ca for more information
- Estate Administration On-Reserve: A Guide for Executors and Administrators in British Columbia
 - Online: <http://www.lss.bc.ca/resources/pdfs/pubs/Estate-Administration-On-Reserve-eng.pdf>
- Estate Administration On-Reserve: Templates Package
 - Online: <http://aboriginal.legalaid.bc.ca/resources/pdfs/pubs/Estate-Administration-On-Reserve-Templates-package-eng.pdf>

Reference Materials & Resources

- Writing your Own Will: A Guide for First Nations People Living on Reserve
 - Online: <http://www.afoabc.org/wp-content/uploads/2015/03/will-kit.pdf>
 - Contact the BC Region Estates Unit of ISC at 1-888-917-9977 or by BCestates@canada.ca for more information

Reference Materials & Resources

- People's Law School, "Writing your Will"
 - for Wills under the BC Wills Act
 - <http://www.publiclegaled.bc.ca/wp-content/uploads/2016/03/Writing-Your-Will-2016-Update-for-web-final.pdf>
- University of British Columbia First Nations Legal Clinic
 - <http://lss.bc.ca/assets/aboriginal/UBCFirstNationsLegalClinic.pdf>
 - Toll Free: 1 (604) 684-7334
- University of Victoria Law Centre
 - <http://www.thelawcentre.ca/>
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