

# WILLS & ESTATES FOR INDIGENOUS PEOPLE - PART 2:

Advance Planning On-Reserve/Nation lands for  
Status Band Members

MAY 2ND, 2024 | 10AM - 11:30 AM PST  
FREE ONLINE WEBINAR VIA ZOOM

REGISTER FREE ONLINE AT:  
[WWW.LEARNINGCIRCLE.UBC.CA](http://WWW.LEARNINGCIRCLE.UBC.CA)





# Wills and Estates

For Indigenous People - Part 2:  
On-Nation/Reserve Lands

---

Catharine Schlenker and Chris Heslinga



# Agenda

Introduction

- Review of Advance Planning Documents
- Overview of Possessory Interests in Property on Nation/Reserve Lands
- Wills on Nation/Reserve Lands
- Resources and Referrals



# Acknowledgement

I would like to acknowledge that I am coming to you from the territory of the Ləkʷəŋən (Songhees and Esquimalt) Peoples and I want to thank them, for their incredible stewardship of these lands. I also acknowledge Indigenous Legal Orders of the Ləkʷəŋən and W̱SÁNEĆ Peoples, whose historical relationships with the land continue to this day. My focus in this presentation on the colonial legal system is not meant to detract from the legitimacy of the Indigenous Legal Orders of any individual or nation/band.



# Who we are



Catharine Schlenker  
Seniors First BC  
Métis



Elder Xwechtaal  
Dennis Joseph  
Squamish Nation



Chris Heslinga  
Law Centre





# Review of Advanced Planning Options:

While Alive:

- Power of Attorney
- Representation Agreement
- Advanced Directive

After Death:

- Will
- Trusts (will not be covering)





# Mental Capacity

- Ability to understand and appreciate the nature and consequences of one's decisions
- All adults (age 19+) are presumed to have mental capacity unless it is established otherwise, usually by a medical opinion or judge's decision
- Loss of mental capacity can be sudden
- Mental capacity can vary and change





# Overview of Possessory Interests in Nation Lands/Reserve Lands





## What Law Applies?

- Indian Act
- Framework Agreement on First Nation Land Management Act
- Family Homes on Reserves and Matrimonial Interests or Rights Act
- Land Codes, Land Use Plans and Decisions of Chief & Council





# Ownership

- Owned by the Crown
- Held for the benefit and use of a First Nation to hold as a community





# What Role Does the Government (“ISC”) Play?

- Approve transfers of CPs
- Validate wills, including the approval of executors
- Appoint administrators
- Settle estates when no family is available
- Manage finances for those who cannot due to incapacity
- Pay out trust accounts for minors





# Types of Possessory Interests

- Certificates of Possession (CP)
- Location Ticket
- Notice of Entitlement (NETI)
- Custom Land Allotment
- Traditional Land Holding





# Wills under the Indian Act





# What is a Will?

- Written document that assigns someone to manage and distribute your assets/possessions according to specific instructions in the Will
- Person assigned is called an “executor” or “trustee”
- Wills can be changed, as long the person has capacity
- ONLY effective after death



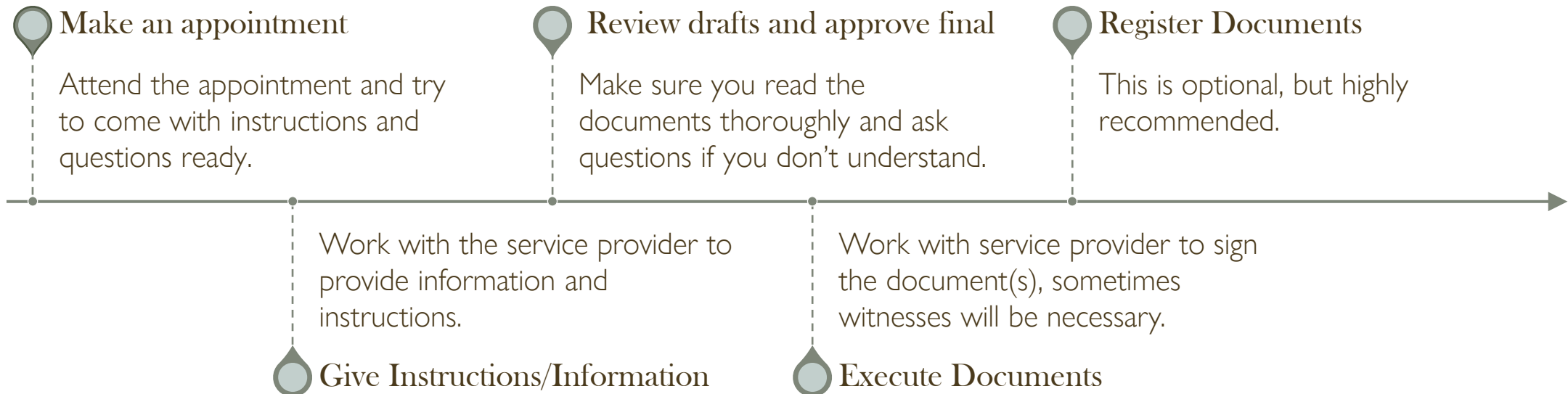
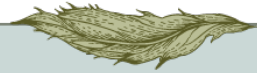


# Why should I make a Will?

- Ensures your wishes are clear to your loved ones
- Chooses someone you trust to carry out your wishes
- Reduces conflict between your loved ones about what you would have wanted
- Keep government involvement to a minimum



# Process for Drafting Advanced Planning Documents





# Will-writer must be...

- “ordinarily resident” on reserve
  - “Status” under the *Indian Act* or entitled to be registered
- AND
- 16 years or older





# When is a Will Voidable?

- Duress
- Undue Influence
- Lack of Capacity
- Against Public Interest
- Undue Hardship to someone you must provide for
- Disposes of Property contrary to Nation/Band Interests
  - Too Vague to be Carried out



# Requirements for a Valid Will



## In Writing

- Best to have it prepared by a lawyer, but many people use Will kits
- “oral wills” are not accepted as valid

## Gift

- Must **give away** something the will-maker owns

## Signed

- Must be **signed** by the Will maker
- Recommend: 2 Independent Witnesses - only need to see the signing

## Capacity

- Adults are presumed to have capacity
- Can be challenged, which might require a *court order* or *medical evidence* to prove

## Genuine

- No “undue influence” or “duress”



# Including Status

- This is my last Will and Testament. I am (name) of (address), in the Province of British Columbia, (postal code).
- I am of the (your band name) and my membership number is (number).

- Will-maker should use the name of their children as they appear on their status card.
- Compare names on the BCID and status card for everyone you name in the document





## Who to choose as an Executor/Trustee?

- Someone you **trust** who understands and respects your **values, wishes and beliefs**
- Who understands the responsibilities and will protect your assets
- Is available to assist and good at record keeping





# Giving Land in a Will

To transfer your interest in land on Nation Lands/reserve in your will:

1. You must have a **Certificate of Possession** for the transfer to be binding
2. Can only give land on Nation Lands/reserve to a person who is a status member of the First Nation where the land is situated
3. Cannot create a trust in the will for the land

Note: the Minister must approve any possession of reserve land under the  
*Indian Act*





# What if I don't have a Certificate of Possession?

- Can still express your wishes for the transfer land in your Will
- It is ultimately up to the Nation/Band to determine who may hold the land
- If you built your home, you may still have an ownership interest in the building if not the land, the value of which could be gifted





# What assets transfer outside of an Estate?

- Assets held in **joint ownership**
  - Automatically belongs to the other joint owners (“right of survivorship”)
  - Includes CPs held in Joint Tenancy
- Life Insurance policies, Registered Retirement Saving Plans (RRSPs), and Pensions
  - The money from these assets are distributed according to the contracts/documents that created them
  - Check with your life insurance company, bank or pension provider to see who the “designated beneficiaries” are for these assets





# What if I have minor children?

- Can Appoint a testamentary Guardian but BC Family Law may override if the other parent/guardian is fit to take on the parenting responsibilities.
- CP land, money and possessions can be given to a minor but the minor cannot sell/lease CP land without an appointed guardian (by Aboriginal Affairs) of the minor's interests.
- Can only create trusts for off-Nation/reserve property.



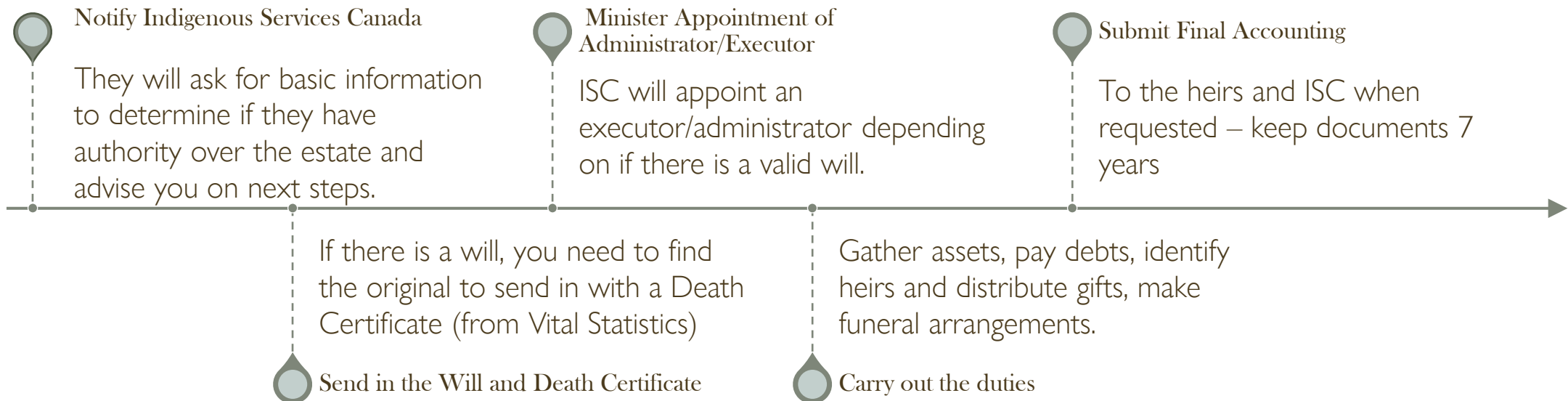


# Changing a Will

- The most recent valid Will applies
- Individuals should review their will if there has been a major change in their life (e.g., change in marital status, children, or assets)
- Best practice is to draft a new will if there are changes being made, to avoid confusion with a “codicil”



# Administering Wills under the *Indian Act*





# Intestacy – Order of Inheritance

1. Spouse (legal, common-law, same sex) – everything if no children, otherwise first \$75,000 with remainder to surviving children in equal shares
2. Children (biological and legally adopted) – if no spouse, all to surviving children in equal shares, if deceased child left surviving children, they get their parent's share in equal shares
3. Parents – if no spouse or children
4. Brothers/Sisters – if no spouse, children or parents, surviving siblings in equal shares, if deceased sibling left surviving children, they get their parent's share in equal shares EXCEPT for CP land interest
5. Next of Kin – except for CP land interest





# Matrimonial Real Property Rights

Intended to Address gaps in family law on reserve:

- Protection orders and family violence
- Family home occupancy during relationship, after separation and after death

**Applies to:**

- Spouses living on Nation/Reserve land where at least one party has status/is a member of the Nation
- Families where the Nation does not have their own matrimonial real property laws, self-governance agreement or land code that addresses this





# Exclusive Occupation & Value of Home

- Surviving spouse can stay for up to 180 days or longer with a Court order.
- If surviving spouse does not have an interest in the home and is not given an interest in the will, they can apply to court to get a share of the value of the property.
  - Must apply within 10 months from the date of death
  - Only a member of a First Nation can have property transferred to them



# Summary



## Will

- Effective after death ONLY
- Must be in writing and signed
- Picks someone to handle estate
- Tells loved ones what you want done with your stuff

## Power of Attorney

- Effective while alive ONLY
- Must be in writing and signed
- Picks someone to handle legal and financial matters
- Can be limited

## Representation Agreement

- Effective while alive ONLY
- Must be in writing and signed
- Picks someone to handle health and/or personal matters

## Advanced Directive

- Effective while alive ONLY
- Must be in writing and signed
- Tells health care providers your wishes on **specific medical procedures**



# Resources

- **Seniors First BC**
  - Telephone: 604-437-1940
  - Toll-Free: 1-866-437-1940
  - Website: <http://seniorsfirstbc.ca/>
  - Provides services to Indigenous people aged 45 and older and non Indigenous people 55 and older
- **The Law Centre (University of Victoria)**
  - Telephone: 250-385-1221
  - Website: [www.uvic.ca/law/about/centre](http://www.uvic.ca/law/about/centre)
  - Law students providing free legal help to low-income individuals





# Resources

- **Law Students' Legal Advice Program (LSLAP)**
  - Telephone: 604-822-5791
  - Website: [www.lslap.bc.ca](http://www.lslap.bc.ca)
  - Free legal assistance through appointments for low-income individuals in the Greater Vancouver area, including representation, document drafting, summary advice, and referrals
- **Access Pro Bono's Lawyer Referral Service**
  - Telephone: 604-687-3221
  - Toll-Free: 1-800-663-1919
  - Website: <https://www.accessprobono.ca/our-programs/lawyer-referral-service>
  - Consultation with a lawyer for up to 15 minutes for free, during which time fees are negotiated for further consultation, but a few well-organized questions can be answered





# Online Resources

Writing Your Own Will A Guide for First Nations People Living on Reserve in BC

[https://med-fom-aboriginal-health-2021.sites.olt.ubc.ca/files/2024/05/Indigenouse\\_Services\\_Canada-Wills\\_and\\_Estates\\_Planning\\_Booklet.pdf](https://med-fom-aboriginal-health-2021.sites.olt.ubc.ca/files/2024/05/Indigenouse_Services_Canada-Wills_and_Estates_Planning_Booklet.pdf)

Estate Administration on Reserve

<pubsdb.iss.bc.ca/pdfs/pubs/Estate-Administration-on-Reserve-eng.pdf>

Estate Administration On Reserve: Templates Package

<pubsdb.iss.bc.ca/pdfs/pubs/Estate-Administration-on-Reserve-Templates-package-eng.pdf>

Family Home on Reserve, when spouse passes

<nalma.ca/wp-content/uploads/2021/03/Understanding-Estates-Management-Booklet.pdf>

<pubsdb.iss.bc.ca/pdfs/pubs/Who-Can-Stay-in-the-Family-Home-on-Reserve-eng.pdf>

<www.coemrp.ca/wp-content/uploads/2015/12/Understanding-Estates-Management-Booklet.pdf>





Thank you



# Upcoming UBC Learning Circles:



**HEALING INNER VOICES**

**MAY 14TH, 2024 | 10AM - 11:30AM PST**  
FREE ONLINE WEBINAR VIA ZOOM  
REGISTER FREE ONLINE AT: [WWW.LEARNINGCIRCLE.UBC.CA](http://WWW.LEARNINGCIRCLE.UBC.CA)

**STIGMA**  
won't live  
in my world

Logos: drawing wisdom.ca, INSPIRIT FOUNDATION, INSPIRIT, REACH, UBC Learning Circle, THE UNIVERSITY OF BRITISH COLUMBIA Centre for Excellence in Indigenous Health



**Cultural Safety in Healthcare:**  
Past, Present, and Future Perspectives

**May 16th, 2024 | 10am - 11:30 am PST**  
Free online webinar via Zoom

Register free online at:  
[www.learningcircle.ubc.ca](http://www.learningcircle.ubc.ca)

Featuring guest speaker:  
Simon Brasscoupe

Logos: UBC Learning Circle, First Nations Health Authority, THE UNIVERSITY OF BRITISH COLUMBIA Centre for Excellence in Indigenous Health



**Nurses Supporting Indigenous Wellness**  
CHANGING LIVES & SHAPING TOMORROW

**MAY 23RD, 2024 | 10AM - 11:30 AM PST**  
FREE ONLINE WEBINAR VIA ZOOM  
REGISTER FREE ONLINE AT:  
[WWW.LEARNINGCIRCLE.UBC.CA](http://WWW.LEARNINGCIRCLE.UBC.CA)

Logos: UBC Learning Circle, First Nations Health Authority, THE UNIVERSITY OF BRITISH COLUMBIA Centre for Excellence in Indigenous Health



**Services for Children and Youth with Support Needs:**  
Emergent Themes and Concepts from Ongoing Engagement and Research

**Sept 5th, 2024 | 10am - 11:30 am PST**  
Free online webinar via Zoom

Register free online at:  
[www.learningcircle.ubc.ca](http://www.learningcircle.ubc.ca)

Featuring guest speakers:

**Danielle Smith**  
Associate Director, Indigenous Policy, Communications, and Engagement Branch

**Molly Fredeen**  
Senior Policy Analyst, Early Years and Inclusion Policy, Communications and Engagement

Logos: BRITISH COLUMBIA, UBC Learning Circle, First Nations Health Authority, THE UNIVERSITY OF BRITISH COLUMBIA Centre for Excellence in Indigenous Health

Sign up online at: [www.learningcircle.ubc.ca](http://www.learningcircle.ubc.ca)