



# Planning Ahead Your Will

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A Resource for Indigenous People

## Table of contents

What is a will?.....	3
Why make a will? .....	3
Who can make a will? .....	3
Who should have a will? .....	3
What happens if you die without a will?.....	4
As a Status Indian, are there any special considerations I should be aware of? .....	4
What territorial or provincial laws apply when I die?.....	5
What does a will address? .....	5
Who should prepare your will? .....	6
Important facts on wills. ....	6
What is an executor and what are important considerations in choosing an executor?. ....	7
What are some of the requirements for a valid will?. ....	7
Who can be a beneficiary in your will? .....	8
What are important considerations for wills? .....	8
What are some concerns for online or stationery store will kits? .....	8
How often should a will be revised? .....	9
What is a holographic will?. ....	9
Can you change your will? .....	9
Where should you keep your will?. ....	9
Do you need a lawyer to make a will? .....	10
What are other will considerations? .....	10
Definitions. ....	11
Applicable legislation .....	13

## **What is a will?**

A will is a written legal document that expresses a person's wishes regarding the disposal of their property after death. It is not pleasant to discuss your death; however, planning in advance will benefit your family and loved ones greatly. The importance of having a will cannot be overstated. Keep reading to find out why...

## **Why make a will?**

It is the most economical, easiest and fastest way of carrying out your wishes after you pass away. It allows your loved ones to know your wishes and execute them to the best of their abilities. Naming an executor in your will allows that person to take control of your affairs and possessions, and make decisions in your place without having to make an application to the Court to have someone named as an administrator. This process can be costly and time consuming. Further, having a will allows you to appoint a guardian for your minor children,

as well as manage your assets for the benefit of the children until they reach the age of majority or until the age you have requested that they receive the remainder of their inheritance. Appointing a guardian for your children is important if both parents die at the same time.

## **Who can make a will?**

A will maker must be over 19 years of age. If the testator/testatrix is a member of the Canadian Forces or of the Royal Canadian Mounted Police, sailor, mariner or is or has been married, they can make a will under the age of majority. Also, the will maker must be mentally competent (be of sound mind).

## **Who should have a will?**

Every person over the age of 19 who wants to have a say in how their assets will be distributed after death, and wants to make their passing and the paperwork easier for their loved ones after their death should have a will.

## What happens if you die without a will?

If you die without a will, also referred to as dying intestate means that your estate will be distributed in order of priority according to the *Intestate Succession Act*, R.S.N.W.T. 1988, c-10, and for Status Indians, sections 42-52 of the *Indian Act*. Once jurisdiction has been determined, your estate will be divided as per the legislation without considerations of your wishes or your family's needs. Depending on your financial situation, this could leave your spouse in financial hardship.

You can choose how you want your property distributed when you die by making a will, or you can let the government decide, it's your choice.

## As a Status Indian, are there any special considerations I should be aware of?

Wills of Status Indians are treated differently, and the Minister must approve the Will before it is approved

in the courts. The wills of Status Indians who live on reserves or land set aside for Indigenous Peoples by the Federal or Territorial Government requirements are set out in Section 42 to 47 of the *Indian Act of Canada* (R.C.S., 1985 cl-5), and sections 5 and 15 of the *Indian Act of Canada Regulations* (C.R.C., C.954).

Section 45 of the *Indian Act* allows Status Indians to make a will. The Minister encourages Indians to do so; however, the Minister or the Supreme Court will need to approve the will to obtain a Grant of Probate or Administration. A Grant of Probate is a court document which is issued when the court deems a will to be valid and that the executor has the authority to act.

Section 45 of the *Indian Act* also indicates that the Minister has the authority to accept as a will any written instrument signed by an Indian which he indicates his wishes or intention with respect to the disposition of their property upon their death. It is highly encouraged to ensure your will meets all legislative requirements so that it is deemed valid upon your death.

If your will is not valid, it will not have legal force or effect and your personal representative will need to manage your estate as though you died intestate (without a will). It is important to note that according to Section 46(1) of the *Indian Act* states that the Minister may declare the will of an Indian to be void in whole or in part if:

- (a) the will was executed under duress or undue influence;
- (b) the testator at the time of execution of the will lacked testamentary capacity;
- (c) the terms of the will would impose hardship on persons for whom the testator had a responsibility to provide;
- (d) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;
- (e) the terms of the will are so vague, uncertain or capricious that proper administration and equitable distribution of the estate of the deceased would be difficult or impossible to carry out in accordance with this Act; or

- (f) the terms of the will are against the public interest.

To ensure your will meets all requirements of the Minister or the court, it is important to seek legal advice when you write your will.

## **What territorial or provincial laws apply when I die?**

Where you reside when you pass away will be the jurisdiction that will have priority over your will; however, if you own personal or real property (houses, land, or real estate) in another province or territory, the laws of that province or territory will come into effect when it comes to the sale or transfer of these assets.

## **What does a will address?**

The executor of your will shall address any assets, debts or liabilities, and they have authority to sell, transfer and dispose of your property as per the instructions in your will depending on various factors that can't always be predicted. i.e. if one beneficiary decides they want to purchase your home, and they may need to buy out other beneficiaries.

If you have life insurance policies, certain bank accounts, or other investments naming a beneficiary, these assets will not form part of your estate and will be transferred to the named beneficiary.

## **Who should prepare your will?**

It is highly encouraged to seek legal advice and the services of an experienced lawyer when drafting a will. A will that does not follow the legal requirements to be considered “a valid will” could potentially be more problematic than dying without a will. Your lawyer will ensure that your will complies with the territory’s legislation.

There are all kinds of potential problematic issues that can affect the validity of a will. Certain terms can lead to confusion. i.e. Children: does the term children include step-children, adopted or custom adopted children? The term spouse can also

lead to confusion. Does the definition include fiancé, separated spouse or common-law spouse? An experienced lawyer will draft your will to ensure it is specific to your own situation, and will ensure that your will meets the legal requirements to be considered valid before the courts.

## **Important facts on wills:**

- A will is only an expression of interest, and it can be changed at any time.
- The property of the deceased is called the estate.
- If someone dies intestate, the person appointed by the court is called an administrator or administratrix.
- If you have children, you can make provisions for their well-being in case you pass away during their minority.
- Even if certain items or property is mentioned in your will, you can dispose of it as you deem fit.

## What is an executor and what are important considerations in choosing an executor?

An executor/executrix is a personal representative you appoint in your will to manage your affairs after you die. The role of an executor is an important one, as it requires a fair amount of paperwork, and management of debts and assets. When you choose an executor, you want to:

- Choose someone who is responsible.
- Ensure that the person or persons you are choosing agrees to the task.
- Choose someone that is comfortable with the paperwork required to administer an estate.
- Choose someone that has the time to administer your estate. If you have children, their investment of time may be significant over several years, depending on your children's ages.
- Choose someone who is organized and trustworthy to manage your assets and debts.
- Someone who understands your own views so they may make choices that respect your values and wishes.

## What are some of the requirements for a valid will?

- The will must be in writing.
- The will must be signed by the maker at the very end of the document. Any words written after the signature will most likely not count.
- The will must be signed or acknowledged by the maker in the presence of at least two witnesses. The witnesses must both be present at the same time. Therefore, signing always requires at least three people to be present at the same time: the maker and two witnesses (it is also a good idea to initial the bottom of each page after the last word to prevent any information being added to the page).
- A beneficiary under the will or a beneficiary's spouse must never be one of the witnesses to the will because this invalidates any gift to them contained in the will. The reason for this is to prevent undue influence on the maker of the will.
- It is preferable that one of the witnesses swear an affidavit to validate the will of the Court.
- Important: you cannot gift what you do not own.

## Who can be a beneficiary in your will?

- Anyone if they are not witnesses in your will signing.
- Charitable organizations.
- YOU CANNOT GIVE/GIFT what does not belong to you. For example, you cannot give marital property that belongs to your spouse to someone else. Also, if you have dependents, including dependent children that require support, the courts may decide that your assets will be used for their support. Also, Reserve or Band land is controlled by the Reserve or the Band and cannot be gifted in a will.

## What are important considerations for wills?

- Wills found online at the stationary store, the legislation varies from each territory or province. Instructions given may not be considered in the Northwest Territories.
- Holographic wills have special considerations.
- If you marry and you had not contemplated the marriage in your previous will, the will shall be

revoked or cancelled. If you marry, it is encouraged to revise your will if your current will does not address this marriage.

- There are significant differences between joint tenancy or tenants in common. It is important to know whether your home would form part of your estate or not.
- The executor/administrator of your will must pay all debts before any assets or monies can be distributed among your beneficiaries. It does happen that an estate is insolvent (more debts than assets).

## What are some concerns for online or stationary store will kits?

Legislation varies from each territory or province. Instructions given may not be considered valid in the Northwest Territories. There can be confusion used by a lay person, i.e. money. Does that include RRSPs, term deposits, Canada Savings Bonds or other savings? Does personal possession include a car? Vague words can give rise to dispute and long-drawn-out court proceedings.

## How often should a will be revised?

A will should be revised as often as necessary. Changes to a will should be made immediately if the executor(s) named in your will loses capacity, passes away, or if any of your beneficiaries have passed away or changed. It is always a good idea to review your will and other legal documents, such as your living will or power of attorney every 3 to 5 years.

## What is a holographic will?

- The will must be written entirely in the handwriting of the deceased, dated and signed by the testator/testatrix themselves.
- A holographic will is valid in the NWT; however, it may not be recognized in another province or territory, i.e. may not be able to transfer a property to a beneficiary in the will.
- Will kits purchased in stores are not considered holographic wills, as a part is in writing and some parts are type written.

## Can you change your will?

Yes!! There is no limit to how many changes you can make; however, make all efforts possible to avoid confusion. If you change your will, ensure that your new will includes a clause stating that any prior will or codicils are revoked. Again, receiving the assistance of a qualified lawyer will assist you to ensure your will complies with the legal requirements.

## Where should you keep your will?

It is important to let your family members and/or executor(s) know where you have stored your will. If they are unable to locate your will, your estate will be treated as though you died intestate (without a will). Your will should be stored in a safety deposit box or a fireproof safe. It is important to provide your trusted friend or family member with the key or passcode to access the location.

## **Do you need a lawyer to make a will?**

You do not need a lawyer to make a will; however, it is encouraged to seek legal advice as a lawyer will be able to advise you on the legal requirements of a will. If you seek the services of a lawyer to draft your will, the lawyer will be able to ensure your wishes are clear and that the document respects the legislative requirements by the court.

## **What are other will considerations:**

- i. You should keep the original of your will in a safety deposit box or safe. The most important consideration is informing your executor or a person you trust where the key and /or passcode are kept. If your loved ones are unable to locate your will, your estate will be processed as though you died intestate (without a will).
- ii. You can attach a list of the property you wish to go to someone specific, for example jewellery or art pieces.

- iii. You can make your funeral wishes known in your will. This may not be legally binding, but it provides the executor/executrix and your family or loved ones with your wishes.
- iv. It is encouraged that you create a death binder where you keep copies of all important documents such as identifications (Social Insurance Number, driver's license, passport, birth certificates for yourself, spouse and children, marriage certificate), safety deposit box information, insurance policies, asset registrations, stocks and bonds, automobile and/or vehicle registrations, real estate information including mortgages, pension plans, tax information, bank statements, investment statements, loans and current debts, list of electronic passwords, funeral arrangements, etc. Keep your executor or family informed of where you keep these items.

- v. For tax planning purposes and depending on the value of your “estate” you may want to consult an accountant who is a tax specialist for special considerations that might lessen taxes, leaving more inheritance to your beneficiaries.
- vi. If you die, intestate leaving no issue, and no other surviving family or relatives can be located, in accordance with *The Intestate Succession Act*, the Minister or government will control who will receive your property.
- vii. You can name someone on your Facebook account to manage your FB page or even on your Apple ID if you have one. This will facilitate your executor or loved ones’ efforts to take control of your digital assets.
- viii. If you have a child or dependent with disabilities, it is important to inform your lawyer so that adequate planning is taken into consideration.

## Definitions:

**Administrator:** A person appointed by the Minister or the courts to administer the estate of someone who has passed. They will manage the deceased person’s estate. If this person is female, the term used is administratrix. For ease of reference, the term administrator is used; however, the writer reminds the reader that the female version is executrix.

**Administratrix:** Female term for Administrator.

**Assets:** Property owned by the deceased. This may include cash, bank accounts, personal effects (art, jewelry), earnings, pensions, tax and disability benefits, bonds and investments, vehicles, settlements, land and buildings owned.

**Beneficiary:** A person who inherits from the estate of the deceased.

**Bequest:** Property disposed of in a will.

**Capacity:** In *Nassim v. Nassim Estate* [2022] BCSC 402 (para 41) states: "The testator must be sufficiently clear in his understandings and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural object of his bounty and (3) the testamentary provisions he is making; and he must moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property..."

**Codicil:** A supplemental document modifying or adding to a will.

**Estate:** All the property, real and personal, owned by a person at the time of their death.

**Executor:** The person or persons named in the will responsible for the administration and distribution of the estate of the deceased in accordance with the will. If this person is female, the term used is executrix. For ease of reference, the term executor is used; however, the writer reminds the reader that the female version is executrix.

**Executrix:** Term used for female version of executor.

**Guardian(s):** A person or persons named in the testator/testatrix's will to be responsible for their children if they pass away while the children are minors. It may not be legally binding, depending on if the other parent is alive and able to care for the children. The Court will, however, take into consideration the wishes of the parent.

**Heir:** A person who may inherit from the estate of the person who died intestate (without a will).

**Indian:** As defined by the *Indian Act* means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

**Intestate:** The estate of a person dying without a valid will.

**Issue:** The term used to describe the testator/testatrix's children and their direct descendants, such as grandchildren or great-grandchildren.

**Minister:** The Minister of Crown-Indigenous Relations and Northern Affairs Canada.

**Property:** Property includes all those things and rights, which are the object of ownership and property consists of land, or anything attached to or part of the land, such as a house. All other property, such as stocks, insurance and jewellery, is called personal property.

**Spouse:** the meaning of spouse is defined by the *Family Law Act for the purposes of this publication*: “spouse” means a person who (a) is married to another person, (b) has together with another person entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act, or (c) has lived together in a conjugal relationship outside marriage with another person, if (i) they have so lived for a period of at least two years, or (ii) the relationship is one of some permanence and they are together the natural or adoptive parents of a child.

**Status Indian:** People who are registered under the *Indian Act*.

**Testament:** Another word for a will. These words are synonymous.

**Testator:** The person making a will is called a testator, or testatrix if female. For ease of reference, the term testator is used; however, the writer reminds the reader that the female version is testatrix.

**Testatrix:** Female person making a will.

**Trustee:** A person that holds property for someone else (i.e. the deceased). A trustee may hold property for a minor until the child reaches the age of majority or the conditions stated in a will.

## **Applicable Legislation:**

*Wills Act, R.S.N.W.T. 1988, c. W-5*

*Intestate Act, R.S.N.W.T. 1988, c.8 (Supp.)*

*Indian Act of Canada (R.C.S., 1985 cl-5)*

*Indian Act of Canada Regulations (C.R.C., C.954)*



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