

WILLS



Writing a will is a good idea. It is the best way to make sure that the things you own end up in the right hands after your death.

What is a will?

A **will** is a legal document that lets you say what you want done with your possessions after you die. It also lets you say who you want in charge of carrying out your wishes.

A person who makes a will is called a **testator**. Your **estate** is all of the possessions you own when you die. This includes many things such as real estate, jewellery, artwork, clothing, and furniture. Whoever is in charge of carrying out your wishes is called your **executor** or your **personal representative**.

A will has no legal effect until you die.

Do I have to make a will?

No. The law does not require you to make a will.

Why should I make a will?

There are many reasons to make a will. A will allows you to:

- deal with your possessions the way you want
- name who has the authority to carry out your wishes
- name who you want to care for any dependent children
- provide for anyone who is dependent upon you
- save money and time by stating your wishes
- have peace of mind in knowing you have said what you want done
- help your family and friends handle your affairs after you die
- reduce the stress and strain on your family and friends
- reduce uncertainty and confusion about your wishes

Should I make a will if my spouse or partner has a will?

Yes, especially if you own anything on your own and if you want someone specific to inherit it. This includes items of sentimental or personal value such as keepsakes or pets. You might die before your partner or spouse, or you could die at the same time in an accident. A will is the best way to let your wishes be known.

You can each have a will that mirrors the other's will. They are separate wills but have identical terms.

 What happens if I die without a will?

If you die without a will, you are said to die **intestate**, and the rules set out in the Nova Scotia *Intestate Succession Act* must be used to decide who gets your estate:

- Your property is distributed to the people considered to be your nearest relatives as listed in the act. There is no flexibility. The distribution may be different from what you would want.
- **Common law partners**, including same-sex partners, are not included on the *Intestate Succession Act* distribution list unless they have a **registered domestic partnership**. They are covered from the date they registered the partnership.
- If common law or same-sex spouses did not have a registered domestic partnership, the surviving spouse may have to go to court to get financial support or to make a claim on the estate.
- Children are included in the *Intestate Succession Act* distribution list.
- There will be extra steps in the process of settling your estate, which can mean additional costs and delays. This may add to your family's pain and distress. It will also mean that there will be less left to distribute.
- Family members may disagree and argue about how you intended to distribute your property.
- Someone will have to offer to look after your estate. The person must apply and be appointed by a court as an **administrator** or a personal representative. That person may not be someone you would have chosen.
- If you and your spouse die at the same time or if you are a single parent when you die and you have not chosen anyone to care for your dependent children or dependent grandchildren, someone will have to offer to take over this responsibility. The person responsible for your children or grandchildren is said to be their **guardian**. A person must apply to be guardian and be appointed by a court. That person might not be someone you would have chosen.
- If the court appoints a guardian to look after your children, it will also often state the terms of the **guardianship**. Those terms might not be what you would have chosen.

The law about **intestacy** also applies if you do not deal with all your property in your will. In this case, you are said to die partially intestate. The part of your estate not covered in your will is distributed according to the *Intestate Succession Act*.

What are the legal requirements of a will?

The legal requirements of a will are set out in the Nova Scotia *Wills Act*. Your will must meet all the legal requirements; otherwise, it will not be valid. The legal requirements include:

Age: In Nova Scotia, you must be aged 19 or older to make a will. There are a few exceptions. For example, a person under 19 can make a will if they are or were married.

Capacity: You must be mentally **competent** to make a will. This is also called “being of sound mind.” When talking about wills, this is most often called having testamentary capacity. To have **testamentary capacity**, you must:

- know that you are making a will and understand what a will is
- know what property you own
- be aware of the persons (such as a spouse and children) you would normally feel you should provide for.

You must have testamentary capacity at the time you make your will. If you become mentally incompetent after you made your will, the will is still valid.

Testamentary capacity is often an issue with persons who have a mental infirmity or who are very ill. The mental **capacity** of someone who is very ill may be affected by the illness, drugs, or pain. You should make your will while you are in good health to avoid having your mental capacity questioned.

Knowledge: You must know and approve of the contents of your will. The will may be invalid if you were misled by fraud or simply by accident. It may also be invalid if someone put an inappropriate amount of pressure on you, known as “undue influence.”

Written: A will must be in writing, but it need not be typed. It can also be handwritten or printed. A videotape, an audio recording, and any other way of communicating your wishes are not considered to be valid wills.

Signature: Your will must be signed at the end by you. You must sign the will before two witnesses who must be present at the same time, unless it is a **holograph will**. If you are unable to sign the will, you can ask someone to sign it for you in your presence. You must tell the two witnesses that the will is yours.

Witnessed and signed by two other people: Your will must be signed by two witnesses in your presence and in the presence of each other. The witnesses must be at least 19 years old and must not benefit from the will or be married to someone who benefits. The witnesses do not need to know what your will says.

▶ What is a holograph will?

A **holograph will** is a handwritten will that is written and signed by the testator but not witnessed. Before August 19, 2008, holograph wills were not valid in Nova Scotia. Then the law was changed, and a holograph will made after that date is now legal. (The courts have ruled that a holograph will made before that date is not valid.) If you have a holograph will, it is best to check with a lawyer to make sure it's valid.

▶ Do I need a lawyer to make a will?

No. The law does not say that a lawyer must write your will. You can write your will yourself, fill in a blank form of a will that you can buy from a store, or download a blank form from the internet. There are also books and kits available about doing wills.

A will is an important legal document, so it is a good idea to get legal advice about making a will even if you do not want the lawyer to write your will. If you feel that a family member or other person is pressuring you to leave money or property to them in your will, you can talk to a lawyer about this.

If you are concerned that your spouse or someone who is dependent on you will not be able to manage their financial affairs or may be vulnerable to financial **abuse** or **scams** if you die before them, you should discuss with the lawyer how to best provide for that person. Your will must be worded very carefully to make sure that what you want actually happens. A lawyer is able to help you by:

- making sure your will is clear about what you want to happen to your property on your death
- making sure your will meets all the legal requirements
- telling you about a number of standard clauses that can be included in your will to provide for unforeseen events
- telling you about options for dealing with things that may not have occurred to you
- telling you about things you can do now to make dealing with your estate easier after you die
- answering any questions you may have about the process of dealing with your estate
- providing proof in the future that your will was made voluntarily, by your own free choice, and free of undue influence
- providing proof in the future that you had testamentary capacity

If you write your own will, you should have a lawyer look it over to make sure that it meets all the legal requirements and that it says what you want it to say.

What does it cost for a lawyer to do a will?

Lawyers charge a fee based upon the amount of legal service you require and how complex the will is. It can range from under \$200 and upwards. You should discuss fees before you make any decisions about hiring a lawyer, whether you plan to prepare the will yourself or you want the lawyer to prepare it.

Can I choose who to leave my property to in my will?

In most cases, you are free to leave your property to who you wish. However, there are two Nova Scotia laws, the Testators' Family Maintenance Act and the Matrimonial Property Act that place some limits on that freedom.

Testators' Family Maintenance Act

This act tries to make sure that your dependents are left with the necessary money and support whenever possible. Children (including adopted children) and a widow or widower are considered dependents under this act.

Common law and same-sex spouses are not considered dependents under the *Testators' Family Maintenance Act* unless they have a registered domestic partnership. Then they are included from the date they registered the partnership. Divorced spouses are not considered dependents under the act.

If you do not provide for a **dependent** in your will, they can go to court and ask a judge to order support. A dependant is someone you are under a legal obligation to support, such as a child under the age of 19 or a spouse. The judge may take into account the following:

- whether a dependent deserves help (based on their character and conduct)
- whether there is any other help available to the dependent
- financial circumstances of the dependent
- any services provided by the dependent to the testator
- the testator's reasons for not providing for the dependent in the will (It helps if the reasons are written and signed by the testator or if they are included as part of the will.)

This is not a complete list. The judge may take other factors into account.

The application for support must be made within six months after **probate** or administration of the estate has been granted. A person who wants to apply for support under this act should first talk with a lawyer.

Matrimonial Property Act

This act recognizes the contribution of both spouses to a marriage. It says that when one spouse dies, the surviving spouse can apply for an equal division of matrimonial assets.

Common law and same-sex spouses are not covered by the *Matrimonial Property Act* unless they have a registered domestic partnership. Then they are included from the date they registered the partnership.

The surviving spouse must apply to the Supreme Court within six months after probate of the will or administration of the estate has been granted. A judge decides what share of the matrimonial assets the surviving spouse should get.

A person who wants to make an application should first talk with a lawyer.

Do I have to leave my estate to my family?

You are responsible to provide for your family and dependents as required by the *Testators' Family Maintenance Act* and the *Matrimonial Property Act* (see previous question), but otherwise you are free to deal with your property as you wish.

You may decide to leave your estate to someone other than your closest relatives. You may decide to leave it to some family members but not to others. If these are the kinds of things you want to do, it is wise to get advice from a lawyer and to record your reasons in writing.

Where should I keep my will?

You should keep your will in a safe place. Your will is a private document, and you may not want it available for family members or others to read.

If you have a safe deposit box that is in your name only or that is held jointly with someone else, that is likely the safest place. It is important that your will be stored in a fireproof location.

You could also give your will to a trusted person to keep in a safe place for you. Keep in mind that it may be many years before your will is needed. The person storing your will may move away or die in the meantime. As time passes, you must always keep track of where your will is being kept.

You should tell your executor where your will is stored. Your executor should be able to find it easily. You should make sure that the people in your life who need to know about your will also know where to get it when it is needed.

If you hired a lawyer to write your will, ask them to keep a copy as well.

Can I change my will?

Yes. A will only comes into force after your death. Until your death, you are free to deal with your property as you wish. For example, if you leave your cottage to your niece in your will, it does not prevent you from selling the cottage and using the money as you wish. The will only applies to property that you still own at the time of your death.

If you are leaving property to someone, you may want to provide for the possibility that they might die before you. For example, if you leave some of your property to nephew, do you want his wife and/or children to inherit it if he dies before you? If you want the property to go to someone else, you should say so in your will.

You can change your will at any time up until you die provided you are mentally **competent**. You should look at your will regularly to make sure it is still what you want. For example, you may no longer own some of the property mentioned in your will. You may want to make changes because of births, deaths, marriages, or divorces in the family.

You should not try to change your will by marking in or crossing out words. This may cause problems. It is much safer to make a **codicil** or a new will.

A codicil is a separate legal document to change part of your will. The opening words of a codicil usually refer to the will it is amending. Then it states which **clauses** of the will are revoked or amended and what is substituted. The closing words of a codicil should say that apart from the changes it makes, you confirm the terms of the original will. You must sign the codicil and have your signature witnessed in the same way as your will. A codicil is generally used only to make minor changes to a will.

It is wise to make a new will if you want to make major changes in your will or if you have made a number of codicils. The first clause of a new

will usually says: "I revoke all wills and testamentary dispositions of any nature and kind made by me." The most recent properly signed and witnessed will is the one that will be used after your death.

You must be of sound mind at the time you make the changes. If you are not, your new will or codicil may be successfully challenged in court.

Can I cancel my will?

Yes. When you cancel a will, you are said to revoke it. There are five ways to cancel or revoke your will or parts of your will.

- Your will is revoked if you marry unless it refers to your marriage and it says whether it is to apply regardless of the marriage.
- Parts of your will may be revoked if you divorced after August 19, 2008. As of that date, a divorce revokes the parts of a will giving a gift, benefit, or power to a former spouse. It also revokes the parts appointing a former spouse as executor or trustee. There can be exceptions. For example, the will, a separation agreement, or a marriage contract may say that the terms of the will are not revoked by a divorce.
- You can make a written document stating that you want to revoke your will. It must be signed and witnessed in the same way as a will. For example, if a bank manager held a testator's will and the testator became ill and signed a letter to the bank manager stating, "Please destroy the will already made out," and the letter was properly signed and witnessed, then it would revoke the will.
- You can make a new will. A properly signed and witnessed new will revokes a previous will. In the same way, a codicil that is properly signed and witnessed often revokes certain parts of your will in order to make the changes you want.
- You can destroy your will or ask some other person to destroy it in your presence. If a will is accidentally destroyed (for example, by a fire in which the testator dies), a copy of the will could still be used because there was no intention to revoke the will.

Is a will made outside Nova Scotia valid in Nova Scotia?

Your will may be valid if it was made outside Nova Scotia. To find out for sure, you should have it checked by a Nova Scotia lawyer.

What does the executor do after I die?

An executor is responsible for seeing that everything in your will is handled properly. The executor gathers all of your assets, pays your debts and taxes out of your estate, and distributes your money and property according to the instructions in your will. It is best to name an executor and a back-up executor in your will so you can be sure that your estate will be handled by someone you know well and trust. Also, you can give broader power to your executor than the Probate Court can give if it has to appoint an administrator.

The executor applies to the Probate Court for a grant of probate. This gives the executor power to handle your estate in accordance with the terms of your will.

If you do not name someone to be an executor in your will, if your executor is not able to act for any reason, or if you die without a will, your next of kin will usually have to ask the Probate Court to appoint someone to fill the executor's role. This person is called an **administrator**.

The court uses the term **personal representative** for a person appointed as either an executor or an administrator.

Who should I choose as an executor?

Most people ask a family member or a close friend to act as their executor. You need to be sure that the person you choose has the time and the ability to carry out the many duties of an **executor**. The executor should be someone who will get things done. Looking after an estate can be difficult and it takes time. Sometimes it includes responsibilities that last for years.

Here are some things to keep in mind when you choose an executor:

- The best executor is a trustworthy, reliable, and **competent** adult.
- Consider choosing someone who has some knowledge about banking and business affairs.
- Choose someone who is likely to outlive you.
- Choosing someone who lives in the same province as you do may cut down on long distance phone calls and other administrative expenses.
- Your spouse, friend, family member, or heir may be able to do a good job as an executor. Many people choose their spouse or their main heir as their executor.

- You should appoint a back-up executor in case your first choice dies, moves away, or for some reason is unable to do the job.
- Before you name an executor in your will, you should ask if they are willing to take on the job.

You can name your lawyer as executor, but most lawyers do not act as executors. They prefer to handle only the legal side of estates. Before you name your lawyer, ask if they are willing to be your executor.

▶ Can the person I choose as executor refuse the position?

Yes. A person named in your will as your executor can refuse to act as executor. This is called a **renunciation**. You should name a back-up executor in your will in case this happens. If you have not named a back-up executor, then your next of kin will have to ask the court to appoint someone else.

Before you make your will, you should ask the people you want as your executor and back-up executor if they are willing to take on the job. If either one refuses, you can appoint someone else.

▶ Can I appoint joint executors?

Yes. You can appoint more than one executor (called “co-executors”) to share the responsibility. Having more than one person in charge means that there may be disagreements about what is to be done. Unless you provide otherwise, each co-executor has the authority to sign on behalf of your estate. If your co-executors do not agree, this could cause problems for your estate.

▶ Can I choose a trust company to act as my executor?

If your estate is complicated or if you do not have a relative or friend who is able to act as executor, you may want to appoint a **trust company** as your executor. You should check that the company is willing to act as executor or co-executor. If you don’t check, the company may renounce and refuse to act as executor upon your death.

Most trust companies have experience in estate planning. Their advice may help you plan your estate to save taxes and to avoid administrative problems. Also, because such companies are strictly regulated, you can be sure that your estate will be handled properly and legally.

If there is a chance that a problem will arise among your heirs, a trust company might be a good choice because it would be an impartial executor. If you appoint a trust company as your executor or co-executor, the company may give you free advice on drafting your will and may store it for you.

There can be disadvantages to using a trust company:

- they may charge the maximum fee allowable. (Any executor may charge up to 5% in fees.)
- they can be conservative investors
- they may not be as familiar with your assets as a family member or friend
- they may not know your dependents and their needs as well as a family member or friend
- they may not be able to be as flexible in dealing with your dependents as a private individual could be
- their fees are subject to certain taxes that are payable out of the estate

Before choosing an executor, you may also want to think about the time involved in administering your estate. For example, if you want to set up a trust for the care, education, and benefit of your children or grandchildren, this would be a long-term commitment for an executor. In a case like this, you may want to consider a trust company rather than someone who might not be able to make such a commitment or who might die before the funds in the trust have all been distributed.

What happens if my intentions are unclear in my will ?

If your will is unclear when you die, your family may have to go to court to sort out your estate. Your executor will have to talk to a lawyer.

Where can I get more information on probate ?

The Probate Court in each of Nova Scotia's **probate** districts has information available to the public. You may obtain copies by visiting or by calling your local Probate Court office or by going to the Courts of Nova Scotia website, www.courts.ns.ca/self_rep/self_rep_kits.htm. Scroll down the page until you see the listing for "Probate Court." The phone number for your local Probate Court office should be

listed in the blue government pages of your phone book under "Courts." Office location information is also available on the Courts of Nova Scotia website. Click on the "Probate Court" tab at the top and select "Location."

The information available includes:

- The *Probate Act* - Questions and answers
- Dealing with an estate
- Grant of probate - checklist
- Grant of administration with will annexed - checklist
- Grant of administration - checklist
- Passing the accounts of an estate in Probate Court - checklist
- How to prepare the final account of the personal representative



Where can I get more information?

Legal Information Society of Nova Scotia (LISNS)
Legal Information Line
902.455.3135
1.800.665.9779

LISNS has online information at www.legalinfo.org.
Under "Legal Information,"
go to "Planning your Life."
Click "Making a Will."