Wills & Estate Planning

Making a Will

Public Legal Education and Information Service of New Brunswick

This booklet is one in a series of resources dealing with wills, executors and estate planning. The purpose of the booklet is to provide some basic information about making a will in New Brunswick. It does not contain a complete statement of the law and laws change from time to time. A will must be made properly or it will have no legal effect. It is a good idea when you make a will to discuss your situation with a lawyer.

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Definitions

When you are making a will, you may come across the following terms:

Will: A will is a legal document that gives instructions about what you wish to happen after your death to the property owned solely by you.

Beneficiaries: The people or organizations whom you name in your will to get a share of your property or assets after your death.

Codicil: A document that changes your original will.

Testator: The person making the will.

Estate: The property that you own or have an interest in at the time of your death.

Executor: The people or trust company that you name in your will to be responsible for administering your estate and distributing your property.

Guardian: The person that you name in your will to care for your minor children and protect their interests should you and your spouse die at the same time.

Minor Children: In New Brunswick, refers to children under 19 years of age.

Spouse: A legally married spouse.

Dependants: Individuals who depend on you for their support and for whom you may have a legal duty to provide.

Intestate: Dying without a valid will.

Reasons to Have a Will

There are several reasons why you should consider making a will. They are, for example:

1. **To distribute your property as you wish.**
   Only by making a will can you select the individuals you wish to benefit and what each should get. If you die without a will a court-appointed administrator will distribute your property according to the ***Devolution of Estates Act***. Your property will be divided in fixed shares among the people that the law regards as your closest relatives. These may not be the people that you wanted to benefit.

2. **To allow you to choose your own executor.**
   When you make a will you may appoint the executor of your choice. If you die without a will, somebody must apply to the court to be appointed as an administrator. The administrator's job is to divide your property and assets among those who are entitled to it. The person appointed administrator is usually a member of your family, or if you have none, a close friend or even a creditor. However, this may not be the person you would have chosen.

3. **To give you flexibility in carrying out your wishes.**
   A will gives you flexibility. For example, you may use "trusts" to help manage the property that you leave your beneficiaries. Also, it lets you set out all the powers needed by the executor to carry out your wishes.

4. **To provide guardianship for your children under the age of 19.**
   When you make a will you may choose the guardian for your children under the age of 19, subject to approval by the court. If you die without a will, the court will appoint a guardian for your children. The guardian will usually be a close relative but it may not be the person you would have selected.

5. **To avoid delays and costs**
   By making a will and appointing your own executor, settling your estate should progress more quickly. Your family will not have to spend time applying to the court to appoint an administrator. This will save your estate money as well.

Legal Requirements for Having a Will

Who can make a will?

In New Brunswick, the ***Wills Act*** requires that you be at least 19 years old to make a valid will. The law makes certain exceptions to the age requirement. If you are or have ever been married you can make a valid will even if you are under 19 years of age. Also, members of the Canadian Forces on active service and mariners or seamen while at sea or in the course of a voyage, can make a valid will under the age of 19. You must also be mentally competent. This is sometimes referred to as "*being of sound mind*". If you become mentally incompetent after making your will, it remains a valid will.

Do I have complete freedom in making my will?

Generally, you can leave your property to the people, organizations and/or charities that you choose. However, you may have a legal duty to provide for certain people who depend on you for their support. If you do not adequately provide for them in your will, one or more of them may apply to the court under the ***Provision for Dependants Act***. Those who may apply include, for example, your spouse, children, parents, and common-law partner. As well, your spouse may apply to the court for certain entitlements under the ***Marital Property Act***. The court may override or change your will to provide for your **dependants** or to give your spouse a proper share of the marital property.

What can I give away by my will?

You can give away by your will any property that you own at the time of your death. You should consider the following:

General Property

What do you want to happen to property such as real estate, bank accounts and vehicles? If you share the ownership of property with others, it is wise to see a lawyer to help you determine if the type of shared ownership you have allows you to include that property in your will.

Pension Plans, Life Insurance, RRSPs, and Credit Union Accounts

You can distribute things in your will like pension plans, life insurance, RRSPs, and credit union accounts but only if you have named your estate as the beneficiary of these assets. In such a case, these assets will become part of your estate when you die and the terms of your will then govern their distribution. However, you may decide instead to make these assets payable to a named beneficiary, other than your estate, and you would not have to deal with them in your will.

Personal Items

You may wish to identify personal items such as jewellery and heirlooms as bequests for specific individuals.

What happens to my debts?

The first thing your estate must be used for is to pay off your funeral expenses, the costs of administering your estate and any debts you owe when you die. Although wills set out how you wish to provide for your family and distribute your estate when you die, your beneficiaries will only get what is left over.

Things to Think About

Can I choose anyone I want to act as my executor?

You may choose either a person or a trust company to act as your executor. Most importantly, you should choose somebody that you trust to carry out your instructions. Since most estates are fairly simple, family members or trusted friends are often chosen as executors. Keep in mind that the job of executor is an important one. It requires time, dedication and some paperwork. The person you name as executor is not required to accept the role so discuss it with him or her first. For more information, you should read the pamphlet **"Choosing an Executor"**.

Do I have to pay my executor a fee?

Your executor has the right to be paid for his or her services. However, family members often will agree to administer the estate without taking a fee. You should tell your executor if you expect him or her to act without pay or for an agreed to amount. It is a good idea to set this out in your will. If you have not done so, your executor can apply to the Probate Court for a reasonable fee.

What should I consider if I have young children?

If you are making a will and you have minor children (under 19 years of age), you should consider naming a guardian to care for them. This is in the event that you and your spouse die at the same time. The guardian would look after the children and protect their interests. Guardianship is an important responsibility. You should discuss it with the proposed guardian beforehand. It is a good idea to name an alternate guardian in case the first one is unwilling or unable to act. The person that you name as guardian does not have to be the same person you name as executor.

Can my will include long-term arrangements for dependants or somebody that I wish to provide for?

Yes. You may consider, for example, setting up a trust and giving a trustee broad powers to manage the trust fund for the benefit of your children while they are under the age of nineteen. Parents of an adult child with a disability may be able to set up a trust that still permits the beneficiary to qualify for government benefits. Trusts can serve many purposes including making the most of certain income tax advantages. You should get legal advice if you are interested in setting up a trust.

Should I put my funeral arrangements in my will?

No. Although it's a good idea to make funeral plans ahead of time, it is not be wise to put them in the will. Often, when a person dies the will is only read after the funeral. Consider putting your instructions in a separate letter and keeping the letter in a safe place. Make sure your family and executor know of your wishes and where to find the letter. If you have not made funeral arrangements, your executor has the right to do so and to pay for them out of the estate.

Many people purchase pre-arranged funeral plans. This option allows you to arrange and purchase the particular funeral plan that you want while you are living. This may give you peace of mind and relieve stress on your family when you die.

Making the Will

Do I need a lawyer to make a will?

No, the law does not require that you have lawyer. However, it is usually a good idea to get advice from a lawyer. A lawyer will know how to prepare the will in the proper legal form. He or she can tell you which things you need to deal

with by your will and which you do not have to include in your will such as insurance proceeds and jointly owned property, depending on the circumstances. The lawyer can suggest the best ways for your will to do what you want. Usually, there are more options than you realize.

The lawyer can also advise you about your legal duty to provide for dependants. This should help to avoid claims against the estate after your death. You can also discuss estate planning with your lawyer and get advice on what arrangements you can put in place during your lifetime as an alternative to using a will. For example, the lawyer can tell you about using "trusts" and other legal methods to help manage benefits for your survivors.

What happens when I go to a lawyer?

At the first meeting you and the lawyer will discuss how you would like to distribute your estate. To help you prepare for your first meeting, review and complete PLEIS-NB's **Checklist for Making a Will**. Afterwards, the lawyer will draft the will and arrange for you to go through it in detail before a final version is prepared for signing. If you are uncertain about any part of the will, ask the lawyer to explain it so you know whether the will does what you want. When you are satisfied that it does what you want, it can be formally signed and witnessed. Your lawyer will advise you on the proper way of doing this. The lawyer and/or the lawyer's office staff usually act as witnesses.

What does it cost to have a lawyer make my will?

Lawyers use different methods of calculating fees depending on the type of legal service provided. Ask up front how much he or she will charge for a will and how you should pay. Lawyers are usually able to quote a flat fee for wills. The lawyer's out-of-pocket expenses, such as long distance telephone calls, photocopies, etc., will usually be extra.

How can I prepare before I meet my lawyer about my will?

You can prepare for your appointment with the lawyer and probably save time and costs by having the following information ready.

i) Full names and addresses of the people you want to leave things to including details of your children's ages, and special needs. If you want to leave something to an organization, such as a charity, try to find out the full legal name of that organization. Most lawyers can verify the exact name if you are unable to do so;

ii) Detailed list of all property including pensions, insurance and annuity contracts. You should also list your debts and the location of your bank accounts and other assets even if you are not sure that these will be covered by your will;

iii) Names and addresses of those you want to appoint as your executor, trustee and guardian for your children;

iv) Special instructions about keeping property such as a house or a cottage in the family;

v) Copies of any marriage or separation agreements and details concerning your place of marriage;

vi) A copy of your previous will;

iv) General instructions on how you want to divide your property.

Can I make my own will?

Yes, you may create a valid will by preparing it completely in your own handwriting and signing at the bottom. Witnesses are not necessary. This is called a ***holograph will***. However, if you are not familiar with the various other legal requirements you may create problems for your estate, family and heirs. Holograph wills should be avoided except in the case of an emergency.

Are there standard will forms or will kits available that I can fill out myself?

Standard forms of wills or will kits may be available from book or stationery stores, websites, and other sources. If you decide to use one of these forms, you should be aware that they may not include provisions required by law in New Brunswick for a valid will. Each province and territory in Canada has its own laws regarding how property can be passed on after someone dies. For example, in New Brunswick, if a will is not properly signed and witnessed it will not be valid. By law, you must sign it at the bottom in the presence of two adult witnesses who sign after you. Everybody must see each signature being made. However, if a beneficiary under the will or the spouse of a beneficiary acts as a witness the gift to that beneficiary may not be valid. If you are preparing your own will, consider having a lawyer review it to be sure that it meets all legal requirements.

What if I previously had a will?

When making a will, it should state that you revoke all previous wills and codicils.

Where should I keep my will?

Keep your will in a safe, fireproof place - there is only one original and your executor will need the original, not a copy, to administer your estate. Some people put their important papers including the will in a safety deposit box. The bank will permit your executor to retrieve it and nothing more at your death. It is important that you tell your executor and family where they can find the will, as well as your funeral instructions and your safety deposit key.

You will not need to register your will. There is currently no wills registry in New Brunswick.

Revoking and Changing the Will

Can I cancel the will once it has been made?

Yes. You can revoke your will at any time before your death as long as you are mentally competent to do so. Under the ***Wills Act*** there are only certain ways to revoke a will. The safest way to do this is to make a new will stating at the beginning that you revoke all previous wills. If you wish to revoke your will you should contact a lawyer.

Can I change a part of the will after it is made?

Yes. You can change your will at any time prior to your death. Again, you must be mentally competent to do so. You must also follow the provisions of the ***Wills Act.*** If you try to change your existing will by writing on it, the changes will likely not be effective. If you wish to change a part of your will you should contact a lawyer.

When do I need to change my will?

The following events may give you reason to update your will:

- **A change in your marital status:** This might include a divorce, separation, or remarriage. Some changes, such as marriage or remarriage, affect the validity of your will. For example, if you marry, your will is automatically revoked unless the will says that it was made in contemplation of your new marriage. Other changes do not affect a will even though your intentions may have changed. For example, if you have named a separated or former spouse as a beneficiary in your will, he or she would still inherit no matter how long you had been apart. However, if you divorce, the portions of your will that involve your ex-spouse may no longer be valid. You must formally change the will if you no longer wish to benefit that person.

- **Changes in family status:** The birth or adoption of a child is a good time to have your will reviewed. You may wish to change your will when a child who was a minor reaches the age of majority or when a dependant experiences a change in their status.

- A move into or out of New Brunswick

- A significant change in your property and assets or changes in tax laws

- One or more of your beneficiaries dies or you wish to change, add or remove beneficiaries.

- Your executor, guardian or trustee dies, becomes incapacitated, or leaves the province. Or, you simply decide you wish to name a new executor/trustee.

As a rule of thumb, to ensure that your will still reflects your current wishes, have your lawyer review it every three to five years, or whenever there is a change in your estate, your family circumstances or marital status.

Tips

- Do not try to make changes on your original will. They may not be effective. It is best to go to your lawyer when you want to make changes.

- Remember that those whom you name as executor, trustee or guardian are not obligated to assume these roles. Discuss your plans with these people and make sure they are willing and able to act.

- Consider whether your estate is large enough to do everything you want. Ask your lawyer about setting an order of priorities among your bequests or giving beneficiaries a percentage so that an increase or decrease in the size of your estate will not alter the balance between your various beneficiaries.

- You may wish to consider organ donation. If you have such plans leave specific instructions in a separate letter and tell your family about your wishes.

- Ask your lawyer to send you a reminder to have your will reviewed every three to five years.

- There is no requirement that you give a copy of your will to your beneficiaries. However, if your will is complex, after your death your executor may have to obtain letters probate for your will. This involves an application to Probate Court, and this application must include the original copy of your will. Once your will is submitted as part of the application to Probate Court, anyone may pay to obtain a copy of it.

- Giving someone a power of attorney over your affairs does not give that person the authority to change your will.

- A situation may arise where you feel pressured to change your will. If so, you may find PLEIS-NB's publication entitled "Protect Yourself from Abuse and Fraud: A Guide for Seniors", located on the PLEIS-NB website, helpful.