



**Public Legal Education  
and Information Service  
of New Brunswick**



**Making  
a  
Will**

*Public Legal Education and Information Service of New Brunswick (PLEIS-NB) is a non-profit organization. Its goal is to provide New Brunswickers with information about the law.*

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## Introduction

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

### What is a will?

A will is a legal document in which you name the people or organizations you wish to receive your property after you die. These people are called your *beneficiaries* and you are called the *testator*. The property that you own at the time of your death is called your *estate*. In your will you also name the people or the trust company you want to be responsible for administering your estate and distributing your property according to your wishes. The person or trust company you choose to handle your estate is called the *executor*.

## 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 decide who gets what. If you die without a will, you are said to have died **intestate**. If you die intestate your property will be distributed by a court-appointed administrator 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.

## **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, the court will appoint 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, it permits you to use "trusts" to help in managing the benefits provided for your survivors. Also it enables you to give to the executor all the powers needed 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 of your choice for your children under the age of 19. 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, the settlement of your estate should proceed more quickly. Your family will not have to spend time in having the court appoint an administrator. This will save your estate money as well.

# Legal Requirements for Having a Will

## Who can make a will?

Under the *Wills Act*, you must be at least 19 years old to make a valid will. You must also be mentally competent. 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.

## Do I have complete freedom in making my will?

Generally speaking, you can leave your property to whomever you choose, including charities. 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 can apply to the court under this *Act* include, for example, your spouse, children, parents, and commonlaw partner. Your spouse may also 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

You should consider what you want to happen to property such as real estate, bank accounts

and vehicles. If you share the ownership of property with others, you may not be sure what you are entitled to give away by your will. This may require considerable legal knowledge. It is wise to see a lawyer who can determine if the type of shared ownership you have entitles you to include that property in your will.

### **Pension Plans, Life Insurance, RRSPs Credit Union Accounts**

Things like pension plans, life insurance, RRSPs and credit union accounts can be given away by your will 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 upon your death and their distribution will be governed by the terms of your will. However, these assets would not be included in your will if they are payable to a named beneficiary other than your estate.

### **Personal Items**

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

### **What happens to my debts?**

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

## **Things to Think About**

### **Whom may I choose 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 under no obligation to accept the role so discuss it with him or her first. You should also talk to your executor about the fee. Tell your executor if you expect him or her to act without pay or for an agreed to amount. Set this out clearly in your will.

### **What should I consider if I have young children?**

If you are making a will and you have 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 looks after the children and protects their interests. Guardianship is an important responsibility. It should be discussed with the proposed guardian beforehand. You should name an alternate guardian in case the first one is unwilling or unable to act. The person that you name as guardian need not 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 include my funeral arrangements in my will?**

No. You should consider making funeral plans but do not include them in the will. When a person dies the will is usually read after the funeral. Think about your wishes for funeral arrangements and leave your instructions in a separate letter. Put the letter in a safe place. Make sure your family and executor knows of your wishes and where to find the letter. If you have not made funeral arrangements, your executor has the right to do so. The funeral expenses are payable 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, but it is wise 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 need to be dealt with by your will and which do not, like 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 advise you about your legal obligations to provide for dependants so that claims against the estate after your death can be avoided. A lawyer can also advise about estate planning and what arrangements you can put in place during your lifetime as an alternative to using a will.

## **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. Come prepared to name your executor(s) and guardian(s) and provide any specific instructions. 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 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 childrens' 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 wills made on the will forms sold in stationary stores valid?**

Yes, they are valid if properly filled in, signed and witnessed. However, you must be very careful because such forms may also create problems for your estate, family and heirs. For example, if the 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. The witnesses must be mentally competent.

### **Where should I keep my will?**

Keep your will in a safe, fireproof place - there is only one original. You may want your lawyer to keep it in the firm's safe and give you photocopies. 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.

## **Revoking and Changing the Will**

### **Can a will be cancelled once it has been made?**

Yes. You can revoke your will at any time prior to 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 a part of the will be changed after it is made?**

Yes. A will can be changed 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?**

Whenever there is any change in your marital or family status, such as a divorce, separation, remarriage, or the birth of a child, you should have your will reviewed. You may want to change your will when a child who was a minor when the will was made reaches the age of majority. Some changes, such as marriage or remarriage, affect the operation of your will. Other changes do not affect a will even though your intentions may have changed. For example, a separated or former spouse who is named as a beneficiary in your will would still inherit no matter how long you had been apart. In this case, you must formally change the will if that is your intention.

In addition, you may also wish to change your will for other reasons. For example, other reasons for changing your will could include changes in tax laws, changes in your financial status, changes in the status or health of a dependant, the death of a beneficiary, or the death or departure from the province of a guardian, trustee or executor. Ask your lawyer to send you a reminder to have your will reviewed every three to five years.

## 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.
- Have your will reviewed by your lawyer every three to five years, or whenever there is a change in your estate, your family circumstances or marital status.