

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.

LEGAL INFOⁱ
NOVA SCOTIA



WILLS

What is a will?

A **will** is a legal document that lets you say what you want done with your **estate** after you die. Your estate is your house, land, and personal things like jewellery and artwork. A will also lets you name an **executor**, who is the person you name in your will to carry out your final wishes. A will has no legal effect until you die.

A person who makes a will is called a **testator**.

What is an estate?

Your estate is what you own when you die. It typically includes:

- property (land, house, condo)
- money (cash, bank accounts, investments)
- personal belongings (household goods, vehicles, valuables like jewellery or artwork)

If you owe debts when you die, for example, have any unpaid credit card bills, those debts must be paid first out of what is in your estate, and what is left may then be distributed following your will or the law that applies when someone dies without a will.

Your estate typically excludes:

- property that you own jointly with someone else
- life insurance policies with a designated beneficiary
- accounts such as a registered savings account or tax-free savings account that allow you to name a beneficiary or someone who can receive the funds directly
- pension plans with a designated beneficiary.

Why make a will?

Nova Scotia law does not say that you must make a will, but it is a good idea to have one. Making a will should give you peace of mind. A will makes it easier for family or friends to handle your affairs when you die.

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

- deal with your important things the way you want to,
- give some or all of your estate to your common law partner. Without a will only married spouses and registered domestic partners inherit,
- give something to a friend, a charity, stepchild, a relative through marriage, or to someone else you care about. Without a will only married spouses, registered domestic partners, blood relatives or legally adopted persons inherit,
- name someone who will carry out your wishes,
- name someone to care for children or others who depend on you,
- make sure your pets or other animals will be cared for,
- save money and time by stating your wishes,
- save taxes
- arrange how a business you own will be handled

What happens if I die without a will?

- help your family and friends handle your affairs after you die,
- lessen stress for your family and friends,
- lessen confusion about your wishes, and
- prevent possible disputes over your possessions.

Nova Scotia has a law called the *Intestate Succession Act*. This law says what happens if a person dies without a will. **Intestate** means a person who dies without a will.

If you die without a will, or you have a will but it is not legally valid, your property is distributed to the people considered to be your nearest relatives as listed in the *Intestate Succession Act*. The rules are not flexible. The distribution may be different from what you would want.

The basic rules are:

- If you are survived by your spouse and had no children all your property goes to your spouse
- If you are survived by your spouse and you had one child, the first \$50,000 goes to your spouse. The rest is equally divided between your spouse and child.
- If you are survived by your spouse and more than one child, the first \$50,000 goes to your spouse. One-third of the rest would go to your spouse, and two-thirds of the rest to your children.
- If you are survived by your children, but no spouse, your whole estate would go to your children.
- If you had no spouse or children, your whole estate would go to your nearest relatives by blood or adoption, by order of priority as listed in the *Intestate Succession Act*. Relatives by marriage are not included.
- The government would inherit if you have no surviving relatives.

A surviving spouse will always get up to \$50,000 from the estate. If your surviving spouse is not a joint owner of the family home, they may choose to take the home and household contents instead, or as part of, the \$50,000.

It is especially important to make a will if you want your common law partner, stepchildren, or grandchildren to inherit something from your estate when you die.

Here's why:

- If you die without a will, only your surviving married **spouse** or **registered domestic partner** can inherit. **Common law partners** are not included. Your common law partner will not automatically inherit your property or money. Your common law partner may have to go to court to make a claim on your estate.

- If you die without a will, only your biological and adopted children can inherit. Stepchildren are not included.
- If you die without a will, your grandchildren will only inherit from your estate if their parent (your child) died before you.

If you and your spouse die at the same time or if you are a single parent when you die, someone will have to look after people who depend on you (a child, grandchild, or person with a disability). If you die without a will, or if you do not name someone in your will to look after your children or grandchildren, the court will have to appoint someone to do this. That person will be called your children's **guardian**. A person must apply to court to be appointed. And the person the court appoints 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.

If you die without a will, 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**. That person may not be someone you would have chosen.

The intestate law 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*.

The federal *Indian Act* has rules for making wills that apply to persons registered under the *Indian Act* who ordinarily live on reserve or on Crown lands. The *Indian Act* does not apply if you have status under the *Indian Act* and live off-reserve, or if you do not have status under the *Indian Act* and live on-reserve. Provincial laws apply instead.

If you have status under the *Indian Act* and ordinarily live on a reserve or Crown lands, you can get information about making a will from:

- Indigenous Services Canada online at www.aadnc-aandc.gc.ca, under 'Benefits and Rights', then 'Estates'
- the Confederacy of Mainland Mi'kmaq (CMM) has a Mi'kmaq Wills and



Wills for persons registered under the Indian Act who ordinarily live on reserve

Estates series which includes:

1. Book One: How to Write a Will
2. Book Two: How to Settle an Estate
3. Book Three: How to Write a Power of Attorney and Personal Directive
4. Mi'kmaq Wills and Estates & Matrimonial Real Property.

Copies are located in band offices of CMM's member bands or can be found online at cmmns.com/program/wills-estates/

- a lawyer who does wills and estates law, and who knows about Aboriginal law and the rules that apply to wills for persons registered under the *Indian Act* who ordinarily live on reserve or on Crown lands.

Do I need a will if my partner or spouse has one?

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 arranging for the care of 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. Mirror wills are separate wills with identical terms.

Do I have to hire a lawyer to write my will?

The law does not say that a lawyer must write your will.

However, a will is an important legal document, so it is always best to have a lawyer write or at least review your will.

Your will must be worded very carefully to make sure that what you want actually happens. A lawyer can:

- make sure your will is clear about your wishes for after your death,
- make sure your will meets all legal requirements,
- make sure you provide for unforeseen events,
- help you deal with things that you might not have thought about yourself,
- tell you what you can do now to make it easier to deal with your estate after you die,
- answer any questions about the process of dealing with your estate,
- give proof in the future that you made your will by your own free choice, free of undue influence, and
- give proof in the future that you had the capacity to make your will.

If you decide not to have a lawyer write your will, you can write it

yourself (see 'What is a Holograph will?'; below) or fill in a blank form of a will that you buy from a store or online. There are also books and kits available to help people write their wills.

If you decide to write your own will, you should at least ask a lawyer to look it over to make sure that it meets all legal requirements and that it will do what you want it to.

A lawyer can help with special problems

- Family pressure. You might 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.
- Worries about family members. You might worry that someone who depends on you will not be able to manage their financial affairs if you die before them. In these cases, you can talk with the lawyer about how to best provide for that person.

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

Lawyers usually charge a fee based on how much legal service you need and how complex the will is. The cost to do a will can begin at less than \$200 and go up. Lawyers often charge a flat fee for doing a will. Some lawyers offer estate planning package deals.

In a package deal, the lawyer might write your will, a power of attorney, and a personal directive and charge a lower cost than for doing the three documents at separate times. You should talk about fees before you decide to hire a lawyer. You should talk over the cost if you prepare the will yourself or if you want the lawyer to prepare it.

Parts of a will

The will contains your instructions about what you want done with your property after you die. The language should be clear and simple, so no one is confused about what you meant.

A will should have several sections, called clauses:

Revocation: The will should say that you revoke, or cancel, all previous wills and codicils. A codicil is a document that changes a will.

Appointment of an Executor: In your will, you should appoint an executor, and a back-up executor. An executor is the person who is responsible for carrying out the instructions in the will. More information about the executor is below, at **Who looks after my will when I die?**

Disposal of Property: This section of the will says who will get specific property (eg. a cottage, an antique car) or property generally and under what conditions.

A will comes into force only after your death. Until you die, you can deal with your property as you wish. For example, if you leave your cottage

Legal requirements of a will

to your niece in your will, you could still sell it and use the money as you wish. The will can only dispose of property that you still own at the time of your death.

As well, if you are leaving property to someone, you may want to say what should happen if they die before you. For example, if you leave the cottage to your cousin, do you want his children to inherit it if he dies before you or do you want the property to go to someone else?

Residuary Clause: Your will should include a **residuary** clause. This clause says who gets the property that remains after all specific gifts have been paid out or given to your beneficiaries.

If your will does not contain a residuary clause, the remaining property (called the residue) will be treated as if you had died without a will. This means it will be distributed according to a provincial law called the *Intestate Succession Act*. **Intestate** means a person who dies without a will.

Other Clauses: A will may contain other clauses to suit your needs. For example, you may want to recommend a guardian for your children, create a trust fund, or set out the powers of the executor.

The Nova Scotia *Wills Act* has certain legal requirements to make a will valid. Your will must meet all the legal requirements to be valid. The legal requirements are listed below.

Age: In Nova Scotia, you must be 19 years old 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. It is also called having **testamentary capacity**. It means you:

- know that you are making a will and understand what a will is,
- know what property you own, and
- are aware of the people (like your spouse and children) that you would normally feel you should provide for.

If you become mentally **incompetent** after you have made your will, the will is still valid.

Mental competence to make a will can be an issue if a person's ability to think clearly is affected by illness, drugs, or pain. You should make your will while you are in good health so that no one questions your mental competence.

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 pressure on you to do your will or put certain clauses in it. This is called undue influence.

Written: A will must be in writing, but it does not have to be typed: it can be handwritten or printed. However, video, audio or digital recording, or any other way of communicating your wishes, are not considered to be valid wills.

Signature: You must sign your will at the end. You must sign it in front of two witnesses who must be present at the same time, unless it is a **holograph will**. If you cannot sign the will, you can ask someone to sign it for you in front of you and you must tell the two witnesses that the will is yours.

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

When you are signing your will, you should put your initials on each page and number the pages so that pages cannot be replaced or removed from the will.

You should put the date on your will.

You should also arrange for one of the witnesses to swear an Affidavit of Execution.

What is an Affidavit of Execution?

An **affidavit** is a statement sworn in front of a **Commissioner of Oaths** or a **notary public**. An **affidavit of execution** is a sworn statement that the witness saw you sign your will on a particular date and that you signed in front of both witnesses.

An affidavit of execution can be made any time after you sign your will. It is best to do it right after the will is signed because witnesses might move away or die before you after the will is signed. After your death, your executor can use the affidavit in court to show that the will was properly signed and witnessed. If there is no affidavit, the executor will have to find one of the witnesses and have the witness swear an affidavit when the executor applies to Probate Court for authority to act on the instructions in your will.

You can see an affidavit of execution on the Nova Scotia Courts website, under Probate Court forms, at www.courts.ns.ca. Look for "Affidavit of Execution of Will or Codicil." The witness must sign the affidavit of execution in front of a lawyer, notary, or designated Probate Court staff.

▶ Can I choose who gets my property?

In most cases, you are free to deal with your property as you wish. However, in Nova Scotia, two laws place some limits on that freedom. Those laws are the *Testators' Family Maintenance Act* and the *Matrimonial Property Act*. A **testator** is a person who makes a will.

Testators' Family Maintenance Act

This law tries to make sure that you leave your **dependents** with money and support if possible and if they need it. Under this law, your children, including adopted children, and surviving married spouse or registered domestic partner are dependents.

This law does not include your common-law partner as a dependent unless you have a registered domestic partnership. Then your spouse is included from the date you registered the partnership. Divorced spouses are not dependents under this law.

If you do not provide for a dependent in your will, they can go to court and ask a judge to order support. The judge thinks about all the circumstances of a case in deciding whether to give support to your dependents. They include:

- whether a dependent deserves help (what is their character and conduct),
- whether there is any other help available to the dependent,
- the dependent's financial situation,
- any services the dependent provided to you, the testator, and
- your reasons for not providing for your dependent in the will. It helps if you put the reasons in writing and sign the document or include the reasons in your 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 or make a property claim under this law should talk with a lawyer.

The Matrimonial Property Act

This law recognizes that both **spouses** contribute to a marriage. The law says that when one spouse dies, the surviving spouse can apply to court for a division of the matrimonial assets, in addition to any other rights of the spouse under the will or on intestacy. The surviving spouse must apply to the Supreme Court. The surviving spouse must apply for division within six months after the court has granted probate or administration of the **estate**. Anyone who wants to make an application should first talk with a lawyer.

A judge decides what share of the matrimonial property the surviving spouse should get.

Common law partners are not covered by this law unless you have a registered domestic partnership. Then they are included from the date you registered the partnership.

Family members

The *Testators' Family Maintenance Act* and *Matrimonial Property Act* say you are responsible to provide for your family and **dependents**, but otherwise you are generally 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 you want to do these things, you should get advice from a lawyer and record your reasons in writing.

What is not part of your will?

Any assets you own jointly with others go directly to the surviving joint owner on your death. They don't form part of your estate, but are said to "pass outside the will". For example, if you and your spouse own your home as joint tenants, the home goes directly to your spouse on your death. If you do not want this to happen there are legal ways to specify what you want, and you should talk with a lawyer.

Also, assets where you have designated a beneficiary, such as RRSPs and RRIFs, pass outside the will. When you die, the bank or trust company transfers the RRSP or RRIF, or pays it out, to the beneficiary you named, taking tax consequences into account. The same is true if you have life insurance that names a beneficiary. If you name your estate as beneficiary instead of a person or charity, the money goes to your estate and will be distributed as you direct in your will.

You can designate the beneficiary of a life insurance policy or benefit plan in your will, even though the proceeds "pass outside the will" and don't form part of your estate. If you do, the beneficiary designation will alter any previous designation. Similarly, a beneficiary designation you make in your will may be changed by a later designation that is not in a will.

Who looks after my will when I die?

Your **executor** looks after your will when you die. An executor is the person or corporation you name to carry out the terms of your will.

If you do not name someone to be an executor in your will or if you die without a will, your next of kin will usually ask the Probate Court to appoint someone to fill the executor's role. This person is called an administrator, and Nova Scotia's *Probate Act* says who can apply to do that job.

Who should I choose as an executor?

The court uses the term **personal representative** for people who are appointed as an executor or an administrator.

It is best to name an executor in your will. That way, you can be sure that someone you know and trust will handle your estate. Also, you can give your executor broader power to make decisions and to act for you than the power the Probate Court will give to an administrator.

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:

- The best executor is a trustworthy, reliable, and **competent** adult.
- Choose someone who is likely to outlive you.
- Choose someone who lives in your province to cut down on expenses.
- Your spouse, a friend, family member, or heir may be able to do a good job as executor. Many people choose their spouse or main heir as executor.
- Think about choosing someone who knows about banking and business affairs.
- You should name a back-up executor in case your first choice dies, moves away, or for some reason cannot do the job.

You can name your lawyer as executor, but most lawyers do not act as executors. Before you name your lawyer as executor, ask the lawyer if they are willing to do this work.

Some people think about naming Nova Scotia's Public Trustee as executor. This happens if they have no family member or friend they feel would be able or willing to act as executor. You must check first with the Office of the Public Trustee if you want them to act as your executor. Contact the Nova Scotia Public Trustee for more information or see the Public Trustee website at novascotia.ca/just/pto.

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

Your estate may be complicated. You might not have a relative or friend who is able to act as executor. What else can you do? You may want to name a trust company as your executor. You should check that the company is willing to act as executor or co-executor. If you do not check, the company may not act as executor when you die.

The pros of using a trust company as executor are:

- They may be able to help you plan to save taxes and avoid problems.
- They are strictly regulated, so you can be sure they will handle your estate properly and legally.
- They would be a neutral executor if you think your heirs will disagree about your will.
- The company may give you free advice on drafting your will and may store it for you.

The cons of using a trust company are:

- They may charge up to 5 per cent in fees.
- They can be conservative investors.
- They may not know your assets as well as a family member or friend.
- They may not know your **dependents** as well as a family member or friend.
- They may not be as flexible with your dependents as a private person could be.
- The taxes for their fees are paid from the estate.

Before you choose an executor, 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.

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

Yes. A person named in your will as executor can refuse to act as executor. This is called **renouncing**. If the executor you named in your will refuses or is unable to act, your next of kin will have to apply to the court to appoint someone else. This causes delays and could cost money.

You should ask the person you want to name as executor if they are willing to take on the job before you name them in your will.

As well as asking someone to be your executor, you should ask another person to be a back-up executor in case your executor cannot or will not act, due to death, moving away, or for some other reason.

WILLS

▶ Can I appoint joint executors?

Yes. You can appoint more than one executor (called co-executors) to share the responsibility. Each co-executor has the authority to sign documents for your estate unless your will says something different. One possible problem is that they may disagree about what to do. Since either can sign documents, this could cause problems for your estate. It is a good idea to talk with a lawyer if you want to appoint two or more executors to act together.

▶ What does the executor do after I die?

The executor's job is to gather together all of your assets, pay your debts and taxes, and distribute your money and property according to your instructions in your will. The executor may have to apply to the Probate Court for authority to deal with your estate. This authority is called a grant of probate. It gives the executor power to handle your estate according to the terms of your will.

▶ Where should I keep my will?

You should keep your will in a safe place. You might not need it for many years, and you will have to keep track of where it is. It must be somewhere that your executor can find it easily, and you should tell your executor where they can find it.

The safest place to keep your will is a safe deposit box that is in your name only or that is held jointly with someone else. If you do not have a safe deposit box, keep your will in a fireproof place that is private, so that others cannot read the will before you die.

You could give your will to someone you trust. However, the person storing your will may move away or die.

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

Wherever you decide to keep your will, you should tell the people in your life who need to know about it where to get it when it is needed.

▶ What is a holograph will?

A holograph will is a wholly handwritten will signed by the testator (the person who made the will), 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 August 19, 2008, is now legal. The courts have ruled that a holograph will made before August 19, 2008, is not valid.

If you have a holograph will, you should check with a lawyer to make sure it is valid.

WILLS

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.

Should I put my burial wishes in my will?

This is not a good idea. Often the will won't be found or read until after the funeral. You should tell your wishes to the person who is likely to arrange the funeral, or leave separate written instructions.

Can I change my will?

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

There are two usual ways to change your will:

- You can write a separate document called a **codicil** to change part of your will. The first words of a codicil name the will being changed. It says which clauses of the will are removed or changed and gives the new instructions. The codicil should also 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.
- You can make a new will. It is wise to make a new will if you wish to make major changes to your will or if you already have several codicils. The first clause of a new will usually say: "I revoke all wills and testamentary dispositions of any nature and kind made by me." The most recent will, as long as it is properly signed and witnessed, is the one that will be used following your death.

Do not change your will by marking or crossing out words in the will. It is much wiser to make a codicil or, even better, a new will.

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.

Cancelling your will

There are five ways to cancel your will, or parts of your will. This is called **revoking** a will.

- If you marry, your will is no longer valid (revoked) unless it says it is made as you prepare to marry that person, called being made 'in contemplation' of marriage.
- If you get divorced, parts of your will are no longer valid. In Nova Scotia, divorce revokes the parts of a will that give a gift to a spouse, provide a benefit to a spouse or appoint the spouse as executor. There

WILLS

are exceptions: the will, a separation agreement, or marriage contract may say that these parts of your will are not affected by a divorce.

- You can make a written document saying that you want to cancel the will. You must sign it and have it witnessed in the same way as a will. For example, in one case a bank manager had a person's will. The person became ill and signed a letter to the bank manager that said: "Please destroy the will I have already made out." The person had signed the letter in front of witnesses, and the letter cancelled the will.
- You can make a new will. Any new will that is properly executed cancels a previous will. A codicil cancels clauses in a will.
- You can destroy the will or ask another person to destroy it in your presence. If your will is accidentally destroyed (for example, by a fire in which you die) a copy of the will can be used as long as there was no intention to cancel your will.

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

Your will may be valid if it was made outside Nova Scotia. You should have it checked by a lawyer to see that it meets the requirements of Nova Scotia law.

▶ Where can I get information on probate?

The Probate Courts in Nova Scotia make information available to the public. You may get copies of probate forms by visiting or by calling your local Probate Court office or by going to the Courts of Nova Scotia website, courts.ns.ca and click on the "Probate Court" tab.

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.

▶ Where can I get more information on making a will?

Legal Information Society of Nova Scotia (LISNS)
Legal Information Line
902-455-3135
1-800-665-9779
Email: questions@legalinfo.org

LISNS has online information at www.legalinfo.org, including a wills app to help you gather the information you need to do a will. Under I have a Legal Question go to "Wills and Estates". Click "Making a Will".

The Legal Information Society of Nova Scotia can also refer you to a lawyer who does wills.

