

Making a Will



This booklet is for Albertans who are thinking about writing or changing a Will. A Will allows you to pass on your belongings to your loved ones according to your wishes. If you die without a Will, it is often more costly, complicated and time-consuming to settle your estate. This booklet gives general information only, not legal advice. If you need more detailed help or advice, see the end of this booklet for more resources.



You should **NOT** rely on this booklet for legal advice.
It provides general information on **Alberta law only**. 2019

DISCLAIMER

The contents of this booklet are provided as general information only. It is not legal advice. If you have a legal problem, you should consult a lawyer.

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What is a Will?

A **beneficiary** (of an estate) is a person (individual or organization) who inherits all or part of a deceased person's estate.

Specific gifts are property that a Will says are to be given to a named person.

Residue is the rest of an estate after the specific gifts have been given away.

A **trust** is a way of holding property. An individual or a company, called the trustee, holds and manages the property for the benefit of another person or persons, called the beneficiaries.

A **Will** is a legal statement of how you want your property to be dealt with after your death. The property distributed following the instructions in a Will is called the **estate**. When you make a Will, you are the **Testator**. The person you put in charge of carrying out the wishes in your Will is called your **Personal Representative**.

A Will does not take effect until you die.

You can dispose of your property as you wish during your lifetime. If your Will states that someone is to get certain property and you no longer own that property when you die, that person will not get that gift.

In Alberta, and in every province in Canada, a Will must be in writing. Other requirements differ depending on the type of Will.

There are three different kinds of Wills:

1. A **formal Will** is signed by the Testator and two witnesses, all in the presence of each other.
2. Handwritten Wills, called **holograph Wills**, are legal in Alberta but not in all provinces or territories in Canada. In Alberta, holograph Wills must be in the Testator's own writing, must be signed by the Testator, and are not witnessed. These types of Wills can be prepared in an emergency, but it is important that they clearly state what your intentions are.
3. Wills written by a Testator while on active service with the Canadian Forces (naval, land or air force) are called **military Wills**. Military Wills are signed by the Testator but are not witnessed.

Typically, a Will has several sections:

- cancelling (revoking) any previous Wills;
- appointing a Personal Representative and alternates;
- naming beneficiaries of specific gifts;
- naming beneficiaries of the residue of your estate;
- naming a guardian or creating trusts for minor children (if applicable); and
- any other details as you wish.

It is a good idea for everyone to have a Will. Illness or accident could claim us at any time. A Will is the only way to control who gets what you have when you die.

What is an estate?

Your estate is the property that you own at the time of your death, including land and possessions. Your estate is distributed according to the instructions in your Will.

The property in your estate is first used to pay debts and taxes, and then it is distributed in accordance with the instructions in your Will.

Some property does not form part of your estate because it does not flow through your Will. The following types of property do not form part of your estate:

- Property where the registered owners are described as **joint tenants**. These types of assets include land, a house or bank accounts.
- Assets for which you have designated a **beneficiary** other than your estate. These types of assets include investment accounts, insurance policies or pension plans.

If you are First Nations and ordinarily live on-reserve, the law is different for wills and how your estate will be dealt with when you die.

The *Indian Act* and the *Indian Estates Regulations* apply to you. For more information, contact Bearpaw Education

780.428.0187 or www.bearpaweducation.ca

Indigenous and Northern Affairs Canada

<http://bit.ly/2J7Dlyo>

A **grant of administration** is a court order that appoints an Administrator of an intestate estate and confirms that the estate can be distributed to the people who inherit the estate on intestacy.

An **Administrator** is a person given authority by the court in a grant of administration to manage and administer the estate of an intestate.

A **spouse** is a person to whom one is legally married.

An **adult interdependent partner** is a person with whom you are in an adult interdependent relationship.

An **adult interdependent relationship** is a term unique to Alberta for relationships outside of marriage and governed by Alberta's *Adult Interdependent Relationships Act*.

Dying without a Will

If you die without a Will, you are said to die **intestate**.

Two immediate problems arise:

1. there is no one appointed to deal with your estate; and
2. there is no formal written record of what you wanted done with your estate.

There are two laws in Alberta that deal with these problems.

First, the *Estate Administration Act* sets out who can apply to the court for a **grant of administration** for your estate. This person is called the **Administrator**. The Act sets out a list of people who can apply. No one has authority to deal with your estate until they have permission from the court.

Once an Administrator has been appointed by the court, Alberta's *Wills and Succession Act* sets out who can inherit your estate. The Administrator must first pay off your debts using the assets in the estate. Whatever assets are left, if any, are usually sold and the money received is given to the beneficiaries.

The law assumes that you would have left your estate to your family if you had made a Will.

For more information on who inherits an intestate estate, see CPLEA's handout called '**Beneficiaries: When Someone Dies Without a Will in Alberta**'.

Making a Will

In Alberta, any adult (age 18 or over) who is mentally capable can make a Will.

A person under the age of 18 can make a Will if they:

- have a **spouse** or **adult interdependent partner**; or
- are a member on active service with the Canadian Forces (naval, land or air force); or
- have the Court's permission.

Making a Will is optional and voluntary.

There are three ways to make a Will:

1. retain a lawyer to draft a Will for you;
2. purchase and complete a do-it-yourself Will kit; or,
3. write a Will entirely in your own handwriting (a holograph Will).

There are advantages to having a lawyer prepare your Will. A lawyer has a lot of expertise to help you deal with matters like tax consequences, international issues, trusts, making suitable arrangements for young children, and many other issues.

It is particularly important to consult a lawyer when making a Will if you:

- have a large or complex estate (for example: business assets, children who live outside of Canada, and children with special needs);
- are separated or getting a divorce;
- have a blended family;
- are older or ill, as your mental capacity may be questioned by others;
- feel you are being pressured or unduly influenced by others;
- are thinking about getting married; or
- are starting or ending an adult interdependent relationship.

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

Mental Capacity

Having the mental capacity (sometimes called “testamentary capacity”) to make a Will means that 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 you would normally provide for.

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

Naming a Personal Representative

Your Personal Representative:

- can be any adult who is mentally competent or a corporation (such as a trust company);
or
- can be a beneficiary named in your Will; or
- can be a lawyer, but you should check to make sure that person is willing to act before you name them.

Your Personal Representative should also have knowledge about business affairs and be someone who is likely to outlive you.

Before you name a Personal Representative, make sure they:

- are trustworthy and reliable;
- will carry out your instructions;
- have the time and ability to carry out the many duties of a Personal Representative; and
- are willing to do the job.

Your Personal Representative does not have to live in Alberta. However, if you choose someone who does not live in Alberta, that person may be required to post a bond with the court before they can deal with your estate. As well, there may be tax consequences for your estate if your Personal Representative lives outside of Canada. You should consult with a lawyer if you want to name a person who lives outside of Alberta.

You can appoint more than one Personal Representatives to act together. If there are two or more Personal Representatives, they must act unanimously unless your Will states otherwise or a court directs otherwise. If you appoint more than one Personal Representative, be sure that they will be able to work together. You should discuss your wishes with both of them. It is best to do this with them together. If one Personal Representative dies, the other one can act alone.

It is also important to name at least one alternate (back-up) Personal Representative in case your first choice is unable to do the job. If you name several alternates, be clear about what order you want them to act.

Witnesses to Will

A formal Will must be signed by two witnesses.

A witness must:

- be 18 years of age or older;
- not be a beneficiary under the Will (otherwise any gift to that person in the Will may be void); and
- not be the spouse or adult interdependent partner of someone who is a beneficiary under the Will (otherwise any gift to that person in the Will may be void).

The Personal Representative can be a witness as long as they are not also a beneficiary.

The witnesses do not need to read your Will. All they have to do is see you sign your Will, and then they both sign the Will in front of you.

Witnesses are required to act in good faith and should refuse to witness the Will if they have reason to question your mental capacity.

Things to Consider

Before Making a Will

Before you make a Will, you should:

- make a list of all of the property you have;
- decide who you want to give this property to when you die;
- think about whether there is any property that could flow directly to a beneficiary (i.e. not pass through your estate under your Will, such as property owned in joint tenancy or property where you can designate a beneficiary);
- make a list of the debts you have;
- decide who you would suggest as a guardian for your minor children;
- be aware of your potential legal obligations to any spouse or former spouse, adult interdependent partner or former adult interdependent partner, children, grandchildren, and great-grandchildren;
- consider any special gifts you would like to make;
- choose someone to act as Personal Representative; and
- assess family dynamics and make your decisions accordingly.

Be sure that you are as clear as possible in your description of your wishes. If there is confusion, your Personal Representative may have to ask the court for direction, and legal proceedings can be costly.

Types of Property

In your Will, you can deal with all types of property: land, possessions, money, investments, personal belongings, business assets, etc. Remember though, certain kinds of property do not flow through your estate and so are not dealt with in your Will.

► **RRSPs, RRIFs, TFSAs, other investment accounts, pension plans and insurance policies.**

Usually these types of assets do not form part of the estate because you can name a beneficiary on the account or plan. For example, when you start an RRSP, the form will usually ask you to name a beneficiary. If you list one or more persons there, then those people will inherit the money in the account when you die. Those beneficiaries will have to submit proof that you are dead to the institution or plan administrator before the money gets paid out to them.

If you choose not to name a beneficiary or choose to name your estate as the beneficiary, then the monies will flow through your estate and be distributed according to the instructions in your Will. If you do not leave specific instructions in your Will of what you want to happen with this money, then it will form part of the residue of your estate.

► **Assets owned jointly.**

You may own assets with other people, such as land, a house, or bank accounts.

If you own this property with other people as **joint tenants**, this means all the owners own the property equally and the property passes to the surviving owners when one owner dies. For example, if you and your spouse are listed on title as the joint owners of your house, then your spouse will become the sole owner of the house if you die first. You would become the sole owner if your spouse dies first.

The exception to this rule is where joint tenants die at almost the same time and it is impossible to tell who died first. If this happens, the joint tenancy will be treated as a tenancy in common.

If you own property as **tenants in common**, this means that each owner owns a share of the property. The shares of each owner do not have to be equal. For example, if you and your partner each own fifty percent of a parcel of farmland, this means that you and your partner only get a say in what happens to each of your halves of the property.

Property that you own as tenants in common with someone else flows through your estate. If you do not leave specific instructions for this property in your Will, then it will form part of the residue of your estate. Maybe your beneficiaries will also become owners with the other tenants in common. Or maybe the other owners will buy your share and the money received by the estate will be distributed in a certain way.

If you are not sure if you own property as joint tenants or tenants in common, check the certificate of title (for real estate) or bank account statements.

Funeral Arrangements

You can specify funeral instructions in your Will, but it is not a good idea as the Will may not be found or read until after the funeral. You should tell the person who is most likely to arrange your funeral what your wishes are beforehand or leave separate written instructions.

Guardian for Minor Children

If you are a **guardian** for a minor child, you can name someone to care for your child if you die. This person can be your Personal Representative or a different person.

Obligations to Family Members

Generally speaking, you are free to give your property away to whomever you wish. Alberta's *Wills and Succession Act* does place some limits on that freedom.

If you do not adequately provide for your family members in your Will, then the Act allows those family members to apply for support from your estate. This means that part of your estate may go towards supporting your family members and whatever is left will be distributed as you originally wanted.

If you are paying spousal support or child support, those obligations do not die with you. If you have not made adequate provision for the maintenance and support of these dependents in your Will, then monies will be taken from your estate to fulfill these obligations.

Family members are defined in the Act as:

- your spouse or adult interdependent partner;
- your child who is under the age of 18 years when you die, including a child who is in the womb and later born alive;
- your child who is 18 years or older when you die and who is unable to support themselves because of a mental or physical disability;
- your child who is 18 years of age but less than 22 years of age when you die and cannot support themselves because they are a full-time student;
- your grandchild or great-grandchild who is under the age of 18 years when you die and who you were standing in the place of a parent for.

A judge considers all the circumstances of a case before deciding whether to give support to the family member, including:

- the nature and length of the relationship between you and the family member;
- the age and health of the family member;
- the family member's capacity to contribute to their own support (such as getting a job);
- your legal obligations to support family members;
- the size of your estate and other property that the family member might receive (i.e. if the family member is a designated beneficiary for an investment account, insurance policy or pension plan or if the family member is a joint tenant with you of property);
- the financial situation of the family member;
- your reasons for not providing for the family member in the Will. It helps if the reasons are in writing and signed by you, or if they are included in the Will.

Where to Keep your Will

Many people choose to put their Will in a safe and accessible place that their Personal Representative knows about. This could be a safety deposit box or a cabinet in your house. Others choose to leave it with a trusted third party such as their lawyer.

A **guardian** (of a child) is the person who has legal responsibility to care for and financially support the child, and the authority to make all of the decisions with respect to that child. Unless a court orders otherwise, the child's parents are their guardians.

Reviewing a Will

Review your Will:

- at least once a year;
- whenever there are important changes in your relationships with others;
- if any of your family members, or others close to you, get divorced, married or die;
- if your Personal Representative dies or says that they are no longer able or willing to act for you; or
- if there are any significant changes in your health.
- After you review your Will, you can decide if it needs to be updated.

► **Divorce or Separation**

If you get divorced or stop being in an adult interdependent relationship after February 1, 2012, your Will is still valid and is not affected by your change in relationship.

However, certain parts of your Will may no longer be valid:

- if you left a gift in your Will to your ex-spouse or former adult interdependent partner, that gift is revoked (cancelled) unless you specifically intended for that person to still get the gift even after the separation;
- if you named your ex-spouse or former adult interdependent partner as your Personal Representative, that appointment is revoked (cancelled), meaning that person cannot act. If you have named alternate Personal Representatives, then those people may be able to act. If you have not named any other Personal Representatives, your Will is still valid but someone will need to apply to the court for authority to administer your estate.

Changing a Will

There are two ways to change your Will:

1. You can write a separate document that changes only a part of your Will. This is called a **codicil**. You must sign and witness your codicil in the same way as your Will.

The opening words of the codicil usually refer to the Will that it is changing. It will say that certain paragraphs of the Will are revoked or changed and others are substituted. It should say that, apart from these changes, you confirm the terms of your original Will.

2. You can make a new Will. It may be wise to do so if you wish to make major changes or if you have already made a number of codicils.

The first paragraph of a new Will usually says: "I revoke all wills and testamentary dispositions of any nature and kind made by me." The most recent Will, properly executed, is the one which will be used following your death.

You should **not** change your Will by marking or crossing out words. Any handwritten changes made after the Will was first signed will not be valid. Instead, you should make a codicil or a new Will if you want to make changes.

A **codicil** is a document you make after you make your Will that changes some of the things in your Will.

Administration of Estate

A **grant of probate** is a court order that confirms the Will is valid and confirms the appointment of the Personal Representative named in the will.

Your Personal Representative is responsible for administering your estate after you die.

The *Estate Administration Act* sets out the Personal Representative's four main duties:

- identifying the estate's assets and debts;
- administering and managing the estate;
- paying the debts of the estate; and
- distributing and accounting for the administration of the estate.

Your Personal Representative:

- must give notice to beneficiaries and family members as required by the Act;
- is governed by the provisions of Alberta's Trustee Act. This law places certain restrictions on their actions;
- may have to apply to the court for a **grant of probate** to deal with your estate.

For more information about the responsibilities of a Personal Representative and how to administer an estate, see CPLEA's booklet called '**Being a Personal Representative**'.

For more information on getting a grant of probate, see CPLEA's booklet called '**Guide to Getting a Grant of Probate or Administration in Alberta**'

Challenging a Will

Common challenges of a Will include claims that:

- the Testator was unduly influenced or pressured to write a Will;
- the Testator did not have mental capacity to write a Will;
- the Testator did not provide adequate maintenance and support for family members;
- the Will is not valid because it was not properly executed.

Only the court has the final say about whether a Will is valid.

Glossary

Administrator

A person given authority by the court in a grant of administration to manage and administer the estate of an intestate.

adult interdependent partner

A person with whom you are in an adult interdependent relationship.

adult interdependent relationship

A term unique to Alberta for relationships outside of marriage and governed by Alberta's *Adult Interdependent Relationships Act*.

It is a "relationship of interdependence" between two people who:

- have lived together for three years or more; or
- live together and have a child together, by birth or adoption; or
- have signed an adult interdependent partner agreement.

A "relationship of interdependence" exists where two people:

- share one another's lives; and
- are emotionally committed to one another; and
- function as an economic and domestic unit.

assets

What you own. Assets can include things such as money, land, investments and personal possessions like jewelry and furniture.

beneficiary

Of an **estate**, a person (individual or organization) who inherits all or part of a deceased person's estate.

Of a **trust**, a person (individual or organization) who receives a benefit from a trust.

codicil

A document you make after you make your Will that changes some of the things in your Will.

debts

What you owe. These can also be called liabilities and may include credit card balances, loans, mortgages and taxes.

estate

All of the property you own at your death. Property that you own as joint tenants with other people or that you have designated a beneficiary for do not form part of your estate.

grant of administration

A court order that appoints an Administrator of an intestate estate and confirms that the estate can be distributed to the people who inherit the estate on intestacy.

grant of probate

A court order that confirms the Will is valid and confirms the appointment of the Personal Representative named in the will.

guardian (of a child)

Of a **child**, the person who has legal responsibility to care for and financially support the child, and the authority to make all of the decisions with respect to that child. Unless a court orders otherwise, the child's parents are their guardians.

intestate

A person who dies without a will.

mental capacity

The ability to understand information that is relevant to making a decision and the ability to appreciate the reasonably foreseeable consequences of the decision.

Personal Representative

The person named in a Will who is responsible for managing the testator's estate and for carrying out the instructions in the Will.

residue (of an estate)

The rest of an estate after the specific gifts have been given away.

specific gift

Property that a Will says is to be given to a named person.

spouse

A person to whom one is legally married.

Testator

A person who makes a Will.

Will

A legal statement of how a person wants their property to be dealt with after their death.

Resources

Legislation

Alberta Queen's Printer

For free electronic and print copies of Acts or Regulations.

www.qp.alberta.ca

Government & Court Services

Government of Alberta

www.alberta.ca

Wills in Alberta:

<https://www.alberta.ca/wills-in-alberta.aspx>

Saying Farewell: A guide to assist you with preplanning and with the death and dying process.

<http://www.seniors-housing.alberta.ca/documents/Saying-Farewell-Dying-Process-Guide.pdf>

Alberta Courts

www.albertacourts.ca

Alberta Supports

Help accessing more than 30 programs and 120 community services.

Toll-free: 1.877.644.9992

Office of the Public Guardian and Trustee

Services and support for vulnerable Albertans and their families.

Toll-free: 310.0000 then 780.422.1868

<http://bit.ly/2IF6Fw1>

Legal Services

Law Society of Alberta Lawyer Referral Service

Provides names of three lawyers. Each lawyer to provide half-hour consultation free of charge.

Toll-free: 1.800.661.1095

<http://bit.ly/2K2fYcs>

Legal Aid Alberta

Toll-free: 1.866.845.3425

www.legalaid.ab.ca

Edmonton Community Legal Clinic (ECLC)

Legal clinic in Edmonton. Call for hours and eligibility.

780.702.1725

www.eclc.ca

Calgary Legal Guidance (CLG)

Legal clinic in Calgary. Call for hours and eligibility.

403.234.9266

<http://clg.ab.ca>

Community Legal Clinic – Central Alberta

Legal clinics in Central Alberta. Call for hours and eligibility.

Central Alberta: 403.314.9129

Fort McMurray: 587.674.2282

Lloydminster: 587.789.0727

Medicine Hat: 403.712.1021

www.communitylegalclinic.net

Grande Prairie Legal Guidance

Legal clinic in Grande Prairie. Call for hours and eligibility.

Phone: 780.882.0036

www.gplg.ca

Lethbridge Legal Guidance

Legal clinic in Lethbridge. Call for hours and eligibility.

Phone: 403.380.6338

<http://www.lethbridgelegalguidance.ca/>

Dial-A-Law

Pre-recorded legal information available 24 hours a day, 7 days a week.

Toll-free: 1.800.332.1091

clg.ab.ca/programs-services/dial-a-law/

Resources for Seniors

Older Adult Knowledge Network

Legal information on Canadian law for older adults.

www.oaknet.ca

Seniors Association of Greater Edmonton (SAGE)

780.423.5510

www.MySage.ca

Kerby Centre (Calgary)

403.265.0661

<https://www.kerbycentre.com/>

Golden Circle Senior Resource Centre (Calgary)

403.343.6074

www.goldencircle.ca

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This booklet is one of many publications produced by the Centre for Public Legal Education Alberta. All publications can be viewed and downloaded for free by visiting www.cplea.ca/publications or **you may order pre-printed publications to be sent to you by visiting www.cplea.ca/store**

Other publications related to this topic that may interest you include:

- Making an Enduring Power of Attorney
- Making a Will checklist
- Making a Personal Directive
- Being a Personal Representative
- Being an Attorney Under an Enduring Power of Attorney
- Being an Agent
- General Powers of Attorney
- *Adult Guardianship and Trusteeship Act*

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