



Wills and Power of Attorney

Introduction

Everyone should have a will. A will is a legally binding declaration of a person's wishes regarding the disposition of his or her estate after death. A will does not operate until the Testator's death, and it may be revoked or amended at any time, provided the Testator retains the necessary mental capacity.

Why do I need a will?

There are many important reasons for having a will, including:

- a will permits you to make specific bequests to specific beneficiaries;
- a will permits you to establish trusts to assist in the financial planning of your beneficiaries;
- a will permits you to select a specific individual or corporation to administer your estate, that is, your executor. It also permits you to grant broader powers of administration to your executor than what might otherwise be available to a court appointed administrator;
- a will permits you to appoint a guardian if you have minor children;
- a will permits you to create a trust for your children, thereby giving your trustee broad powers to manage the assets of the trust for your children's benefit until they reach the age of majority; and
- a will permits your affairs to be dealt with in a timely and less costly manner.

What if I do not have a will?

If you have no will, your property will be disposed of in accordance with the laws of intestacy in the province in which you live. These laws are inflexible and your estate may pass to beneficiaries you did not intend to benefit.

In addition, in most provinces the court dictates who will administer your estate. This individual may be a person who ordinarily would be unacceptable to the deceased.

The same holds true for guardians of your minor children. A court appointed guardian may be a person who the deceased would not otherwise personally select.

Delays arising in the court appointment of an administrator may be costly to the estate. Furthermore, a court appointed administrator must secure a bond before he or she can act and this cost may be borne by your estate. An executor appointed under a will can serve without a bond.

Finally, family discord frequently results when the estate distribution is seemingly inflexible and unfair.

What is controlled by a will?

Except as stated below, all real and personal property which is owned solely by you will be controlled by your will.

It should be noted life insurance or RRSP's payable to a named beneficiary do not form part of your estate and are not controlled by your will.


Joint ownership of property, including real estate, also does not form part of your estate and will pass automatically to the other joint owner if the joint ownership is with rights of survivorship.

Can I deal with my property as I wish in my will?

In most cases, you may deal with your property as you wish. There are, however, two laws, the *Testator's Family Maintenance Act* and the *Matrimonial Property Act*, that place some restriction on you.

The *Testator's Family Maintenance Act* attempts to ensure that your dependants are left with adequate resources and support whenever possible and if necessary. A child (including illegitimate and adopted children) and a widow or widower are considered "dependants" under the Act. It is of note common law spouses and divorced spouses are not considered under the Act.

The *Matrimonial Property Act* recognizes the contribution of both spouses to the marriage. The Act provides that when on spouse dies, the surviving spouse can apply to the Supreme Court of Nova Scotia for an equal



division of the “matrimonial property”. The application must be brought within six months after probate or administration of the estate has been granted.

What are the main clauses in a will?

- Identification of the person making the will;
- Cancellation of all previous wills;
- Appointment of executors;
- Payment of debts and taxes;
- Specific gifts or legacies;
- Residual bequest (including estate trust);
- Administrative clauses;
- Guardianship clause.

Are there any estate taxes, succession duties or other taxes on my estate upon my death?

In Nova Scotia, there are no estate taxes, succession duties or gift taxes at present. Federal tax is levied on capital gains. The deceased is deemed to have disposed of all capital property at fair market value as of the date of death. The difference between cost base and market value results in the gain.

How long does my will remain in effect?

Your will be valid until you change or revoke it. If you marry or remarry, your will is automatically revoked unless it was made in contemplation of the marriage. You should consider re-examining your will upon

occurrence of one or more of the following events:

- Change in marital status;
- Change in family status (eg. birth or death of a child);
- Significant change in the value of or type of property in your estate;
- Change of residence;
- Death of a named Executor or alternate Executor; and
- Death of one or more of the beneficiaries named in the Will.

What laws apply?

The laws of the province in which you reside at the time of your death will govern the disposition of your personal property. Your real estate will be governed by the laws of the province in which it is located.

Basic Considerations in appointing your Executor and Proctor

Your executor is the person or corporation you name in your will to carry out the terms of the will. As a result, it is an important decision.

Although you do not need any specific skills or experience to be an executor, it is helpful to have a general understanding of income tax, real estate, asset valuation and management, accounting, insurance and financial administration. It can be detailed and complicated work. It can also be extremely time consuming over an extended period

of time, particularly if the will establishes a trust for children. It should also be remembered that every executor is legally responsible to the beneficiaries.


You may consider as your executor a spouse, a friend or business associate, lawyer, accountant or a trust company. There are advantages and disadvantages to each. Where a trust is involved, you may wish to consider appointing a trust company to act as either your executor or together with a person you nominate as a co-executor. This may ensure experience and expertise, impartiality and understanding, and permanence and availability. Your lawyer can discuss what may be best for you.

You may also wish to appoint your lawyer as proctor of your estate. The proctor will carry out the necessary legal work to probate your will.

Powers of Attorney: Living Wills

A Power of Attorney is an instrument authorizing another person to act as your agent or attorney during your lifetime and which becomes null and void upon your death.

If you have not prepared and signed a Power of Attorney, and become incapable of handling your financial affairs, a court can appoint a trustee/guardian to act on your behalf.



This is a restrictive and expensive process you should avoid.

Who should act as your Attorney?

An Attorney can be either a person or a corporation. As in the case of executors, there may be situations you should consider a trust company to act as your Attorney. These reasons may include, experience and expertise, impartiality and understanding, and permanence and availability. Your lawyer can discuss what may be best for you.

When should the Power of Attorney be acted upon?

You should identify the circumstances when you wish your Attorney to commence acting on your behalf. Typically, you would specify that the holder would act only in the event of your incapacity or inability to act on your own behalf.

What should your Attorney's powers be?

Your Attorney's powers can be all-encompassing or limited to a certain purpose. Your Attorney's powers may also include the right to provide consent or directions respecting your medical treatment as permitted by the Medical Consent Act and to provide for the appointment of your guardian for the purposes of the Hospitals Act. Your lawyer can discuss with you the advantages of each approach.

Drawing your Will and Power of Attorney

Some people attempt to draft their own will using either a stationary form or copying an existing will. Although such a will, if properly executed, can be legally binding, it is seldom advisable. Your estate is unique to you. As a result, your lawyer should draw or prepare your will and power of attorney to ensure that all legal formalities are met and that the documents properly reflect your wishes.

For your appointment with your lawyer, have the following information available:

- Full names, birthdays and addresses of your beneficiaries;
- Detailed listing of all of your property, real and personal, which you possess, including insurance and annuity contracts and RRSPs. Also include a list of all liabilities;
- Outline of how you wish property to be distributed;
- Burial instructions, if any; and
- Names and addresses of executors, guardians and attorneys.

You should also note that you cannot change your will except by a new will or codicil. Changes must be made as carefully as was the original will. Again, you should consult a lawyer to ensure that changes are effected properly.



Glossary of Legal Terms

Administrator

The person appointed by the courts to control and protect your estate's assets and to distribute your property in accordance with provincial law. A woman performing this job is called an *Administratrix*.

Attorney

A person who has the authority to act on your behalf to do almost anything you become unable to do yourself.

Beneficiary

A person (or organization, or charity) who receives a benefit under your will.

Codicil

An amendment which modifies the terms of your will.

Estate

The sum of all your assets.

Executor

The person or trust company appointed in your will to control and protect your estate's assets, pay off any debts, and distribute your property as directed by your will. A woman performing this job is called an *Executrix*.

Guardian

The person or persons appointed in your will or by the court to have custody of your minor children and their assets.

Probate

The official confirmation of your will by the courts which confirms your executor's legal authority.

Proctor

The lawyer that files your original will, together with all other supporting documentation, with the courts. You may wish to appoint your proctor in your will.

Property

All those things and rights which you own.

Testator

The person making the will. You are a *testatrix* if you are a woman making a will.