Writing Your Will

A People's Law School Publication

Contents

Introduction

Image via www.flickr.com

Writing Your Will is for people who are making a will in British Columbia. It explains what is involved in making a will, what to consider in appointing an executor, and what to do after making your will. The information reflects the *Wills, Estates and Succession Act* [1], which became law in 2014.

At People's Law School, we believe accurate, plain English information can help people take action to work out their legal problems. This publication explains in a general way the law that applies in British Columbia. **It is not intended as legal advice.** For help with a specific legal problem, contact a legal professional. Some sources of legal help are highlighted in the "Where to Get Help" section.

We have tried to use clear language throughout. See the "Glossary" section for definitions of key legal terms, which are also bolded in the text.

People's Law School

People's Law School is a non-profit society in British Columbia, dedicated to making the law accessible to everyone. We provide free education and information to help people effectively deal with the legal problems of daily life.

References

[1] http://canlii.ca/t/8mhj

What Is a Will?

This section was last reviewed for legal accuracy by Helen Low, QC in January 2016.

A **will** is a legal document that leaves instructions about what the person making the will wants done with their property and obligations after they die.

Image via www.istockphoto.com

Why should you make a will?

Making a will gives you some control over what happens to your **estate** after you die. Your estate is made up of the property and possessions, also known as the **assets**, that you own at your death (with some exceptions explained below). With a will, you can make sure the things you own go to the people you want to have them.

A will can also help the people who outlive you. They can feel sure that they are carrying out your wishes. Putting your intentions into a will can help save your family members and those you leave things to time, effort and money.

"I've decided I need to make a will. Both my sisters want me to leave my opal ring to them. The ring originally belonged to our mother, and is a family heirloom. I can now see that unless I'm very clear in my will about who should have the ring, there will be family conflict later."
- Maria, Nanaimo

What happens if you die without a will?

If you die without a will, there is no way to prove what your wishes were. The law dictates how your estate will be divided. The rules are set out in the *Wills, Estates and Succession Act* [1]. For example, if you have a spouse and no children, your estate passes to your spouse. If you have a spouse and you had children together, your spouse gets the first $300,000 value of your estate and half the balance; the other half of the balance is divided equally among your children.

There are further rules depending on the combination of relatives alive at the time of your death. The estate goes to the government if no relatives can be found.

Another result if you die without a will is that the court has to appoint someone called an **administrator** to deal with your estate. That person, usually a spouse or child, needs to file documents in British Columbia Supreme Court that ask the court to appoint the person to administer the estate.

If there is no one who applies to administer the estate, then the **Public Guardian and Trustee** takes responsibility.

Do you have to make a will?

The law does not say that you have to make a will. However, by making one you can make sure that your wishes about inheritance are respected.

	"My sister Susan died without a will. A year before, she told me what she wanted done with the things she owned. Her wishes included giving her car to me. But without a will, the law says how the estate is divided. In Susan's case, everything in her estate will go to her only child, Amy." - Janet, Vernon

Does a will deal with everything you own?

No. A will generally doesn't cover property that you don't own exclusively. For example, a joint bank account or a house owned in joint tenancy has a "right of survivorship." When you die, any jointly owned properties will automatically become the exclusive property of the other joint owner. This property doesn't form part of your estate.

Also, property where you have designated a **beneficiary** doesn't form part of your estate. The beneficiary is entitled to receive the proceeds on your death. Common examples include a life insurance policy or a retirement benefit plan.

How is a will different from a power of attorney or representation agreement?

A will takes effect only after you die. A **power of attorney** and a **representation agreement** are ways to plan for the handling of your affairs **during your lifetime**.

With a power of attorney, you can give someone the legal power to take care of financial and legal matters for you while you are still alive. With a representation agreement, you can give someone the legal power to take care of health care and personal care matters.

Both a power of attorney and a representation agreement cease to have effect when you die.

What is a "living will"?

A "living will" is not a legal document in British Columbia. The term has been used to describe a person's wishes for their health care treatments, and particularly treatments they do not want in an end-of-life situation. The options available in British Columbia to address health care wishes for an end-of-life situation are a **representation agreement** or an **advance directive**. Both are ways to plan for health care decisions that may need to be made before you die.

References

[1] http://canlii.ca/t/8mhj

Making Your Will

This section was last reviewed for legal accuracy by Helen Low, QC in January 2016.

You can make a will on your own, or have someone such as a lawyer or a **notary public** help you. There are rules and formalities that must be followed, no matter how simple the will, or the will may not be valid.

The person making a will is referred to as the **will-maker**.

Image via www.flickr.com

Requirements for a will

For a will to be valid:

- The will must be **in writing**. It can be typed or handwritten.
- The will must be **signed at its end by the will-maker**. As the will-maker, you must sign the will or acknowledge the signature as yours in front of **two witnesses** present at the same time. If you are unable to sign the will because of illness or disability, you can ask someone to sign it for you in front of you, and in front of the two witnesses.
- The two witnesses **must sign the will in front of you**. You and the witnesses should initial each page of the will in front of each other.
- The will must have the **date** included on it.

Who can make a will?

To make a will, you must:

- be age 16 or over,
- be mentally capable of managing your own affairs, and
- freely agree with the contents of the will at the time you make it; in other words, if it is proven in court that someone has pressured you to make a will that doesn't represent your intentions, the will is not valid.

In considering whether a person is mentally capable to make a will, key factors are:

- Do they understand the nature of a will?
- Do they understand the extent of their property?
- Do they appreciate the claims to which they ought to give effect? Put another way, if someone is being excluded from the will who would inherit a portion of the estate if there was no will, does the will-maker appreciate the effect of their decision? For example, if they leave their child out of the will, does the will-maker appreciate the effect of that decision?

Who can be a witness to your will?

Your two witnesses must:

- be age 19 or over, and
- be mentally capable.

It used to be that a person who witnessed a will could not also receive a gift under the will. But now, a witness may be able to inherit under a will. The witness has to apply to court and show that you **intended** to make the gift even though the person was a witness to the will. If the court isn't satisfied, the gift to the witness is void. Either way, the remainder of the will is not affected.

Ultimately, it remains good practice for your witnesses not to be people - or the spouses of people - who are named as executors, alternate executors, or beneficiaries under the will.

The witnesses do not need to read the will. All they need to do is watch you sign your name to the will, and sign the will themselves in front of you.

Elements of a will

Typically, a will has several sections:

- **Initial matters:** The first section of the will appoints the **executor**. The executor is the person who is responsible for carrying out the instructions in the will. The will can specify the extent of the executor's powers in administering the estate.
- **Distribution of the estate:** The will sets out who receives your possessions and property, also known as your **assets**, and under what conditions. The people to whom you give things are called **beneficiaries**. You can make gifts of specific property or cash gifts. Whatever amount left over after debts and taxes are paid and gifts are distributed is called the **residue** of the estate. In the will, you say who receives the residue, and in what portions.
- **Other details:** The will can also include other details as you wish. For example, if you have any children under age 19, you should name a **guardian** for them in the will. You should also provide for financial assistance for the guardian to cover the costs of raising the children.
- **Signatures:** The last section of the will includes the signatures of the will-maker and witnesses.

How detailed does your will need to be?

Your instructions in the will should be clear and specific.

You need to be specific about exactly who the beneficiaries are. For example, you should not say that you want to leave everything to "my best friend" or "my cousins".

	"I have no spouse or children of my own. I want to leave my belongings to my niece after my death. I wrote into my will her full name and relationship to me: '...to give the residue of my estate to my niece, Daniella Cortez....'" - Paulo, Vancouver

You don't need to write down every specific item you own. You only need to be specific about who should get what when it comes to items of special value, especially if you want to make certain the item goes to a particular person.

	"I want my son Michael to receive my grandfather's gold watch. In my will, I included that gift: '...to transfer my Omega gold watch to my child, Michael Chen…' I left out any mention of my other clocks, as they weren't special in any way." - Lin, North Vancouver

What should not be included in your will?

A will often isn't read until after the funeral. As a result, most wills don't include details relating to the funeral service. You should tell the executor or your family or leave a letter saying what kind of ceremony you want when you die, and whether you want to be buried or cremated.

Any assets you own jointly with others don't need to be included in your will. These assets 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.

Also, assets where you have designated a beneficiary don't need to be included in your will. For example, retirement benefit plans such as RRSPs and RRIFs, where you have named a beneficiary under the plan, 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.

The same is true if you have life insurance that names a beneficiary.

Tip	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 altered by a later designation that is not in a will.

Does the law say you have to leave your estate to your family?

In general, you are free to leave your estate to whomever you want. However, the law does require that you make adequate provision for the proper maintenance and support of your spouse and children. Your spouse or children can apply to court for a portion of the estate that is "adequate, just and equitable in the circumstances".

Spouse includes a common-law spouse, which is a person you have lived with in a marriage-like relationship for at least two years.

If your spouse or children wish to dispute your will because they feel they have not been adequately provided for, they have to apply to court within 180 days after **probate** has been granted. (Probate is a legal procedure that confirms the will is legally valid and can be acted on.) The person disputing the will needs to prove in court that the will does not provide for them adequately.

Separated spouses generally have no legal claim to dispute the arrangements made in your will. Other relatives who are left out also generally have no claim.

Tip	If you want to leave a spouse or child out of your will, you should explain this in a separate document or letter, kept with your will. You need to show that you have considered them and your obligation to provide for them. This does not guarantee that they will not receive something if they dispute the will in court. You should seek legal advice.

Making the will

When should you make a will?

You can make a will at any time. You should make a will **if you marry** or **if you start a family**. Even if you don't marry or have children, or don't have significant property, it's still a good idea to make a will so that you can leave your belongings to the special people in your life.

	You should try to make a will when you are in good health. To make a will, you need to be mentally capable. Your mental capability can be affected by illness, an accident, or drug treatment. If you are proven to have been mentally incapable when you made your will, it will be considered void and of no legal effect.

Do you have to get legal help to make a basic will?

With good do-it-yourself materials, it's not too difficult to make a will that takes care of basic concerns, such as leaving a home, investments, and personal items to loved ones.

However, getting professional help to make a basic will does not cost very much, and having your will made by a lawyer or notary public is the safest way to avoid mistakes. Using an experienced lawyer or notary can give you the peace of mind of knowing that your will is properly drafted and valid, and that your affairs will be handled according to your wishes.

Getting advice from a lawyer or notary becomes particularly important where there are features such as a blended family, a charitable gift, property outside of British Columbia, a family business, a desire to hold property in trust for someone (such as a child), or a wish to disinherit potential beneficiaries.

Ask a lawyer or notary how much it will cost before you decide to give the job to him or her. To find a lawyer or notary, see the "Where to Get Help" section.

Appointing an Executor

This section was last reviewed for legal accuracy by Helen Low, QC in January 2016.

Your **executor** is the person you name to carry out the instructions in your will. They are responsible for settling your affairs.

What are the executor's responsibilities?

The role of executor usually involves paying any outstanding debts, applying for the Canada Pension Plan death benefit, selling some assets, preparing the final tax return, and distributing the estate. How much time this takes depends on how complicated your affairs are.

Your executor may need to **probate** the will. Probate is a legal procedure that confirms the will is legally valid. In the probate process, the executor submits special forms and the will to court. If everything is in order, the court issues a grant of probate.

Some estates that involve only a small amount of money (under $25,000) may not need to go through probate. It is up to the third parties who hold your assets whether they will give the executor those assets without probate.

Who should you choose to be your executor?

An executor should be someone you trust and who has the ability to carry out the instructions in your will. It's best if he or she is familiar with your situation and your wishes. An executor can be one of your beneficiaries. Most people ask a family member or close friend to be their executor.

You can also appoint a lawyer, a notary public, or a private trust company as executor. The Public Guardian and Trustee may agree to be appointed executor in some circumstances.

In choosing an executor, keep in mind that:

- Your executor should be someone who will likely outlive you.
- Your executor can be someone who does not live in the province, but all procedures to settle the estate will be done in British Columbia. It is more convenient to get documents signed and tasks done by an executor who lives close by.
- Although not recommended, you can appoint someone under age 19 as executor. However, if he or she has not reached age 19 on your death, probate may be delayed.
- It helps if the person you appoint is organized and a good communicator.
- Most importantly, the person must be willing to take on the duties of executor.

	It is very important to name at least one alternate or backup executor in your will. If the executor is unable or unwilling to act, the alternate can take over.

Can more than one person act as executor?

Yes, you can appoint two or more people to act as your executors. It is important to be aware that if more than one executor is named, the co-executors must act jointly. Neither of them is the "lead" executor or "main" executor. They'll have to agree on many things, from the selling price of the house to who is going to get the family photo albums.

If one executor dies, the other one can act alone.

Sometimes people choose three executors so that if there are disagreements, the executors can vote and the majority will decide. However, you need to say in the will that this is what you want; otherwise all decisions must be unanimous. You also must say that the executor who doesn't agree with the other two will still go along with the decision and sign any necessary documents. This is called a **majority rule clause**.

If you appoint more than one executor, consider if they will be able to work together. You should discuss your wishes with both of them. It's best if you can do this with them together.

How can you make the job easier for your executor?

First, ask the person you have in mind if he or she is willing to be your executor. Once they have agreed, you can make the job easier for them if you:

- **Discuss your wishes** with the executor, including burial and cremation.
- **Register your will**, and tell your executor where the original will is kept. It is a good idea to keep it somewhere where your executor can access it.
- **Keep an up-to-date, detailed record** of all that you own and all that you owe. For example, record your bank accounts, RRSPs or RRIFs, insurance policies, real estate, and pension benefits. Note any items which are owned in joint tenancy or which name a specific beneficiary. These are dealt with outside the estate, so the executor does not have to manage them.
- **Explain your plans** to family members, the beneficiaries, or anyone who may be entitled to a share of the estate. Talking with them now will prevent problems later.
- **Review your will** and your choice of executor every few years or when your circumstances change.
- **Update the will** if there are any changes.

It is always a good idea to make a new will if you move between provinces. If someone dies in British Columbia but had a valid will in another province, the executor may be able act on the will. But the process may be more complicated.

After Making Your Will

This section was last reviewed for legal accuracy by Helen Low, QC in January 2016.

After making your will, you should register it and keep the original in a safe place.

Image via www.istockphoto.com

Where should you keep your will?

You need to keep the original of your will in a safe place that is fireproof, waterproof, and tamper-proof. There is a presumption that a lost will has been destroyed and revoked, so take care in storing the will.

Tip	Tell your executor where you have stored your will. The executor needs to know where it is, so that he or she can easily access it after your death.

How do you register your will?

You can register your will with the provincial government's Wills Registry [1]. The law does not require this step, but it's a good idea because it lets others know where you have stored the original copy of your will.

To register your will, you (or your lawyer or notary public) need to file a Wills Notice with the Wills Registry maintained by the provincial government's Vital Statistics Agency. The Wills Notice is a form that you fill out to say that you have made a will and the location of the will. You do not provide a copy of the will to the Wills Registry, just the Wills Notice.

Tip	For the Wills Notice form [2] and filing instructions, see the Wills Registry [1] of the Vital Statistics Agency. Their contact information is: Victoria: 1-250-952-2681 Toll-free: 1-888-876-1633 www.vs.gov.bc.ca [3]

Can you change your will after you've made it?

You can make a new will at any time. Or you can change the will you've made by signing a separate document, called a **codicil**.

To be legal, the codicil has to meet the same requirements as the will. For example, it must be in writing, and be signed by you and two witnesses. You don't have to use the same two witnesses you used for your will. The codicil must refer to the will it is amending.

Can you cancel your will?

Yes, you can cancel your will by:

- destroying the original will (you must destroy it with the intention of revoking it), or
- making a written declaration revoking your will, signed in the same way as a will (for example, signed by you and two witnesses).

A new will normally cancels any previous will. Even so, it is common practice to clearly provide for this by including a **revocation clause** at the beginning of a will:

> *"I hereby revoke all my prior wills and codicils."*

Neither marriage nor divorce of the will-maker cancels a will. The exception is if you married before March 31, 2014, and made a will prior to your marriage. Your will would have been automatically cancelled on your marriage, unless the will said that it was made in contemplation of your marriage.

References

[1] http://www2.gov.bc.ca/gov/content/life-events/death-and-bereavement/wills-registry
[2] http://www2.gov.bc.ca/assets/gov/health/forms/vital-statistics/vsa531_fill.pdf
[3] http://www.vs.gov.bc.ca

Resources

Where to Get Help

This section was last reviewed for legal accuracy by Helen Low, QC in January 2016.

Access Pro Bono

Access Pro Bono operates a clinic to help low-income seniors (ages 55+) and people with terminal illnesses prepare a will.

604-424-9600

www.accessprobono.ca/willsclinic [1]

Clicklaw

Clicklaw offers one-stop access to legal information, education and help for British Columbians from trusted organizations. Select the topic “Wills & Estates [2]”.

www.clicklaw.bc.ca [3]

Dial-A-Law

The Canadian Bar Association, BC Branch provides legal information for the public by telephone recordings and over the internet. See the script on “Making a Will and Estate Planning [4]”.

Lower Mainland: 604-687-4680

Toll-free: 1-800-565-5297

www.cbabc.org [5]

Law Students’ Legal Advice Program Clinics

Law students from the University of British Columbia offer free assistance to qualifying clients with some legal matters, including preparing certain types of simple wills. The manual used by LSLAP law students has a chapter on "Wills and Estates [6]" that includes sample clauses for making a will.

604-822-5791

www.lslap.bc.ca [7]

Lawyer Referral Service

The Canadian Bar Association, BC Branch offers referrals to lawyers who can provide a half-hour consultation for $25. The lawyer will not be able to prepare a will for you in this time, but can answer initial questions you may have.

Lower Mainland: 604-687-3221

Toll-free: 1-800-663-1919

lawyerreferral@cbabc.org [8]

www.cbabc.org [9]

MyLawBC

From Legal Services Society, the agency that provides legal aid in British Columbia, MyLawBC is an online resource that enables you to make a simple will through answering a set of questions. It also provides information on wills as well as personal planning documents such as powers of attorney and representation agreements.

mylawbc.com [10]

Nidus Personal Planning Resource Centre and Registry

Provides information, education, and support for people to make and use representation agreements and enduring powers of attorney.

info@nidus.ca

www.nidus.ca [11]

Public Guardian and Trustee of BC

This government office may agree to be appointed executor in a will in appropriate circumstances. They can also administer an estate when the executor is not able or willing to do so, or when someone dies without a will.

700 - 808 West Hastings Street

Vancouver, BC V6C 3L3

604-660-4444

www.trustee.bc.ca [12]

Self Counsel Press

Self Counsel Press publishes do-it-yourself guides on legal topics for BC, including on making a will.

www.self-counsel.com [13]

Society of Notaries Public of BC

A notary public can help with making a will. The Society of Notaries Public of BC offers a list of notaries in the province.

Lower Mainland: 604-681-4516

Toll-free: 1-800-663-0343

www.notaries.bc.ca [14]

References

[1] http://www.accessprobono.ca/willsclinic
[2] http://www.clicklaw.bc.ca/global/search?f=Wills+%26+estates
[3] http://www.clicklaw.bc.ca
[4] http://www.clicklaw.bc.ca/resource/1267
[5] https://www.cbabc.org/For-the-Public/Dial-A-Law
[6] http://www.clicklaw.bc.ca/resource/1736
[7] http://www.lslap.bc.ca
[8] mailto:lawyerreferral@cbabc.org
[9] https://www.cbabc.org/For-the-Public/Lawyer-Referral-Service
[10] http://mylawbc.com/paths/wills/
[11] http://www.nidus.ca
[12] http://www.trustee.bc.ca
[13] http://www.self-counsel.com
[14] http://www.notaries.bc.ca

Glossary

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Advance directive

: A document specifying instructions to health care providers about what kind of health care treatment a person does or does not want, including life support or life-prolonging medical interventions.

Assets

: Property owned by a person at their death. Assets can include things such as money, land, investments, and personal possessions such as jewelry and furniture.

Beneficiary

: A person designated to receive money or property in a will, benefit plan, or insurance policy.

Codicil

: A document made after the will that changes some things in the will.

Estate

: All of the property and belongings a person owns at their death, with some exceptions. The estate does not include property owned with someone else jointly (such as a joint bank account) or property where a beneficiary has been designated (such as an insurance policy).

Executor

: The person appointed in a will to carry out the instructions in the will and settle the will-maker's affairs after they die.

Notary public

: A public official who is legally authorized to provide advice and prepare documents on certain matters, including wills (so long as they do not create trust terms).

Power of attorney

A legal document that enables an adult to give another person (or more than one person) the authority to make financial and legal decisions for them.

Probate

A legal procedure that confirms a will is legally valid and can be acted on. It allows financial institutions and others to rely on the will as being the last will made by the will-maker.

Public Guardian and Trustee

A public body established by law to protect the interests of British Columbians who lack legal capacity to protect their own interests.

Representation agreement

A legal document that enables an adult to authorize someone to make decisions for them when they can no longer manage on their own. The "representative" can make decisions relating to health care and personal care matters. With a "section 7 representation agreement", the representative can also be authorized to handle "routine management" of financial affairs and most legal matters.

Residue

The residue of the estate is whatever is left over after the executor pays all the debts and expenses and distributes any specific gifts.

Spouse

Two persons who are married to each other, or who have lived together in a marriage-like relationship for at least the two years prior to the death of the will-maker.

Will

A legal document that leaves instructions about what the person making the will wants done with their assets and obligations after they die.

Will-maker

A person who makes a will.

About

About this Publication

Writing Your Will is for people who are making a will in British Columbia. It explains what is involved in making a will, what to consider in appointing an executor, and what to do after making your will. The information reflects the *Wills, Estates and Succession Act* [1], which became law in 2014.

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About People's Law School

People's Law School is a non-profit society in British Columbia, dedicated to making the law accessible to everyone. We provide free education and information to help people effectively deal with the legal problems of daily life.

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www.peopleslawschool.ca [3]

References

[1] http://canlii.ca/t/8mhj
[2] mailto:info@peopleslawschool.ca
[3] http://www.peopleslawschool.ca