



Making a Will

This booklet is for Albertans who are thinking about writing or changing a will. Writing a will allows you to pass on your belongings to your loved ones according to your wishes and with as few problems as possible. If you die without a will, it's often more costly, complicated, and time consuming to settle your estate. If you need more detailed help or legal advice, see the last few pages of this booklet for information on where to get help.



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What is a will?

General information about wills

What is a will?

The dictionary defines a **will** as the legal statement of a person's last wishes about how to divide his or her property after death. The property that is distributed following the instructions in a will is known as the **estate**. When you make a will, you are known as the **testator**. The person you put in charge of carrying out your wishes as expressed in the will is called a **personal representative**.

A will does not take effect until you die. Therefore, if you specify in your will that you leave certain property to someone — for example, a diamond bracelet to your sister or a lake lot to your brother — you can still dispose of that property during your lifetime. You can sell it or mortgage it or deal with it in any way you choose. Of course, you can also change your will at any time.

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 two different kinds of wills, each with its own rules and requirements:

1. The “formal” (or “attested”) kind, which is witnessed by two witnesses. This kind of will needs to be completely typewritten or printed (not in handwriting).
2. The kind that you hand write completely. Handwritten wills are called **holograph wills**. They are legal in Alberta, Manitoba, Saskatchewan, Ontario, Quebec, New Brunswick and Newfoundland and Labrador but they are not allowed in other provinces.

What is an estate?

The property that you own at the time of your death, including land and possessions, which is distributed following the instructions in your will is known as your estate. 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.



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Property that does not flow through your will does not form part of your estate. For example:

- Property such as land, a house and bank accounts for which the registered owners are described as **joint tenants**. This kind of property transfers to the remaining joint tenant(s) when you die.
Note: On the other hand, property for which the registered owners are described as **tenants in common** does flow through your estate.
- RRSPs, pensions, and life insurance policies for which you have designated a **beneficiary** other than your estate.

Consider the following scenarios:

- In 1999, you signed a designation of beneficiary form leaving the death benefit of your pension plan to your sister. Then in 2006 you wrote a will but did not mention your pension plan. The death benefit will go directly to the named beneficiary (your sister) and will not form part of your estate. No part of the funds can be used to pay the debts of your estate.
- On the other hand, in 1999, you signed a designation of beneficiary form leaving the death benefit of your pension plan to your sister. Then in 2006 you wrote a will and in that will you did make other arrangements for this benefit (you left it to your brother). The death benefit will form part of your estate, meaning that it can first be used to pay debts, and what remains of it will go to your brother.

As a result, it is very important to be careful and stay consistent when dealing with property for which you can designate a beneficiary.

What is a personal representative?

A personal representative is the person named in a will to carry out the directions contained in the will (formerly known as an executor). The personal representative is responsible for settling the person's affairs after death. The person's estate passes temporarily to the personal representative.



A personal representative is the person named in a will to carry out the directions contained in the will (formerly known as an executor).

The personal representative locates all of the person's **assets** (everything he or she owned), pays the funeral costs, debts and taxes, and then distributes the remaining money and property according to the instructions in the will. The personal representative is accountable to the beneficiaries in the will.

For example, the personal representative must let the beneficiaries know if or when he or she is applying for **probate** (a legal procedure that confirms a will) and must keep records and give all beneficiaries a final statement of accounts. If the will is probated, the personal representative is also accountable to the court.

NOTE: This person was formerly called an **executor** or **executrix** and these terms will continue to be in use for some time. However, the *Alberta Estate Administration Act* (2015) has changed the name of these roles to personal representative.

Do I have to make a will?

No, it is optional and voluntary. While it is very important to consider making one, you don't have to, and no one can make you sign one if you do not want to do so. Making a will just makes things clearer when you die as it helps to ensure that the things you own go to the people you want to have them. A will is also useful for the people who outlive you, as they can feel certain that they are carrying out your final wishes.

Why should I make a will?

It is a good idea for everyone to have a will, even someone who is young and healthy. Illness or accident could claim any of us at any time. People often have more assets than they think. For example, life insurance and pension benefits may be payable to an estate. Sometimes credit card contracts include accidental death benefits. Even if you don't have many assets, a will is the only way to control who gets what you do have.

Anyone with children should make a will so that they can recommend a guardian for their children. Parents can also list their intentions for their children's upbringing and financial needs.

NOTE: The naming of a guardian in a will is not binding. Someone else can still apply to be the guardian of your children, and only the court has the final say. Naming a guardian in a will, however, does ensure that a court will hear your opinion.

Only you know what you want done with your estate when you die and simply telling someone, or even more than one person, does not suffice. Your wishes need to be in writing. This is especially true if you are leaving the bulk of your estate to non-family members. Where there is no will, the *Wills and Succession Act* presumes the deceased intended to leave the estate to his or her family.

Finally, your estate may end up being more complicated and expensive for your family to handle if you don't leave a will, as a family member may need to apply to the court to appoint him or her as **administrator**.

When should I make a will?

Anyone over the age of 18 with mental capacity can make a will at any time (a person under 18 may make a will with the court's permission). You should make a will if you marry (or enter into some other type of committed relationship), start a family, or divorce (or end some other type of committed relationship).

You should also make a will if you have a particularly complicated set of wishes. Even if you are not in one of these situations, it is still a good idea to write a will so that you can leave your belongings to whoever you want.

In addition, you should make a will when you are still in good health. In order for a will to be valid, you must be mentally capable (i.e. have the appropriate mental capacity) when you make it. Your mental capacity can be affected by illness, accident, or drug treatment.

What happens if I die without a will?

If you die without a will, you are said to die **intestate**. Two immediate problems arise:

1. Because there is no personal representative appointed, there is no one to take charge of the handling of your estate.
2. There is no formal written record of what you wanted done with your estate.

In this situation, the *Estate Administration Act* (the Act) deals with the first problem by providing for the appointment of a personal representative to handle the gathering together and distribution of your estate. This can only be done after someone applies to take on the job and the court issues an order appointing him or her, as such there may be some initial delay.

The Act addresses the second problem by setting out a schedule of relatives who may inherit the estate.

For example:

- if you have a surviving **spouse** or **adult interdependent partner**, and any surviving children who are also children of that survivor, the whole of the estate goes to those individuals (except in specific circumstances of separation and cases of dependent adult children);
- but if you have surviving children from a different spouse or partner, the surviving spouse or adult interdependent partner only receives a portion of your estate (the greater of the amount stated in the law at the time of death or 50% of the estate), with the rest to go to your descendants;
- if there is a surviving spouse *and* a surviving adult interdependent partner, all or some of the estate will be divided between the two (depending on whether there are also children and/or grandchildren involved);
- if there is no surviving spouse or adult interdependent partner, but you have children, the estate will be divided among your surviving children, and potentially also your grandchildren (if the parent – a child of the deceased – died before the deceased); and
- if you have no spouse or adult interdependent partner and no children, then the estate will go to other relatives in an order set out in the Act.

If you do not have a spouse or any blood relatives, then another Alberta law comes into play: the *Unclaimed Personal Property and Vested Property Act*.

According to this law, if you die without a will, two years after the date of the **grant of administration**, the personal representative must give the provincial government any portion of the estate not claimed by a valid heir. The provincial government must keep this unclaimed personal property, or its equivalent value, for ten years.



If you die without a will, your estate may not be divided up as you would have wished.

During the ten-year period, a valid heir could still come forward to claim the property. After the ten-year period has passed the property belongs to the government.

The result: If you die without a will, your estate may not be divided up as you would have wished. Only you know what you want done with your estate when you die and simply telling someone, or even more than one person, is not enough. Your wishes need to be in writing.



Choosing not to write a will may lead to court fees for your family if they need to file for a grant of administration.

If I make a will, can the government take some of my money as estate tax?

No. There are no estate taxes of any kind in Alberta, regardless of whether there is, or is not, a will.

If you write a will and the will needs to be probated, there will be filing fees to get a grant of probate. The exact amount depends on the value of the estate. However, probate may not be required; the need for probate is related to the kind and amount of property involved, not the existence, or non-existence, of a will.

Choosing not to write a will may lead to court fees for your family if they need to file for a grant of administration.

What is the cost of preparing a will?

There is no exact answer to this question. It will vary from lawyer to lawyer, and it will also depend on the complexity of the will and the expertise needed to draft it.

Often, lawyers will quote a single price for separate wills done for two spouses (or common-law partners) at the same time.

Similarly, a lawyer may quote a single price for a package including a power of attorney, personal directive, and a will for each spouse. The price may increase if the lawyer needs to use his or her expertise in complicated tax planning measures, the creation of **trusts**, or very large estates.

How do I make a will?

Common questions about creating a will

Who can make a will?

In Alberta, any adult (age 18 or over) who is mentally capable can make a will. In addition, a person under the age of 18 can make a will if she or he:

- has a spouse or adult interdependent partner;
- is a member of a part of the Canadian Forces on active service or regular force under the *National Defence Act*; or,
- has the permission of the Court.

How do I make a will?

There are three ways to make a will:

1. hire a lawyer to draft a will for you;
2. complete a store bought form will; or,
3. write a will entirely in your own handwriting (a holograph will).

Making a verbal recording of your wishes (such as a video, CD or MP3) is not enough and will not be considered a valid will.



Wills have to be worded very carefully and precisely to make sure that exactly what you want happens.

Do I have to use a lawyer to make my will?

There are certainly advantages to having a lawyer prepare your will. He or she has a lot of expertise that you can call upon to deal with matters like tax consequences, international issues, trusts, making suitable arrangements for young children, and many other issues.

Wills have to be worded very carefully and precisely to make sure that exactly what you want happens. Lawyers are skilled in the careful use of language and are unlikely to make a mistake.

In the unlikely event that the lawyer should make a mistake, there is insurance to cover the situation. It is particularly important for some people to consult a lawyer when making a will:

- people with large and complex estates (for example: issues such as business assets, children who live outside of Canada, and children with special needs);
- people who are separated or getting a divorce;
- people with blended families;
- older or ill people who feel that they are being pressured or influenced by others;
- people who are thinking about getting married; and
- people starting or ending an adult interdependent relationship.

What is a holograph will?

A holograph will is a will that you write entirely in your own handwriting. These wills are valid in Alberta, but not in all provinces in Canada. The advantages of holograph wills are that they do not require any witnesses and they can be prepared quickly and privately.

There are some very interesting examples of holograph wills. The most famous in Canada concerns a Saskatchewan farmer who was trapped under his tractor when it rolled over on top of him and who managed, before he died, to scratch on the fender that he left his estate to his wife.

Certainly, holograph wills are handy in an emergency, and some people will write them before leaving on a trip or on some other occasion when time is short. However, it is very easy to make a mistake or write in a way that causes confusion, so holograph wills are usually not a good idea.

Are wills made on store bought forms okay?

This kind of will is valid in Alberta, if used correctly. These forms are readily available, are reasonably priced, and come with instructions for filling them out.

They offer the advantage of privacy, since no one but you needs to know the contents. They also offer the advantages of speed and low cost.

The disadvantage is that, as opposed to a holograph will, they are subject to the same conditions as a will done by a lawyer and, sometimes, these requirements are not explained in detail.

For example, the *Wills and Succession Act* sets out very specific conditions for the witnessing of wills. A store bought form will still needs to be witnessed by two people. Each witness must see you and the other witness sign the will at the same time. If all three persons are not present at the same time and do not watch each other sign the will, it may be held to be invalid (only a court can decide if a formality such as this one can be waived).

A beneficiary (a person who gets something under the terms of the will) and a beneficiary's spouse or adult interdependent partner should not be a witness. If such a person does sign as a witness, that does not invalidate the whole will, but the gift to that person will likely become void unless a court rules otherwise. For example, if you leave your estate to your wife and your wife is one of the witnesses to your will, then the gift to her likely becomes invalid.

Wills on store bought forms may also run a risk of being confusing in their interpretation, especially if a person simply fills in blanks (as then the will is neither wholly typewritten or wholly in handwriting). If you decide to make your own will using a store-bought form, be sure that you:

- do your research;
- know all the rules about making a will;
- read the instructions very carefully; and,
- make sure that you fully understand the instructions.

If you have any doubts, consult a lawyer.

What mental capacity do I need to make a will, and who decides if I have that capacity?

Having the mental capacity to make a will (also known as having testamentary capacity) means that you must:

- know that you are making a will and understand what a will is;
- know what property you own; and,
- be aware of the people (such as a spouse and children) you would normally provide for.



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

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

Testamentary capacity can be an issue with individuals who have a mental infirmity or who are very ill. The mental capacity of a very ill person may be affected by their illness, drugs, or pain. This can mean that the person sometimes has testamentary capacity, and sometimes does not. Making your will while you are in good health may avoid the problem of having your mental capacity questioned.

In addition, you must know and approve of the contents of your will. If you were misled, whether by fraud or simply by accident, or if someone put undue influence on you, your will may later be found to be invalid.

For example:

- undue influence would occur if someone (such as your child or your caregiver) pressures or forces you to make a will so that he or she can benefit from it;
- fraud would occur if you were persuaded to sign a will but you believed that it was some other document.

This is another reason for meeting with a lawyer to discuss your will. This may provide proof that the will was made by your own free choice. Further, you should be alone with the lawyer when making your will. You need to be able to speak freely without being afraid of hurting anyone's feelings.

Who can be a witness to my will, and what are my witnesses' responsibilities?

A witness must:

- be 18 years of age or older;
- cannot be a beneficiary under the will or the **bequest** (person property left to a beneficiary) to him or her may be void; and,
- cannot be the spouse or adult interdependent partner of someone who is a beneficiary under the will (or the bequest to him or her may be void).

The person who is appointed as personal representative can be a witness. The witnesses do not need to read your will. All they have to do is see you sign your name to the will, and then they 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 the mental capacity of the person who is signing it. As long as they meet these standards they will not be held responsible even if the will is later challenged.

What should I do with my will after I have completed it? Do I need to register it with the Alberta government?

It depends on your situation. Many people choose to put their will in a safe place that their personal representative knows about and can be easily accessed (i.e. a safety deposit box at their bank). Others choose to leave it with a trusted third party such as their lawyer.

If you do this, however, it is important to remember that it may be many years before your will is needed and the person you have left it with may have moved away or even died in the meantime.

There is no requirement that a will be registered. The government does not keep a registry (except for international wills – your lawyer can discuss this issue with you).

It makes sense, however, to make sure that the people in your life who need to know about these documents, especially your power of attorney and personal representative, have a copy or know where to get one if needed.

In addition, you should review your will every few years, as circumstances can change quickly.

If I made my will in another province, do I have to make a new one if I move to Alberta?

You will not always have to remake your will. However, if you want to be sure your out-of-province will meets the requirements of Alberta law, it is a good idea to have it reviewed by an Alberta lawyer.

Similarly, if you move to another province, it is a good idea to have your will checked by a lawyer in that province to see that it meets the legal requirements of the province where you will live.

In addition, a holograph will written in Alberta may not be valid in another province, depending on the province to which you move.



You should look at your will at least every few years to make sure that it is still up-to-date.

For more information on how to update your will, see page 25.

Selecting a personal representative

Common questions about choosing a personal representative

Who can I appoint as my personal representative?

You can choose any adult you wish. Most often, people choose a family member or a trusted friend to be their personal representative.

A personal representative can also be a corporation (such as a trust company). Either way:

- be sure that the person you choose has the time and ability to carry out the many duties of a personal representative; and,
- before you appoint someone, ask them if they are willing to do the job.



The best personal representative is a trustworthy, reliable and competent adult. A personal representative needs to be someone you trust and who has the ability to carry out your instructions.

You can choose a beneficiary to be your personal representative.

You can also choose someone who does not live in Alberta, but this may prove inconvenient, as all procedures to settle your estate will be done in Alberta.

What should I think about in choosing a personal representative?

Looking after an estate can be difficult and time-consuming. Sometimes it can include responsibilities that last for years.

The best personal representative is a trustworthy, reliable and competent adult. A personal representative needs to be someone you trust and who has the ability to carry out your instructions (which may involve standing up to family members and friends and dealing with interpersonal conflicts).

You should consider choosing someone who has some knowledge about business affairs. Choose someone who is likely to outlive you. Choosing someone who lives in the same province as you do may cut down on long distance phone calls and other administrative expenses.

Your spouse, an adult child, a friend, family member or heir may be able to do a good job as personal representative. Many people choose their spouse or main heir as personal representative.

It is also very important to name an alternate (back-up) personal representative in case your first choice dies, moves away, or for some reason is unable to do the job.

You can name your lawyer as personal representative but most lawyers don't act as personal representatives. Before you name your lawyer check that she or he is willing to be your personal representative.

Naming more than one personal representative

You can appoint more than one personal representative. 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.

Appointing a trust company

If your estate is complicated or you don't have a relative or friend who is able to act, you may want to appoint a trust company as personal representative. In addition, if there is a chance that a problem will arise among your heirs, a trust company might be a good choice because it would be an impartial personal representative.

There can, however, be disadvantages to using a trust company. It usually charges the maximum fee allowable and tends to be a conservative investor. In addition, it probably won't be as familiar with your assets as a friend or family member might be. You should check that the company is willing to act as personal representative. If you don't, the company might refuse to act as personal representative upon your death.

I want to name a specific family member as my personal representative but I'm worried that this will cause conflict. Is there anything I can do to prevent this?

There are a number of options that may help, depending on your situation and personal preferences.

Conflict can often be avoided by telling your family in advance and explaining the reasons for your choice. Another way to avoid family conflict is to name someone else such as a close friend, or a trust company.

Should I include provisions about payment for my personal representative?

The *Surrogate Rules* indicate that personal representatives are entitled to "fair and reasonable compensation for their responsibility in administering an estate by performing the personal representatives' duties."

In your will, you can state how much your personal representative will be paid. If you do, this is the maximum amount the personal representative can receive. If you do not name an amount, and if the personal representative wants to be paid, your personal representative may either ask the beneficiaries to approve his or her fee or the court must order the fee.

Often, a personal representative does not accept a fee. This is common if the personal representative is a spouse, family member, or close friend. Alternatively, your personal representative may prefer to take a gift rather than a fee because a fee is taxable, but a gift (jewellery, cash, real estate, etc.) given under your will is not. Any expenses the Personal Representative has while settling the estate are paid for out of the estate. Examples of such expenses are photocopying, postage, and long-distance phone calls.

What goes in a will?

Common questions about what information to include in a will

What should I think about before I make a will?

- Make a list of all of the property you have. This includes: land, possessions, insurance policies, bank accounts, pension plans, investments, etc.
- 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).
- Make a list of the debts you have, as debts must be paid from your estate.
- If you have children under 18, decide who you would suggest as a guardian.
- If you have special needs children, think about what arrangements you want to make for them.
- Be aware of your potential legal obligations to any spouse or ex-spouse, adult interdependent partner or ex-adult interdependent partner, children, grandchildren, and great-grandchildren.
- Consider any special bequests you would like to make (and think about doing so while you are still alive if you anticipate any problems with such bequests).
- Choose someone to act as personal representative and talk to this person about it.
- Assess family dynamics and make your decisions accordingly.

Remember that you will not be around to help your loved ones interpret your will. Be sure that you are as clear as possible in your description of your wishes. Although a court can take into account additional evidence of intent, this is not a simple matter, and legal proceedings can get costly. For example, be clear about exactly who your beneficiaries are. You can't say, for example, that you want to leave everything to "hungry children in Alberta."

Similarly, you need to be clear about the special items that you leave. For example, you may have more than one ring, and more than one nephew, so be sure to mention that is it your “great-great-grandfather Bob’s gold wedding ring” that you want to leave to your nephew, “Joe Mitchell.”

What kind of instructions does a will contain?

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. Typically, a will has several sections.

- It often begins by cancelling any previous will(s).
- It appoints the personal representative. This is the person who is responsible for carrying out the instructions in your will. You should appoint someone whom you think will outlive you and who is capable of the task (see the previous section for more information).



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.

- It says who gets your property. Remember that your will only comes into force after your death. It can only dispose of property you owned at the time of death. If you are leaving property to someone in particular, you may want to provide for the possibility that he or she might die before you. For example, if you leave your property to your niece, what happens if she dies before you do? Do you want her children to inherit it, or do you want the property to go to someone else?
- It says who gets any property that remains (known as the “residue”) after all the beneficiaries have been given their specific gifts. If a will does not contain such a clause, the residue will be treated as if the testator had died without a will (“intestate”).
- It can include other details as you wish. For example, you can name a guardian and/or create trusts for your minor children.

Note: The naming of a guardian in a will is not binding. Someone else can still apply to be the guardian of your children, and only the court has the final say. Naming a guardian in a will, however, does ensure that a court will hear your opinion.

Should I put my burial wishes in my will?

You can if you want to, but it may not be a good idea, as often the will won't be found or read until after the funeral. The person named in your will as your personal representative has first priority to make funeral arrangements, followed by your spouse or adult interdependent partner living with you at the time of your death.

You should tell the person who is most likely to arrange your funeral what your wishes are or leave separate written instructions.

Can I deal with all of my property in my will, or is there some property that I cannot deal with in my will?

In theory, in your will, you can deal with all types of property: land, possessions, money, investments, personal belongings, insurance policies, business assets, etc. However, how you hold a particular piece of property (for example, joint tenancy), might mean that property does not flow through your estate and therefore is not dealt with under your will.

Similarly, documents you otherwise sign in relation to a piece of property, like a designation of beneficiary form, might mean that property does not flow through your estate and therefore is not dealt with under your will.

What happens to property held in joint tenancy?

In general, if you own assets in **joint tenancy**, they do not form part of the estate. Let's say you and your spouse own your home as joint tenants, or have a bank account as joint tenants. When you die, the home and the money in the account automatically belongs to your spouse and does not pass through the will.



If you own assets in joint tenancy, they do not form part of the estate.

As a result, such property cannot be used to pay your debts. An exception to this rule, however, is a situation in which joint tenants die at almost the same time and it is impossible to tell who died first. In such a case, the joint tenancy will be treated as a tenancy in common, meaning the property will flow through the estate.

Note: Property for which the registered owners are described as tenants in common does flow through your estate.

What happens to my RRSPs, RRIFs, TFSAs, and pension plans?

Usually RRSPs and RRIFs do not form part of the estate, because in the RRSP or RRIF you name a beneficiary. If you do so, when you die, the bank or trust company transfers it or pays it out to the beneficiary you named.

You can also name your estate as the beneficiary, at which point the monies will flow through your will.



It is important to keep in mind who you have named as beneficiaries and ensure that you keep your wishes up-to-date.

Similarly, if at the time of your death your named beneficiaries have died before you, the monies will flow through your estate. This is why it is important to keep in mind who you have named as beneficiaries and ensure that you keep your wishes up-to-date.

With RRSPs and RRIFs, it is also important to think about the potential tax consequences. There are tax advantages to leaving RRSPs and RRIFs to a spouse. These tax advantages do not exist with other beneficiaries.

A pension plan death benefit can say that it is to be paid to a certain beneficiary or to your estate. If the money is to be paid to your estate, the money will form part of your estate and will be distributed according to the terms of your will. If the money is to be paid to a certain beneficiary, the money goes directly to that beneficiary. It does not become part of your estate. For example, if you name a pension plan beneficiary in your will, and then later sign a separate designation form for the pension plan benefit, the earlier provision made in the will is revoked.

What happens to insurance policies?

An insurance policy can say that it is to be paid to a certain person or to your estate. If the insurance money is to be paid to your estate, the money from your policy will form part of your estate, may be used to pay debts, and will be distributed according to the terms of your will. If the insurance money is to be paid to a certain person, the money goes directly to that person. It does not become part of your estate.

Again, if at the time of your death your named beneficiaries have died before you, the monies will flow through your will, an important reason to keep in mind who you have named as beneficiaries and ensure that you keep your wishes up-to-date.

I own my own business and have a special needs child – how do I deal with such things in my will?

Dealing with business assets can often be complicated and there are many legal technicalities that you may need to consider (such as corporate law and tax law). You should consult a wills and estates lawyer.

There are various means of ensuring financial security for your special needs child (such as the creation of a trust). This, however, can get quite complicated. It is again recommended you consult a lawyer.

Do I have to leave my estate to my family?

In most cases, you are free to deal with your property as you wish. However, the *Wills and Succession Act* does place some limits on that freedom.

The Act tries to make sure that your family members are left with money and support whenever possible, particularly if they need it. Children, including adopted children, and a widow or widower are all considered “family members” under this Act, and they can make a claim if they feel that they have not been adequately provided for under your will.

In such a case, a judge considers all the circumstances of a case in deciding whether to give support to the family member. Some of the circumstances are:

- the nature and duration 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 his or her own support;
- the financial circumstances of the family member; and,
- 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.

Similarly, minor and disabled adult children, and adult children under 22 who are going to school can apply for support from a parent's estate, if the deceased was supporting the child at the time of the death.

The same is true of a minor grandchild or great grandchild, if the deceased grandparent/great grandparent was standing in the place of the parent of the grandchild/great-grandchild when the grandparent/great-grandparent died.

The Act also recognizes the contribution of both spouses to a marriage. The Act says that when one spouse dies, the surviving spouse is entitled to an equal division of matrimonial property.

My spouse and I separated quite some time ago, but we never did get a divorce. I have now been living with someone else and we are adult interdependent partners. Does this affect whether I should write a will and, if I do, what I should put in it?

Yes. In such a situation (i.e. where there is both a spouse and an adult interdependent partner), if you die without a will, either all or some of your estate may be divided between the two individuals (depending on whether there are also children and/or grandchildren involved).

However, if you die without a will (intestate) your surviving spouse is deemed to have died before you if you have lived separate and apart for two years, or have signed an agreement finalizing your affairs.

The separation of married spouses for any length of time does not affect a will; no change occurs until a divorce is final. This may not be as you wish.

For this reason you should consider writing a will that sets out your wishes (bearing in mind any legal obligations you may have to either or both your spouse and your adult interdependent partner). Also, given the general complexities of the situation, you may wish to consult a lawyer.

I am currently paying both spousal support and child support to my ex-spouse. Is this something that I need to address when writing my will, or would this obligation die with me?

No, the obligation does not die with you. Upon your death, a court can look at whether, in keeping with your obligation, you have made “adequate provision for the maintenance and support” of the dependents in question, and, if you have not, monies to fulfill the obligation can be taken from your estate.

When should a will be updated?

Common questions about reviewing and updating a will

How often should I review and update my will?

Ideally, you should review your will every few years, although this does not necessarily mean meeting with your lawyer.

You should at least remind yourself of your will's contents and decide whether anything has happened which requires a change in your will.

Examples of such events include: changes in your marital status, the purchase of property or investments, and the birth or adoption of children or grandchildren.

How can I change my will?

There are two usual ways to change your will.

1. You can write a separate document that only changes 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 amending. It will say that certain clauses of the will are revoked or amended 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 completely 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 clause 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, as handwritten changes are unlikely to be effective. Instead, make a codicil or a new will.

You should not change your will by marking or crossing out words, as such handwritten changes will not be considered. Instead, make a codicil or a new will.

You must have testamentary capacity at the time you make the changes or the new will or codicil may be challenged in court and may be found to be invalid.

I just got married/separated/divorced – does that void my will?

Entering into marriage or an adult interdependent partnership does not invalidate a will unless the will specifically says so.

However, if you divorce, then your ex-spouse is deemed to have died before you so that any gift under the will is revoked, unless the will states otherwise.

In addition, if your ex-spouse was named as your personal representative, then that appointment is also revoked.

If one of these major life changes occurs, review your will to see if it still meets your needs. If not, consider writing a new will as soon as possible.

My divorce was finalized last week. I have not yet had time to make a new will. Does that mean that, if I die tomorrow, my former partner will still get what I left him or her in my will?

Under the *Wills and Succession Act*, a divorce that occurred after the Act came into force (February 2012) will revoke a gift to the ex-spouse, unless the court can find an intention that the gift was not meant to be revoked. Generally, it is always a good idea to make a new will after a divorce.

If your divorce was after February 2012 then any gift to your ex-wife is revoked. However, if your divorce occurred before that date, revocation is not guaranteed.

Last week, I left my adult interdependent partner. I have not yet had time to make a new will. Does that mean that, if I die tomorrow, my ex will still get what I left him or her in my will?

Under the *Wills and Succession Act*, the end of an adult interdependent relationship that occurred after the Act came into force (February 2012) revokes a gift to the ex-adult interdependent partner, unless the will specifically states otherwise.

Generally, a one-year separation after an Adult Interdependent Partnership ends is required.

Therefore, if the end of the relationship has resulted in a change in your wishes, consider writing a new will as soon as possible.

If I make a new will, does it automatically cancel the old one?

Basically, yes, if you make a completely new will that revokes your previous will. That means the previous will is cancelled.

However, it is possible to simply make a new document that only changes parts of your will. This is known as a codicil.

Making a properly executed codicil does not automatically void all of your previous will, but rather, only certain clauses of that will.



To be certain that you have only one complete will in effect, ensure that each new will includes a phrase that revokes all wills previously made.

To be certain that you have only one complete will in effect, ensure that each new will includes a phrase that revokes all wills previously made.

Note: If your will is accidentally destroyed, for example, by a fire in which you die, a copy of the will can be used because you did not intend to revoke it.

What happens when I pass away?

Common questions about the administration of wills

What are my personal representative's duties and is there anything she or he cannot do?

Your personal representative is responsible for settling your affairs after your death.

The *Estate Administration Act* sets out the personal representative's duties as falling under four main categories:

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

The Act further sets out the core tasks of the personal representative.

In your will, you can identify what you want your personal representative to do. You can also list anything that you do not wish him or her to do.

However, you cannot prevent your personal representative from doing something that is required by law. For example, you cannot state that your personal representative should not pay your outstanding debts.

In addition, your personal representative is governed by the provisions of the *Alberta Trustee Act*, which places certain restrictions on his or her actions. For example, if your personal representative needs to invest your assets for a while, he or she can only invest in a specific list of allowable investments.

Your personal representative must give notice to beneficiaries and family members as set out in the Act. In addition, if probate is obtained, your personal representative may have to report to the court.

What is probate and what is involved in that?

Probate is a legal procedure where the court determines the will's validity and confirms the personal representative's appointment.



Probate is a legal procedure where the court determines the will's validity and confirms the personal representative's appointment.

In Alberta, this is the Court of Queen's Bench, Surrogate Matters. A personal representative must apply to the Court to probate a will. There is a range of court fees charged for probate – the larger the estate, the higher the fee.

For example, as of the June of 2015, the fees were:

ESTATE VALUE	COURT FEES
Up to \$10,000	\$35
Over \$10,000 but not more than \$25,000	\$135
Over \$25,000 but not more than \$125,000	\$275
Over \$125,000 but not more than \$250,000	\$400
Over \$250,000	\$525

What happens to property located outside of Alberta?

If property, such as a vacation house in British Columbia, is located outside of Alberta your personal representative may have to file for probate in that jurisdiction. This is especially true for real property (land). It is best to check the laws of that other jurisdiction.

What happens if the person I appoint as my personal representative cannot act for me for some reason, or wants to quit?

You can avoid this problem by naming one or more people as your substitute personal representative(s). The substitute can act if your personal representative dies, or is unable or unwilling to assume the role.

If, after you have died, your personal representative who had previously accepted the appointment is unable or unwilling to continue the role, she or he must apply to the court for a discharge.

That said, if all of the possible personal representatives named in your will are unable or unwilling to act, a court will appoint someone.

Can a will be challenged?

Yes. Common causes of a challenge include claims that that testator was unduly influenced, and the claims of dependents under the *Wills and Succession Act*. Only a court has the final say about whether a will is valid.



In order to minimize the chances of your will being challenged, talk to your family members, your beneficiaries, and anyone who may be entitled to a share of the estate and explain your plans.

In order to minimize the chances of your will being challenged, talk to your family members, your beneficiaries, and anyone who may be entitled to a share of the estate and explain your plans. This may prevent problems later.

Is a photocopy of the will valid?

A photocopy of a will is rarely acceptable to parties such as banks, investment companies and the court. Most parties require at least a notarized copy of the will. An application for a grant of probate will require your original will. If you write a new will, copies of previous wills should be destroyed and replaced, so as to avoid confusion.

Glossary

administration (or grant of administration)

A legal procedure wherein the Alberta Court of Queen's Bench (Surrogate Matters) appoints someone (an administrator) to administer the estate of a deceased person who died without a will. The Court's authority for that administrator to act is given in a grant of letters of administration.

administrator

Someone who is given authority by the Alberta Court of Queen's Bench (Surrogate Matters) to manage and administer the estate of a deceased person who dies without a will. When an administrator is appointed, the Court issues a grant of letters of administration. (A female administrator is sometimes called an administratrix.)

adult interdependent relationship

A term unique to Alberta and governed by the *Alberta Adult Interdependent Relationships Act*. It is a "relationship of interdependence" outside of marriage where two people: share one another's lives; are emotionally committed to one another; and function as an economic and domestic unit. To meet these criteria, the relationship need not necessarily be conjugal (sexual). It can be platonic.

There are two possible ways for such a relationship to exist.

- If you have made a formal and valid adult interdependent partner agreement with the other person (two people that are related by either blood or adoption must enter into such as agreement in order to be considered adult interdependent partners); or
- If you are not related by either blood or adoption and if you have
 - lived with the other person in a relationship of interdependence for at least 3 continuous years; or
 - lived with the other person in a relationship of interdependence of some permanence where there is a child of the relationship (either by birth or adoption).

assets

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

beneficiary

A person or organization that you leave something to in your will.

bequest

Personal property left to someone in a will.

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.

executor / executrix

These terms are still in use but will gradually be replaced by the term personal representative.

estate

All of the property you own at your death. The estate does not include property you own with someone else in joint tenancy, or joint bank accounts. The estate does not include insurance policies, RRSPs or RRIFs, or other things you own which specifically name someone as your beneficiary.

holograph will

A will that is completely in a person's own handwriting.

intestate

A person has died without leaving a will.

joint tenancy

A type of ownership where any two or more persons (related or not) may equally own property and the property passes to the survivor or survivors on the death of one (without flowing through the estate of the deceased).

personal representative (previously known as executor / executrix)

The person you name in your will who is responsible for managing your estate and for carrying out the instructions in your will.

probate (or grant of probate)

A legal procedure that confirms the will can be acted on and authorizes the personal representative to act. The procedure includes submitting special forms and the original will to the Alberta Court of Queen's Bench (Surrogate Matters).

spouse

A person to whom one is legally married.

tenancy in common

A type of ownership where any two or more persons (related or not) own property, but, unlike joint tenancy, the shares need not be equal, and there is no right of survivorship (on the death of an owner, the share does not flow to the other tenant in common, but rather, flows through the estate of the deceased tenant in common).

testator / testatrix

A person who has made a will.

trust

A part of an estate that is set up to ensure ongoing income for a beneficiary, usually a dependent child.

trustee

The person or company named to manage a trust.

will

The legal statement of a person's last wishes as to the disposition of his or her property after death.

Where can I get more help?

Legislation

For print copies of Acts or Regulations, contact the Queen's Printer Bookstore:

Edmonton: 780.427.4952

Toll-free in Alberta: dial 310-0000 followed by 780.427.4952

Website: www.qp.alberta.ca

Free electronic copies of Acts and Regulations can be found by searching the alphabetical list at: http://www.qp.alberta.ca/Laws_Online.cfm

- *Wills and Succession Act*
- *Estate Administration Act*
- *Adult Guardianship and Trustee Act (AGTA)*
- *Trustee Act*
- *Unclaimed Personal Property and Vested Property Act*
- *Adult Guardianship and Trusteeship Regulation*
- *Surrogate Rules*

Government & Court Resources

Alberta Courts

Frequently Asked Questions about wills: www.albertacourts.ca/court-of-queens-bench/frequently-asked-questions

Alberta Justice

Wills: www.justice.alberta.ca/programs_services/wills/Pages/default.aspx

Saying Farewell: A Guide to Assist you with the Death and Dying Process

Available online: www.seniors.alberta.ca/documents/Saying-Farewell-Dying-Process-Guide.pdf

Alberta Supports Contact Centre

Phone: 1.877.644.9992

Office of the Public Guardian & Trustee

Phone: 1.877.427.4525

Website: www.humanservices.alberta.ca/guardianship-trusteeship.html

Legal Services

Law Society of Alberta Lawyer Referral Service

The Lawyer Referral Service will provide you with the names of three lawyers in your area that you can consult. Each lawyer should provide a free half-hour consultation.

Toll free in Alberta: 1.800.661.1095

Calgary: 403.228.1722

Website: http://www.lawsociety.ab.ca/public/lawyer_referral.aspx

Legal Aid Alberta

Legal Aid Alberta can help with select adult guardianship and trusteeship matters, as well as certain income support and government benefit cases. Call to determine eligibility.

Toll-free in Alberta: 1.866.845.3425

Law Information Centres (LInC)

Located in Calgary, Edmonton, Red Deer, and Grande Prairie courthouses. LInC can provide information about court processes, court forms, and explain the steps to take in making a legal application. LInC cannot provide legal advice.

Website: <http://albertacourts.ca/resolution-and-court-administration-serv/law-information-centres-linc>

Family Law Information Centres

Located throughout Alberta, these Centres can provide general information about family law, court procedures, and court forms.

To find a location:

<http://albertacourts.ca/resolution-and-court-administration-serv/family-law-information-centre-flic>

Calgary Legal Guidance

Elder Law Program helps older adults who have questions about wills, estates, adult guardianship and trusteeship, powers of attorney, and elder abuse. Call to determine eligibility.

Phone: 403.234.9266

Website: <http://clg.ab.ca>

Central Alberta Community Legal Clinic (Red Deer)

Offers legal advice on wills to low income individuals. Strict financial guides apply; call to determine eligibility.

Phone: 403.314.9129

Toll-free: 1.877.314.9129

Website: www.communitylegalclinic.net

Edmonton Community Legal Centre

Can provide referrals to lawyers or firms who can assist in drafting wills for a reduced cost based on income. Call to determine eligibility.

Phone: 780.702.1725

Website: www.eclc.ca

Grande Prairie Legal Guidance

Offers legal advice on wills to low income individuals. Call to determine eligibility.

Phone: 780.882.0036

Website: www.gplg.ca

Dial-A-Law

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

Calgary: 403.234.9022

Toll-free: 1.800.332.1091

Website: <http://clg.ab.ca/programs-services/dial-a-law>

Resources for Seniors

Older Adult Knowledge Network

A website of the Centre for Public Legal Education Alberta

Website: www.oaknet.ca

Kerby Centre

Phone: 403.265.0661

Website: <http://kerbycentre.com>

Golden Circle Senior Resource Centre

Phone: 403.343.6074

Website: www.goldencircle.ca

Seniors Association of Greater Edmonton (SAGE)

Phone: 780.423.5510

Website: www.MySage.ca

Ministry of Seniors – Government of Alberta

Programs and Services for Seniors

Website: <http://www.seniors.alberta.ca>

Making A Will

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.

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

- Making a Power of Attorney
- Making a Personal Directive
- Being a Personal Representative
- Being an Agent
- Planning Your Own Funeral
- *Adult Guardianship and Trustee Act*

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You should **NOT** rely on this booklet for legal advice. It provides general information on **Alberta law only**. October 2015.