



Community Legal Information Association of PEI

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# Wills



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**This booklet is part of a series called “Putting Your Affairs in Order At Any Age”. Publications in this series include:**

- **Putting Your Affairs in Order At Any Age**
- **Wills**
- **Powers of Attorney**
- **Consent to Treatment**
- **Health Care Directives**
- **Moving to a Community Care Facility or Nursing Home**
- **New Relationships: Legal and Safety Concerns**
- **Preventing Abuse and Neglect of Older Adults**
- **You and Your Grandchildren**

**All of these publications can be found at [www.clapei.ca](http://www.clapei.ca) or can be ordered by calling Community Legal Information Association (CLIA) at 892-0853 or 1-800-240-9798. To view the acts mentioned in these booklets, go to [www.gov.pe.ca](http://www.gov.pe.ca), click on “Government”, “Supreme Court” and then click on “Statutes”. A list of the acts will come up in alphabetical order. You can also order paper copies from Island Information Service at 368-4000 or 1-800-236-5196. There is a small fee for paper copies.**



## Wills & Estates

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The following stories are examples of situations people may experience in PEI. How the information helped them is explained at the end of the booklet.

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*George keeps putting off making a will because he doesn't think he has the extra money to hire a lawyer. Besides, he has already told his large family that he wants them to share equally whatever he has left, which won't be much anyway.*

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*Bill and June have been married for 10 years. They each have an adult daughter from their previous marriages. Bill and June now live in Bill's house. They have joint savings and chequing accounts. Bill knows he wants his money and his house to go to his daughter. He believes June's family is well looked after by the trusts June has set up. Bill is worried that his half of the house and that half of the money in their accounts will pass on to June instead of his daughter, whom he believes needs it more.*

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This booklet is designed to give people like George, Bill and June general information about the law concerning wills. We will meet them again at the end of the booklet.

The law about wills is contained in PEI legislation called the **Probate Act**. The words in **bold** are defined in the glossary at the end of this booklet.

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## What is a will?

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A will is a legal document that leaves instructions about what you want done with everything you own at your death. When you make a will, you are called the **testator**.



## Why do I need to make a will?

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Making a will is the only way to make sure the courts know how you want your property and possessions passed on. It allows you to choose an **executor**. It allows your loved ones to know how you want your possessions distributed. You can also spare your loved ones extra difficulties as they deal with your death.

A will usually ensures that your estate is settled much more quickly and inexpensively than if you die without a will, or **intestate**. If you have a will, you can set up **trusts** for dependents. This can reduce the size of your estate and you may owe less **capital gains tax**. You can name guardians for dependants and leave gifts for charitable organizations or educational institutions.

A lawyer can explain your options and help you create a will that will meet your needs and ensure your estate is distributed as you wish.

## What are the rules for making a will?

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The rules and regulations are set out in Section III of the **Probate Act**. Some of the rules are:

- You must be 18 years of age or over and of sound mind to make a will
- You can make a will if you are under 18 and married or in the Armed Forces
- A will must be signed properly by you and by two witnesses, present at the signing
- Witnesses cannot be beneficiaries in your will or the spouse of a beneficiary. If they are, the gift to the beneficiary fails or the will may be declared void

See the **Probate Act** or ask a lawyer about other rules.

If the rules and regulations in the **Probate Act** are not all followed, a will may still be valid. If a will is contested because the rules were not followed, the court will try to understand the wishes of the deceased person and follow them.

The law in Prince Edward Island covers how you make your will and what happens to your property if you die while living here. If you make a will here and later move to another province, the laws of that province will govern what happens to your property.

If you move to another province or buy land there, see a local lawyer there about your will. If you have personal or **real property** (land and buildings) in another country, you may want to make an international will that must be certified by a lawyer to be valid.

## What Is The Process For Making A Will?

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When making your will, make sure you have the full names and addresses of your beneficiaries and your children.

You will need a list of all your assets and property. Include a list of debts you owe or money owed to you and the location of your bank accounts and other assets.

It is helpful to have a general outline of how you want your property to be distributed and a list of special bequests if you have them.



You will also need the names and addresses of those you want to appoint as your **executor**, trustee and guardian for your children. It's a good idea to name alternates in case the people you name are unable or unwilling to act at the time of your death. It is very important to speak to people to make sure that they will accept the responsibility.

If you are using a lawyer, make an appointment and bring the above information with you to the appointment. Your lawyer will go over your will with you to make sure that it reflects your wishes. If you are using a Canadian will kit or making a hand-written will, check it carefully to be sure it says what you want it to say. Make sure someone knows where your will is kept.

Sign your will with **witnesses** present. There are certain procedures that must be followed to sign a will properly. Two **witnesses** must watch you sign your will. A person who inherits

in your will or a person married to a **beneficiary** cannot act as your **witness**. The **witnesses** usually must sign a “Proof of Will declaration” at the same time the will is signed. Your **executor** needs this document when probating your will and must track down your witnesses if it has not been done.



## **Are handwritten and will kits legal?**

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In PEI, handwritten (**holograph wills**) and form wills are legal. However, it is important to write a will according to the regulations so it is less likely to be contested. If you use a will kit, make sure it is a Canadian kit. Be sure your will is properly witnessed. Only the original signed will is valid and it must be kept in a safe place. Tell someone where your will and copies are kept.

## **Who can be my executor and what does an executor do?**

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The **executor** of your estate is a very important person. Pick someone you trust and, if your estate is complicated, pick a person with some business knowledge. Many people choose a close family member as **executor**, but this can be a very difficult role for close family and friends to fill when grieving.

Ask people if they will act as **executors** before naming them in your will. They may withdraw at the time if they do not wish to act as **executor**.

It is important to name at least one **alternate executor** in case your **executor** dies before you or cannot act at the time of your death. Some people appoint more than one **executor**, allowing them to act together as **co-executors**. You need to state in your will whether they must agree or can act as alternates.



Your **executor** is responsible for the following duties:

- making funeral and burial arrangements. Do not leave these instructions in your will as your will is often not read until after the funeral. Make a separate document or do a pre-arranged funeral
- gathering together all your assets
- paying all funeral expenses, debts, and taxes owed by you
- distributing your estate according to your will
- reporting to Probate Court and to your beneficiaries
- distributing what is left over in your estate after the above have been done

Other duties may include notifying your insurance broker of your death, filing the Income Tax return required for that year, and applying for Survivor's Benefits through the Canada Pension Plan. A rebate on funeral expenses is available from the Canada

Pension Plan, but it must be applied for. Copies of the Death Certificate and a receipt for funeral expenses must be included with the application.

Your **executor** is usually paid for any out-of-pocket expenses and may ask to be paid a fee. This cannot be more than five per cent (5%) of the value of your estate.

## **Who can be my witnesses and what do witnesses do?**

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The law requires two **witnesses** for your will. They must be **competent** at the time of witnessing. Your **witnesses** cannot be anyone who receives something in your will or be married to anyone who receives something in your will.



You and your **witnesses** must all be present when you sign your will and when they sign your will. Otherwise, the will is not valid.

## **Where do I keep my will?**

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The original signed copy of your will is usually kept in your lawyer's safe and you may be given a copy to store in a safe place. Some people put it in a safety deposit box or a fireproof box in their home. It is very important that someone knows where your

will and copies are located. Usually the bank will allow a family member supervised access to a safety deposit box to see if the will is inside. Ask your bank about their policy on this.

If your lawyer dies before you or the law firm dissolves, the contents of that lawyer's safe are passed on to another lawyer named as Trustee by the Law Society. A will can always be tracked down if it is in a lawyer's safekeeping.



You may give copies of your will to your **executor** and/or family members, but only the original signed will is valid.

## **What happens if I die without a will?**

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This is called dying **intestate**. All RRSPs, life insurances, and other pension plans with named beneficiaries automatically go to the **beneficiary**. All jointly-owned property usually goes to the survivor, although this can be contested in some circumstances. These are not considered part of your estate and are easily dealt with.

Anything that is part of your estate involves a longer process – the surviving **spouse** or heir must get an **administrator** appointed by the court. This **administrator** then distributes your property according to the provisions of the **Probate Act**. It takes longer, is more expensive, and may not allow things to be passed on as you would have wished.

## What does it cost to make a will?

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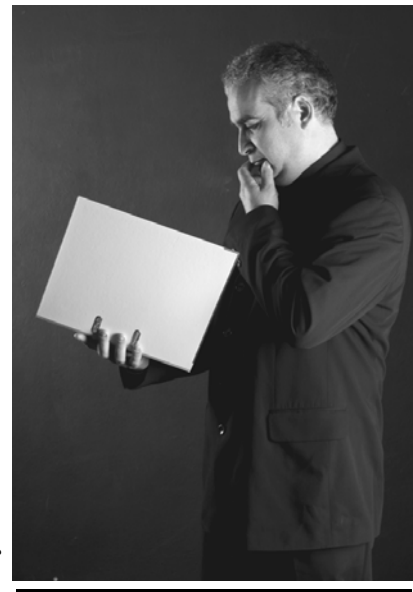
The cost of making a will depends on your situation and how complicated your will is - if there are a lot of **conditional bequests** or **trusts**, more writing and careful drafting is required, so the cost would be greater. Straightforward wills cost less. Often lawyers will offer a lower rate for couples who make wills at the same time and leave everything to each other.

Lawyer's fees for wills are usually not high, so it is a good idea to use a lawyer to be sure it is done properly. The cost of a will kit varies. It is important to be sure you have a Canadian will kit.

## How specific do I need to be in my will?

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You can make your will as specific or as general as you wish. It is good to keep in mind that the size and value of your estate may change over time. Most wills drawn up by a lawyer have an attached memorandum in which you list bequests of personal items to specific individuals. If your will states that things are to be divided equally, usually a cash value is assigned and that value is divided equally. Then beneficiaries claim items until their share is reached. You can also name a percentage of your estate or a specific property to go to each person, if you prefer.



If you think your estate may not be large enough to go around, making a will allows you to set an order of priority on your bequests, or to give everyone a percentage. If there is more money than you thought, you can make plans for this as well.

## **How often do I need to update my will?**

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Wills should be updated:

- if you marry or remarry (marriage voids a will)
- if you divorce (divorce does not void a will, but the will would be read as though your ex-spouse predeceased you)
- when your children reach the age of majority
- if you have a big change in your financial circumstances
- if a child or spouse is diagnosed with a medical condition that could require financial support or cause them to die before you
- if beneficiaries die before you
- if new children are born into your family
- if you move and your assets also move, you should have a will done up in the province where the majority of your assets are, according to the regulations of that province

## How do I make changes or add things to my will?

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Only your most recent will is valid. Usually changes are made by a lawyer, with either a new will being drawn up or through a legal addition called a **codicil**. If there are a lot of changes, the best way to change your will is to write a new one. Most wills include a clause of revocation that invalidates all previous wills. Destroy your old will when you make a new one. If you make a **codicil**, it should be kept with your will.

## What happens if I die before I complete my will?

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If the will is in writing and needs only to be witnessed and signed, a lawyer can go to court and swear that these are the instructions received from you.

## If a request in my will is impossible to carry out, how is this resolved?

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Most wills now contain a **residue** clause. This allows the **executor** to dispose of whatever remains in your estate after debts, funeral expenses, and bequests are paid. For example, if there is a bequest in your will for an item you no longer own, another item or cash may be substituted from this **residue**. However, not all estates will have **residue**, or there may not be enough to honour all bequests. These decisions are made by your **executor(s)**.

## What is probate?

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**Probate** is the process of declaring a will valid. When a person dies, someone (usually, but not necessarily, a lawyer) applies to the court for **Letters Probate**. These authorize the **executor** to act and limit future claims against your estate (for example, unpaid bills) to a six month period. The lawyer gets the legal documents together for **probate** and for passing on ownership. If everything a person owns is dealt with through joint ownership and beneficiaries have been named on all individual documents (RRSPs, Life Insurance policies), probating a will may not be necessary. If you and your spouse own all of your assets jointly, probate may not be required until the second spouse dies. **Probate** also may not be required for small estates with no **real property** involved.

If the majority of your **assets** are located in another province, a different and more expensive procedure must take place. Sometimes wills must be probated in different jurisdictions, depending on where your assets are located.

## Does it cost to have your will probated?

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The cost of **probate** depends upon the value of your estate. It is usually a percentage, between .4% and 1%, and it goes to the Provincial Treasury. The lawyer's fees are in addition to this and depend on the work and time involved.



## **What taxes must be paid?**

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There are presently no **succession duties** in Prince Edward Island. Your estate pays your income taxes for the year in which you die and any other taxes, including **capital gains tax**, that are due. Your **executor** will be responsible for completing your personal and estate tax returns and paying the necessary taxes from your estate. Your **executor** will also hold back a certain amount from your estate until he or she receives a Clearance Certificate from Revenue Canada to say that all taxes have been paid.

## **What other costs must be paid?**

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Your **executor** will also pay any other costs associated with probating your will. These may include probate fees, **executor's** fees, and advertising costs.

## What are the grounds for contesting a will?

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The usual grounds for contesting a will are:

- undue influence, coercion, or trickery by another is suspected
- the individual was incompetent when making the will
- proper procedures were not followed
- the surviving dependent spouse or children are not adequately provided for by the will

## Can I leave my estate to someone other than my spouse and children?

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You can leave your estate to whomever you wish. However, if your **spouse** or children are dependent upon you and you do not provide for them in your will, they can apply to the court for financial support from your estate.



If you own real estate jointly with another person in “joint tenancy”, the property will automatically pass on to that person when you die. If the property is owned jointly by “tenancy in common”, your share of the property does not pass to the joint owner when you die, but to your heirs. Make sure your documentation concerning the property states “tenancy in common” if that is what you want.

## What benefits are there to reducing the size of my estate and how do I do this?

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This is an important issue to consider as the benefits can be significant.

Everything that is part of your estate is considered as being disposed of, or turned into cash, at the time of your death.

**Capital gains tax** may be owed on it. This may be reduced by careful use of joint ownership and naming of beneficiaries on RRSPs and other investments. Get advice from an accountant or an estate planning specialist to arrange your affairs in a way that will benefit you and your heirs.

## What if my beneficiary differs from my joint owner and joint account signer?

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This situation can arise in blended families. In the case of joint ownership of property, the surviving joint owner usually receives the property and the **beneficiary** does not. However, there are situations where the joint owner would be required by law to hold the joint funds in trust for the **beneficiary**. A lawyer can explain some options that may change the situation.

## What Else Do I Need To Think About?

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- Creating a **power of attorney** and **proxy**. It is a very good idea to have a **power of attorney** for financial decisions when you cannot make them yourself and a **proxy** for medical decisions when you cannot make or communicate them yourself.
- Donating your body or vital organs. Arrangements for donations of your body or vital organs should be made with the recipient hospital or medical school, your doctor and your family, long before your death.
- Funeral and burial instructions. Leave instructions for your funeral in a letter separate from your will and tell your family what your wishes are. Your **executor** may not read your will until after your funeral has taken place.
- Setting up a **trust**. A **trust** can serve many purposes. You may wish to create a **trust** to support a cause you are interested in or to look after dependent family members. A **trust** can:
  - provide income for your children until they are adults;
  - pay for your children's education;
  - provide for any special needs;
  - provide substantial tax benefits; or
  - pay for special care for a disabled child or other relative.

Your lawyer or your accountant can show you how a **trust** may help.

## **Now let's look at George, Bill and June...**

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*George decides to look into making a will and goes to his local seniors' group to find out what he should do about it. They give him the phone number for the Lawyer Referral Service (1-800-240-9798 or 892-0853), which he calls. He makes an appointment to see a lawyer. The lawyer listens to George's concerns, explains his options and tells him that, because his will is quite simple, it will only cost him \$200.00. George makes his will. Now he knows that his wishes will be carried out and his children will be treated equally.*

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*Bill called Community Legal Information Association who recommended that he see a lawyer. The lawyer advised:*

- that Bill and June discuss this and, hopefully, agree that June will sign a consent to pass the house and money on to Bill's daughter*
  - that Bill immediately write a will naming his beneficiaries. If June does not agree to this, and if the deed is in joint names, the property will pass to June and any attempt by Bill to pass his share to his daughter will fail. However, there are several possibilities that Bill could pursue to help with his situation*
  - that Bill obtains legal advice and help in getting the best solution for himself, his daughter, and June*
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## Glossary of Terms

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**administrator** - the person appointed to administer the estate of a person who has died without a will or without an executor

**alternate executor** - a person appointed to act as executor if the regular executor cannot or chooses not to act

**assets** - real or personal property

**beneficiary** - a person entitled to benefit from a trust, a will, an insurance, an education savings, or other savings plan

**capital gains tax** - a tax on the profit earned when property is sold or turned into cash

**codicil** - an addition or a change made to a will by a testator

**coercion** - compelling by force or threats

**co-executors** - persons appointed to act together as executors

**competent** - refers to mentally competent; in this booklet it means that a person is able to understand financial and legal matters and has the ability to make decisions

**conditional bequest** - personal property given by a will that is subject to specific conditions named in the will

**executor** - a person appointed in a will to carry out the instructions of the will

**holograph will** - a will written entirely in the testator's own handwriting

**intestate** - dying without having made a will

**Letters Probate** - a document, granted by Probate Court, giving authority to an executor to carry out the provisions of a person's will

**power of attorney**— a legal document that gives another person the power to look after your financial and legal affairs if you cannot do this yourself or if you wish that person to do it for you

**probate** - a process to prove the originality and validity of a will

**Probate Act** - a provincial act that sets out the terms of wills and estate law

**proxy** – a person named in a Health Care Directive to make decisions when the person who made the directive cannot make or communicate decisions

**real property:** property that can't be moved, including land and buildings

**residue** - what remains in an estate after every debt, trust, and bequest is paid out

**spouses** - two people who are legally married or two people who have lived together in a conjugal (sexual) relationship for at least 3 years or two people who are living together in a conjugal (sexual) relationship and are the natural or adoptive parents of a child or children

**succession duty:** a tax placed on the property that is passed on to the beneficiaries of a will. PEI does not have succession duties at present

**testator** - a person making a will or who has died leaving a will

**trusts** - a relation between two people by which someone (the trustee) holds property for someone else (the beneficiary)

**witness** - a person asked to be present at the signing of the will, who can swear it took place

**void** - having no legal effect

# Notes

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**Caution:**

**The contents of these booklets are general information only and should not form the basis of legal advice. The contents are not a complete statement of the law or policy in these areas. Changes in law and policy occur frequently, so readers should check with CLIA or a lawyer for up-to-date information. For legal advice, contact a lawyer or call the Lawyer Referral Service at 892-0853 or 1-800-240-9798.**

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