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## Community Legal Information Association of Prince Edward Island, Inc.

# What Seniors Need to Know Wills and Estates

*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, 77, and Elaine, 74, have been married for 10 years. It is a second marriage for both of them and they each have a grown daughter from their previous marriages. After her first husband died, Elaine sold her home, invested the money, and set up trusts for her daughter and 2 grandchildren. Bill and Elaine now live in Bill's house.*

*They have joint savings and chequing accounts.*

*Bill does not yet have a will, but knows he wants his money and his house to go to his daughter. He believes Elaine's family is well looked after by the trusts Elaine has set up, and that Elaine has all that she needs with her pensions, her investments, and her 50% of their savings.*

*Bill is worried that 50% of the value of his house will automatically go to Elaine and her heirs, and that his 50% of the money in their joint accounts will pass on to Elaine instead of his daughter, whom he believes needs it more.*

This pamphlet explains what you need to know about making a will. It is part of the series Planning Ahead – What Seniors Need to Know. Words in bold are defined in the glossary at the end of this pamphlet.

## **What is a will?**

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

## **Why do I need to make a will?**

Making a will is the only way to make sure your property and possessions are passed on as you wish. It allows you to choose an **executor**. It allows your loved ones to know they are carrying out your final wishes, and also shows them that you cared enough for them to spare extra difficulties arising from 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 are able to set up **trusts** for dependents, which can reduce the size of your estate so you owe less **capital gains tax**. You can also name guardians for dependants, and leave gifts for charitable organizations or educational institutions.

All of these can be set up through a lawyer, who can explain the options to you and help you choose the right one for your needs.

## **What are the rules for making a will?**

The specific rules and regulations are set out in Section III of the Probate Act. It includes such things as:

- 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 the maker of the will and by two **witnesses**, present at the signing.
- If a witness is a **beneficiary** in your will or the spouse of a beneficiary, either the gift to the beneficiary fails or the will may be declared **void**.

See the Probate Act or a lawyer for other rules, as there are too many to list here.

If these rules and regulations are not all followed, your will is not necessarily invalid. If the will is contested because the rules were not followed, the court tries to understand the wishes of the deceased person and follow them.

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

The **executor** of your estate is a very important person. You need to pick someone you trust and, if your estate is complicated, it should be a person with some business knowledge. Many people choose a close family member as executor, but this is a very difficult role for close family and friends to fill when they are dealing with the emotional effects of your death.

It is important to name at least one **alternate** 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**. It is essential to ask people if they will act as executors before naming them in your will. They may withdraw if, at the time of your death, they do not wish to act as executor.

Your executor is responsible for the following duties:

- making funeral and burial arrangements
- gathering together of 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 heirs
- distributing what is left over in your estate after the above has been done

Other duties may include notifying your insurance broker of your death, filing the Income Tax return required for that year, looking into and applying for Survivor's Benefits through the Canada Pension Plan. A rebate on funeral expenses is available from the Canada Pension Plan, but must be applied for to be received. 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 exceed five per cent (5%) of the value of your estate.

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

The law requires two **witnesses** for your will who are **competent** at the time of witnessing. Your witnesses cannot include anyone who receives something in your will or is 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?**

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. Most people put it in a safety deposit box. 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 also 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?**

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

Anything that is part of your estate involves a longer process - the surviving spouse or heir must hire a lawyer to get an **administrator** appointed by the court. This administrator then distributes your property according to the regulations of *The Probate Act*. It takes

longer, is more expensive, and may not allow things to be passed on as you would have wished.

### **Are handwritten and form wills legal?**

In P.E.I., handwritten (**holograph wills**) and **form wills** are legal. However, it is important to write a will according to the regulations so it is not likely to be contested. Be sure it 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.

### **What does it cost to make a will?**

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 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.

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

You can make your will as specific or as general as you wish, but 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, that value is divided equally, and 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.

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

Wills should be updated:

- if you marry or remarry (wills are voided by marriage)
- if you divorce (divorce voids a will)
- 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 debilitating condition that could require financial support or cause them to die before you
- if beneficiaries predecease 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?**

Usually changes are made by a lawyer, with either a new will being drawn up or through a legal addition called a **codicil**.

Wills usually state that they include a memo of your personal belongings with instructions as to who is to receive them. Some lawyers will allow this to be changed without their involvement, but others will not. Any changes are less likely to be contested if done by a lawyer, and if the document is stored with your will.

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

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?**

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?**

**Probate** is the process of declaring a will valid. When a person dies, someone (usually, but not necessarily, a lawyer) must apply 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 making conveyances or passing on ownership.

If everything a person owns is dealt with through joint ownership and beneficiaries

have been named on all individual documents (RRSP's, Life Insurances) probating a will may not be necessary.

It is important to know that a will must be probated in the province where you live. If the majority of your assets are located in another province, a different and more expensive procedure must take place.

### **Does it cost to have your will probated?**

The cost of probate depends upon the value of your estate. It is usually a percentage, between .5% 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. Fees usually range between \$800.00 and \$1500.00 (1997).

### **What are the grounds for contesting a will?**

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 spouse/children are not adequately provided for by the will

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

This is an important item to consider as the benefits may be substantial.

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 RRSP's, bonds, etc. Seek the advice of an

accountant or an estate planning specialist to arrange your affairs in the manner that most benefits you and your heirs.

**What if my beneficiary differs from my joint owner and joint account signer?** This situation can arise in blended families. In the case of joint ownership of property, the surviving joint owner receives the property and the beneficiary does not. A lawyer can explain some options that can change the situation somewhat, and help to put the best arrangement in place.

In the case of a joint account, the beneficiary will usually receive 50%, though there are risks to this because of the survivor's right of access to the account. This is also an area in which legal advice about your options can be helpful.

***Back to George.....***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 for 30 minutes for \$10.00 + tax. 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 \$75.00. George makes his will. Now he knows that his wishes will be carried out and his children will be taken care of equally.

***Back to Bill and Elaine....*** Bill called Community Legal

*Information Association who recommended that he see a lawyer. The lawyer advised:*  
- that Bill and Elaine discuss this and, hopefully, agree that Elaine 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 Elaine does not agree to this, and if the deed is in joint names, the property will pass to Elaine 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.

*The most important thing is that he needs legal advice and help in getting the best solution for*

*himself, his daughter, and Elaine.*

**Did you know that you should not put requests for funeral and burial arrangements in your will? Your will is usually read after your funeral. That information should be in a separate letter given to your executor at the time your will is made. Your family should also know your wishes in this area.**

## Glossary of Terms

**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 pamphlet 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 by the will

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

**form will** - a will made by filling out a form designed for that purpose

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

**incompetent** - refers to "mentally incompetent"; in this pamphlet it means a person who is unable to understand financial and legal matters and does not have the ability to make decisions

**intestate**- the condition of 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

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

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

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

**testator/testatrix**- 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

The following "Preparing to Make a Will Worksheet" can help you to think about what you want to include when you prepare your will. This worksheet is not to be signed or used as a will. It is only a guide to help you plan.

# Preparing to Make A Will Worksheet

(Not to be signed or used as a will)

This form is a guide only. Completing this form will help you think about what you want to include in your will.

Name in full \_\_\_\_\_

Address \_\_\_\_\_

Occupation \_\_\_\_\_

Age \_\_\_\_\_

Marital Status \_\_\_\_\_

Full Name of Spouse \_\_\_\_\_ Age \_\_\_\_\_

Full Names of Any Dependents \_\_\_\_\_ Age \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Full Name and Address of Executor(s)** – You can name more than one person, or you can name a law firm, trust company, or other business to act for you. If you name more than one, you can specify whether they are to act together as co-executors or can act as alternates.

\_\_\_\_\_

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\_\_\_\_\_

\_\_\_\_\_

**Assets:** To help you in writing your will, list your assets or the things you own. Include such things as real estate, bonds, bank accounts, insurance, vehicles, investments, household property.

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\_\_\_\_\_

\_\_\_\_\_

**Liabilities:** A list of liabilities, or things you owe, is also helpful when preparing your will. Write down to whom the liability is owed and if it is insured.

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\_\_\_\_\_

\_\_\_\_\_

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**Conditions:** Are there any specific conditions you would like in your will? For example, you might want an heirloom passed on to someone only after age 21. Discuss these with your lawyer when making your will.

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**Beneficiaries:** List the names of your beneficiaries and what you wish to leave to each one. This could be a specific bequest (land, house, personal item, cash) or a portion of your estate.

Full Name of Beneficiary

Relationship

Bequest

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**Guardianship:** If you have a son or daughter or other relative who needs a guardian, you can name a guardian in your will. Be sure to ask the person if they are willing to be guardian and get this in writing. Give the full name, address, and relationship to you.

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*Common Disaster/Limited Survival: In cases where husband and wife die at the same time from a common disaster, or one survives the other by only a short while, it is important to decide what should happen to your property. Write here what you would like to happen (for example, that trusts be set up for dependents).*

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**Credits**

*The information in this pamphlet was prepared by Community Legal Information Association of PEI, Inc. The material was extensively reviewed and edited for accuracy and readability.*

**Caution**

*The contents of these pamphlets are general information only and should not form the basis of legal advice. Changes in law and policy occur frequently, so readers should check with a lawyer or Community Legal Information Association (telephone 892-0853 locally or 1-800-240-9798 toll-free) for up-to-date information.*

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