

The Out/Law Series of Legal Guides

Making A Will

Everything you need to know

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The Basics

The law in B.C. has certain requirements for a **will** to be valid. They are:

1. Your **will** must be in writing.
2. The **will** must be dated.
3. You need to agree with the contents of the **will** at the time you make it. If someone misleads you or puts pressure on you, the **will** is not legal. (So at some point when you are writing the **will**, you should be alone with the lawyer or other person who is helping you. You need to be able to speak freely without being afraid of hurting anyone's feelings).
4. You must sign your **will** at the end of it.
5. When you sign your **will** you and your witnesses must initial every page and sign it in front of two witnesses at the same time.

Preparing A Will

To get ready to make your **will**, answer the following questions:

1. Who do you want to be your **Executor**?
(See the section on **Executors**, below).
2. If the person you choose as **Executor** dies before you do, who would you like to be the **Executor** instead?

3. Make a list of all of your assets, noting where they are and their approximate value. For example:
 - personal possessions (it is not necessary to list them separately)
 - savings
 - investments
 - RRSP's
 - life insurance
 - vehicle
 - condo or home
 - vacation property
 - art or jewelry
4. Make a list of all your debts, noting where they are and their approximate value. For example:
 - credit cards
 - mortgage (is it life insured?)
 - bank loans
 - personal debts
5. Make a list of who you would like to give things to, including their full names and addresses.
6. Decide what you would like to give each person. There are three main ways of giving things to people. You can give a **beneficiary** something specific. For example, you can say, "I give any home I am living in when I die to my partner Alex". Or you can give people things in percentages. For example, you can say "I give 50% of my property to my sister Nadine

Wong, 30% to my brother John Wong, 10% to my friend Sophie Beaumont, and 10% to the organization known as Pacific Foundation for Minority Equality. The third way to give away things is a combination of the first two: give some people specific things and divide the rest of your estate into percentages.

7. If you have children under 19, decide who you want to be guardian of your children if you die.
8. If any of your beneficiaries are under 19, decide who you want to look after the money for them till they are 19. The person who looks after the money is called a “Trustee”. Think about whether you would want the Trustee to keep the money untouched till the children turn 19, or whether the Trustee can spend it for the children’s benefit while they are minors.
9. Think about what you would like to have done with your body, and what kind of service or celebration you would like to have.

Does My Will Cover Everything I Own?

No. There are four main exceptions to the rule that your will governs what happens to your property after you die.

1. If you own real estate with someone else, and you own it with them in **joint tenancy**, the person you own the real estate with gets your share automatically if you die. It does not make any difference what your will says. The same is true in reverse. If your co-owner dies first, you get his or her share

automatically. On the other hand, if you own real estate with someone else, and you own it as **tenants in common**, you can give your share of the real estate to a **beneficiary** under your **will**, and then that person becomes the tenant in common with your co-owner when you die. Make sure the title to your property is the way you want it to be by checking your ownership documents.

2. If you have a joint bank account with someone, they get the money automatically if you die. The same is true in reverse.
3. Life insurance with a named **beneficiary** is not governed by the will. The insurance company will pay it directly to the person named on the policy when that person shows a death certificate.
4. RRSPs with a named beneficiary generally go directly to the person named on the RRSP, and does not form part of your estate when you die unless you have not named a beneficiary, or have named your estate as the beneficiary.

To be sure if an asset is or is not part of your estate, review your assets with a lawyer. Your **will** may not cover real estate located outside of B.C.

RRSPs: A special Note

Common law partners - heterosexual, same sex and married spouses can designate their partner or spouse as the **beneficiary** of their RRSPs, and take advantage of a “spousal rollover”. After you die, the funds are deposited to your partner’s RRSP and are taxed only

when the partner takes them out. That means the RRSP is taxed at a lower marginal rate than would be the case if they were taxed in the year of death.

Note: you and your partner are common law spouses for income tax purposes after you have been living together for **one** year.

Does The Law Say I Have To Leave My Property To My Family?

In general, you are free to leave your estate (your property) to whomever you want. Only your spouse (married or common law, straight or queer) or your children can automatically dispute the arrangements you make in your **will**. They have to apply to the Supreme Court within six month after the **will** has been **probated**. They have to prove in court that the **will** does not provide for them adequately. If they succeed the court will give them part of your estate. So if you want to leave a spouse or child out of your **will**, you should explain this in a separate document or letter, kept with your will. You need to show that you have considered them and your obligation to provide for them, and that you had a reason leaving them out of your **will**. This does not guarantee that they will not receive something if they dispute the **will** in court, but it will help a court understand your thinking.

If you want to provide in your **will** for someone who receives disability benefits, you need to talk to a lawyer.

A Word About Children

For the purposes of your **will** a child is only your child if you were a biological parent of that child, or if you have adopted the child. Other children you may have raised are not considered ‘your children’ in this context. So lesbian co-parents are not legally the parent of their partner’s child even if their name is on the child’s birth certificate. So they need to take extra care if to you want to make sure that their children will be raised by their partner rather than the child’s biological father.

How Detailed Do I Have To Get In My Will?

You need to be clear about exactly who the beneficiaries are. You can’t say, for example that you want to leave everything to “my friends” without saying which friends!

And you need to say what the **beneficiary** is getting: for example, “the home I am living in when I die”; or “25% of the value of my estate”; or “the gold watch engraved HBC that I inherited from my mother”.

What About My Mementoes?

If you have confidence in your **Executor**, it is not necessary to itemize every memento that you have and specify which friend you want it to go to in your **will**. Instead you can leave your personal effects to your **Executor** in your **will** and then say in your **will** that you may leave a list of things you want your friends to have.

The advantage is that you can change the list if you get a new friend, or if you break the vase you were planning to leave Aunt Hilda because the list is not part of the **will**. And **probate** (see below) is much simpler because the **Executor** does not have to account for each and every item to the court. Here's the hitch: because you have given your personal effects to your **Executor**, if he or she does not want to respect that list of wishes, they don't have to. So this is only a good alternative if you trust your **Executor** implicitly.

What If My Assets Change After I Have Made My Will?

A **will** is usually worded generally so that it applies to everything you own even if you own different things when you die than you did when you made the **will**.

But I'm Young – I Don't Need a Will!

In Western culture, no one likes to think about dying. But unless you make a **will**, if you are injured or killed in an accident, your loved ones may be left to struggle with what you would have wanted to happen without any direction from you.

Be kind to your loved ones - make it easy for them by making a **will**. Because mental capability can be affected by illness or drugs, it is a good idea to make a **will** while you are in good health. Making a **will** is the responsible thing to do.

I Want To Leave Everything To My Partner

Consider putting assets in **joint tenancy** so your partner will have quick access to them after your death. That means your partner would not have to **probate** your **will** to receive those assets. But you still need a **will** because your partner and you could die in the same car accident. If you and your partner were to die together a **will** is necessary to ensure that your assets are distributed fairly.

What Is An Executor?

Your **Executor** is the person you name to carry out the instructions in your **will**. If your estate is worth more than \$10,000 your **Executor** will need to get a document from the Supreme Court named “Grant of Letters **Probate**”. **Probate** means that the court confirms that all necessary information has been filed, and that financial institutions and the land title office can rely on the **will**.

An **Executor** is responsible for settling your affairs. This usually includes clearing out your home, or arranging for someone else to do so; selling some assets, preparing the final tax return, paying any outstanding debts, applying for the Canada Pension Plan death benefit, and distributing the estate. How much time this takes depends on how complicated your affairs are.

An **Executor** is entitled to charge a fee up to 5% of the value of the estate. The **Executor** must let the beneficiaries know what he or she plans to charge as executor’s fees, and get their approval before taking the fee. However, if your **Executor** is getting another

gift from you in the **will** you must make it clear whether he or she may claim **Executor's** fees in addition or whether the gift is instead of **Executor's** fees.

Who Should I Choose To Be My Executor?

An **Executor** needs to be a reliable adult. Most people ask a family member or close friend to be their **Executor**. You can also appoint a private trust company or a bank or a credit union or the Public trustee as **Executor**. If an **Executor** finds that the job of being an **Executor** is complicated, he or she is entitled to retain the services of professionals such as accountants and lawyers.

You need to ask the person if he or she is willing to take on the job. It may be a good idea to sit down with your **Executor** and show him or her the **will** and discuss it, and to go over your list of assets and where they are. However if your **Executor** is also a **beneficiary** you may prefer not to do that because you may change your **will** in the future.

It is possible to appoint more than one **Executor**. If you are going to appoint more than one **Executor**, you want them to be able to work together. For example, it might be difficult for two **Executors** to work together if one lives in B.C. and the other lives in Nova Scotia. If you have two **Executors**, both **Executors** will have to sign all documents. It is a good idea to make provision for what happens if two executors disagree with each other. It is a good idea to name a 'backup' **Executor** in case your first choice is unavailable.

I've Made All the Choices – Now What?

You have to write your **will** down, or have someone do it for you. Your instructions must be clear.

Then you must sign the **will** in the presence of two witnesses. The formalities (below) are **required**.

Who Can Be a Witness to My Will?

Watch out! If you are making a gift to someone in your **will**, do not ask them or their partner to be your witness. *If you do, any gift you make to that person in the **will** is invalid!!!*

The formalities of executing (signing) a **will** are mandatory:

- Make sure the **will** is dated. If you are inserting the date by hand, you and each of the witnesses must put your initials beside the date.
- Your two witnesses must be at least 19 years old and must be mentally capable.
- All three people (you and both witnesses) must be present at the same time.
- You must initial each page of the **will** and sign the **will** with your ordinary signature at the end of it.
- Each witness must then initial each page and sign at the end.
- DO NOT make any changes to the **will**. If changes are required, print a new **will**.

Can I Change My Will after I've Made It?

You can make a new **will** any time. A new **will** automatically revokes any earlier **wills**. A **will** is revoked automatically if you marry, unless you have named the person in your **will** as your intended spouse.

Do I Need a Lawyer to Make My Will?

No, but it is always wise to get some legal help to make sure that the **will** meets all legal requirements, and to make sure it is clear what you want to happen. If tax planning is important, it is also wise to talk to an accountant.

Where Should I Keep My Will?

You need to keep your will in a safe place that is fireproof, waterproof, and tamper-proof. Good choices include your safety deposit box, the freezer of your refrigerator in a Ziplock bag, or a fireproof safe. Your **executor** should know where the **will** is. If it is in a safety deposit box, your **executor** should also know where the key is!!

What is a Wills Notice?

The government of British Columbia maintains a Wills Registry. For a fee (currently \$17) the Vital Statistics Agency will keep a record of where your **will** is located. Your **executor** must search the Wills Registry after you die.

Glossary

Beneficiary	Someone who receives something under a Will
Codicil	A supplementary document to a will, also witnessed by two people in the same way that a will is witnessed, that adds to or changes the will.
Executor	The person named in a will to carry out the Testator's instructions.
Joint Tenancy	A way to own property with one or more other people which says that if one owner dies, the other owner(s) automatically get the share of the person who died. Property owned in joint tenancy cannot be given away in a will.
Probate	The formal process after the death of a testator of having the court certify that the will is valid and the Executor has the legal power to carry out the instructions in the will.
Tenancy in Common	A way to own property with one or more other people which says that if one of the co-owners dies, his or her share does not pass to the other owners, but instead passes to the beneficiary designated in the testator's will.
Testator	The person who writes a will.
Will	A formal document signed by a testator and witnessed by two people, which takes effect when the testator dies and directs what is to happen to the testator's property after he or she dies.

The information in this booklet is current to November 2009

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