Making a Will:
(Almost) everything you need to know

An Out/Law Legal Guide

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Note: *Words which are defined in the glossary at the end are* ***bolded*** *in the guide.*

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 **Executor**s, 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. A note about personal possessions you want particular people to have: If you want to give your aunt's blue bowl to your niece Les Finnigan, and your piano to your friend Joshua Sidhu, and so on…there are two ways to do that. You can list each gift in the will. The upside of that choice is you can be sure that the beneficiary will receive what you have designated. The downside is that your executor has to find each item, list it, and pay probate fees on it. The alternative

is to give your personal effects to your executor; and then include a clause saying you may leave a list of things that you would like your executor to give to friends and family, but that does not take away from the gift to your executor. The upside to this option is that it is much easier for your executor because it is not necessary to list the items separately for probate; but the downside is that if your executor does not distribute things according to the list you leave, the beneficiary has no remedy against the executor. So it is important to know whether you trust your executor.

8. If you have children under 19, decide who you want to be guardian of your children if you die.

9. 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.

10. 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. The only exception is if the account is not a "true joint tenancy" – which happens if you put someone else's name on your account for convenience, but you do not intend that they get the property when you die. In such a case, consult a lawyer.

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

People who are married or who have lived together for at least one year in a common law relationship (whether opposite- or same-sex) 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. This tax benefit applies only to spouses or common law partners.

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 months after the **will** has been **probate**d. 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 <u>not</u> legally the parent of their partner's child <u>even if</u> their name is on the child's birth certificate. So if you are the bio-mom you need to take extra care to name your partner as guardian of the children you have together to make sure that your children will be raised by your partner rather than the child's biological father. And if you are the child's non-bio-mom, you need to make sure to identify your child

or children by name and not leave property to “my children”, since that term may only include your children if you have adopted them.

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 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. (But consider whether it is a true joint tenancy: if you broke up, would you intend that your partner own 50% of the asset? If not, you need to talk to a lawyer). If the asset is in joint tenancy, 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**. This usually involves getting 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 the assets which are not identified in the **will** to go to someone specific, preparing the final tax returns, 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. If you don't make that clear, the **Executor** may not be allowed to claim executor's fees.

Who Should I Choose to Be My Executor?

An **Executor** needs to be a reliable adult. Most people ask their partner, a family member, or a 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 wise to appoint more than one **Executor**, so that if the person you chose is unable or unwilling to act, there is a backup.

We don't recommend appointing more than one executor to act jointly. If for any reason they disagree, it is very hard to resolve the disagreements and can create a big mess.

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**.

Does My Will Last Forever?

Almost. There is one important exception. If you give a gift to your spouse (common law or married spouse) in your **will**, and your marriage or relationship ends, the gift to that person is void.

Apart from that factor, you don't need to change your **will** unless there is a change in the circumstances of a beneficiary or you decide you want to make a different disposition. Specifically you do NOT need to change your **will** if anyone's address changes. If a beneficiary dies, check your **will** to make sure you have provided for what will happen if a beneficiary died before you.

If there are other major changes in your life, check your **will**. And in any case, review it every five years to make sure it still reflects what you want.

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, or a fireproof home 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.

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This Out/Law Legal Guide is for information only. The law may have changed since its publication date. It is not legal advice. For legal advice about your own situation you should consult a lawyer.

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