The Who, What, Where, When & Why of Wills

In Newfoundland and Labrador

Benson Buffett PLC Inc
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General Information

What is a Will?

A Will is a legal document that expresses how you want your affairs handled after you have died. You may use it to specify what you want to have done with your possessions and debts, and who should take care of any dependents you may have. Your Will may be typed or handwritten. If your will is typed there are certain formalities that must be followed and advice from a lawyer is strongly encouraged. Your lawyer will prepare your Will to ensure that it meets all criteria.

A handwritten will is known as a holographic will. A holographic Will must be written **entirely** by you in your own handwriting. Holographic Wills are valid in Newfoundland and Labrador. This does not guarantee that your Will adequately addresses your wishes.

The advice of a lawyer is beneficial whether you handwrite your Will or ask them to draw it up. Many lawyers have valuable experience in this area. For example, they can ensure that you use correct unambiguous wording. This will ensure that none of your gifts fail because they are unclear or illegal. Your lawyer can also inform you of common practices such as including a clause to cover distribution of anything not specifically mentioned (a residual clause) or what to do if you and your beneficiaries all die in a common accident. Finally, another valuable function a lawyer can provide is unemotional advice. Writing a Will is often an emotional experience and your lawyer will ask you questions that you may otherwise avoid asking yourself.

One issue with holographic Wills is that they are not recognized as valid in all jurisdictions. If you own property outside of Newfoundland and Labrador you should contact a lawyer to ensure you comply with all requirements for that jurisdiction.

Why Do I Need a Will?

Individuals who have a valid Will have comfort in knowing that their wishes will be respected with the most precision and the least possible cost to their estate. One way in which having a Will cuts down on costs is the appointment of a personal representative, called an executor, to carry out your wishes. This is a very important, highly structured and time consuming job that will be discussed in more detail later. By naming an executor you will simplify the administration of your estate. This may save your estate, and therefore beneficiaries, money. It will also make this process less difficult on the loved one who seeks to carry out your wishes. If you do not name a personal representative in your Will, someone will need to apply to court for permission to represent you and administer your estate. The person applying to be your administrator will likely need to provide a personal bond, which is a promise to the Court to reimburse the estate from their own pocket if they act improperly.

You may also appoint a guardian, or guardians, for any minor children or dependent adult(s). You should indicate who you would like to take care of your dependent and who you would like to take care of your dependent's finances. This may be the same person or two different people. While the court is not bound to follow your wishes (they must do what they

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believe is in the best interests of the dependent) they will take your wishes under advisement. If you believe there may be some question as to whether this person is the clear choice, it is advisable to include your reasons for your choice.

Your Will performs many other useful functions, such as allowing you to make gifts of specific items to individuals or groups, or make a gift to an unrelated loved one. This will not happen if you do not have a Will. An explanation of what will happen if you die without a valid Will can be found on page 5.

The permanent guardian of your child(ren) will not be determined by the court until 3 months after your death. During this period the individual you selected will act as their guardian.

Can Anyone Make a Will? What Makes My Will Valid?

Only people who meet certain criteria may make a valid Will. You must have the capacity to make a Will and the Will itself must reflect your true intention. These words have very specific legal meanings. Individuals who make a Will are known as testators.

"Capacity"

Testators need to be at least 17 years old, or, if not, then a regular member of the armed forces on active duty, or a seaman or mariner at sea. These criteria represent a general threshold. If you meet one of them it must also be established that you completely understand what a Will is and the effect it will have. This means being able to understand and recollect the nature and extent of your assets, and that you are benefiting certain people and excluding other people. Your lawyer will ask questions to ensure that you are of a sound and competent mind and understand the effect of your choices, but they may also require a medical assessment if there is a possibility that your lawyer's assessment will be challenged.

Even those suffering from mental illnesses may make a valid Will if they give the instructions during a period of clarity.

"True Intention"

Wills are meant to reflect your true intention. To ensure that your Will correctly reflects what you, and only you, intend, your lawyer will make inquiries and put safeguards in place to ensure that no one is influencing your decisions. For example, your lawyer may ask your loved ones to allow your lawyer to be alone with you at times during the course of taking instructions, writing your Will and signing the finished document. This is not because your lawyer does not trust your loved ones. It is simply a safeguard put in place to protect every client.

In the long run this is for the benefit of your beneficiaries. By ensuring that you are not unduly influenced, we eliminate one ground that others may use to attack your Will. This will help eliminate costly and time consuming litigation against your estate.

REMEMBER: There is no reason for anyone to see your Will until after you have died. Unless you decide otherwise, no one besides your lawyer and witnesses (your lawyer can

provide witnesses) will have any way of knowing what you have decided. Therefore, you may do with your assets as you wish without worrying about personal consequences.

Those with different abilities such as the blind or those physically unable to sign their name may make a valid Will, but specific extra steps need to be taken to ensure their Will reflects their true intention and that no one is influencing their actions.

Does "Capacity" and "True Intention" Guarantee a Valid Will?

No.

Formalities

Your Will is a legal document and as such must adhere to certain formalities. For example, none of your beneficiaries or their spouses should act as a witness to your Will. If they do, then they may not be allowed to receive any gift you leave to them. If your Will is typed, you must initial every page and sign the last page. There are additional formalities that are required to create a valid Will, but your lawyer will ensure that they are followed.

Subsequent Marriage

Marriage after you have signed your Will will void the Will unless it states that it was made in contemplation of that particular marriage. It is wise to name your intended spouse.

If you get married, you do not have to write an entire new Will. You may continue it by writing a codicil, a document that goes with the Will to alter it.

Restrictions on What You May Do With Your Property

There are certain restrictions on what you can do with your property in your Will. As a general rule, restrictions help to eliminate things that society may find offensive. This may affect certain clauses or the Will itself. For example, the courts and the government have decided that people have the responsibility to care for their dependents even after they have died. The responsibility to care for your dependents is now a legal duty under the *Family Relief Act*.

The *Family Relief Act* requires that you make adequate provisions for the maintenance and support of your dependents. This includes all minor children, even illegitimate, adopted and stepchildren, and dependent adults. If you do not adequately provide for a dependent, the court may provide for them out of your estate. However, if you have reasons for disinheriting an individual, you should include these in your Will because the court will consider your reasons and may give effect to your intentions. Some things the court will consider are the character or conduct of the dependent, your relationship with them, their financial circumstances, and any provisions you made for them during your lifetime. You should discuss your reasons for disinheriting the individual with your lawyer to ensure those reasons are included in your Will.

The *Family Law Act* also affects what you can do with your property. Unless you opt out of the *Act* by completing a marriage, cohabitation or separation agreement, you cannot dispose

of your matrimonial home in your will. This is because sole ownership will pass to your spouse upon your death. The *Act* also affects what you may do with your personal property. Generally, your spouse is entitled to half of everything received during the marriage and may even be entitled to items you owned before you were married depending on how they were used. On the other hand, there are items that your spouse has no entitlement to even if they were acquired during the marriage, for example, business assets and certain inheritances. You should consult a lawyer to determine what property you are able to address in your Will or whether you should execute a marriage, separation or cohabitation contract.

Finally, specific clauses in your Will may fail if they are against public policy, or are too vague. The circumstances that can lead to the voiding of a single clause are too numerous to discuss. Your lawyer will discuss all specific clauses and any potential problems with you.

Will I Ever Need to Change My Will? Do I Have to Do What I Told Someone I Would in My Will?

Your Will may be changed at any time prior to your death. You should review it every time you, or someone very close to you, experiences a major life event such as marriage, divorce, and the birth or death of a loved one. This will ensure that your Will continues to reflect your wishes. Even if you do not experience one of these major events, your Will should be reviewed every 3-5 years. It is often surprising how much can change during that period. For example, you may not have noticed that your children have grown up and no longer require trusts.

You may cancel or change any, or every, contract you made in your life in your Will. You are not bound by promises to leave certain things to specific individuals. However, as with everything in life, there are qualifications to this statement.

If a person performs services for you or lends you money in return for you leaving them something in your Will, the court will ensure they are compensated from your estate. This is not changing your Will as such, but ensuring that the individual gets the money they are owed from your estate before your Will is administered. In certain situations, the courts may enforce contracts against your estate as if it were you.

If you have agreed to donate organs or tissue, this agreement will be enforced against the wishes of your family. You should ensure your family is aware of your intentions so that they do not argue with medical staff and become even more distraught.

What Will Happen if I Don't Have a Valid Will?

Dying without a valid Will is known as dying "intestate". If you die intestate, the distribution of your estate will be governed by the *Intestate Succession Act.* The following table shows how your estate will be distributed under this Act.

For the purposes of the table, child includes any living descendants of your child if they have died. Children conceived before, but born after, death are included as if they were already born at the moment of death.

Beneficiary/Beneficiaries	Distribution
Spouse only	100% to your spouse
Spouse and one child	Spouse and child equally.
Spouse and multiple children	Your spouse will receive 1/3 and the remaining 2/3 will be split equally among your children.
No spouse or children	Both of your parents equally or to one completely if the other has predeceased you.
No spouse, children or parents	Siblings in equal shares. If your sibling(s) has died their children will split the share designated for them.
No spouse, children, parents or siblings	Equally among all nieces and nephews.
No spouse, children, parents, siblings or nieces/nephews.	Equally among the level of your next-of-kin most closely related. Those related by half-blood will inherit the same as whole blood relatives.

REMEMBER: Without a Will, there is no guarantee that your beneficiaries will get specific items they have an emotional connection to and there is no provision for loved ones, other then your spouse, to which you are not related by blood. It is also important to note that the term "spouse" is not defined in the *Intestate Succession Act* and a common law spouse may face opposition when seeking their entitlement.

Property

Your lawyer may refer to property as "real" or "personal" property. Real property refers to land and all items that are attached to the land, such as buildings. Personal property refers to everything else, from money, cars and heirlooms to your toothbrush. This distinction is important as the law sometimes treats these types of property very differently.

Jointly Held Assets

There are various ways in which individuals may own property together. As a general rule, real property may be held by two people as joint tenants or tenants-in-common. This distinction is very important. It determines what happens upon the death of one of the owners.

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If the property is held as a tenancy-in-common, each owner has a 50% interest. Their interest passes to their estate to be dealt with according to their Will or the rules for intestacy. However, if the property is held as a joint tenancy, the surviving owner has what is called a right of survivorship. This means that the survivor immediately takes ownership of the entire property upon the death of the other owner. The ownership of the property passes outside of the Will. However, in Newfoundland and Labrador, your Will still has to be probated so that your executor can sign the necessary conveyancing deed for real property (land). The only exception to this is certain transfers to a surviving spouse.

A familiar example of joint tenancy is the matrimonial home. If you and your spouse live in a house as a married couple, you are deemed to have created a joint tenancy by the *Family Law Act*. Unless you opt out of the *Family Law Act* through a marriage or cohabitation contract, your spouse will take sole ownership of the home on your death. You cannot leave it to a specific beneficiary, such as your child, even if it is a second marriage. This is true regardless of whose name the property is registered in or when/how they obtained the property.

In certain situations, the court may look to the intentions of the testator to determine if the property is truly "joint" property. This commonly happens in cases dealing with joint bank accounts. This departure from the normal rule is meant to address the reality of joint bank accounts. Many elderly individuals or those with mobility difficulties often add others to their accounts to help them deal with their finances. This is done purely for practical reasons, and there is no intent to create a true joint account. If the account was created and used only for this reason, it will not be treated as a joint account and would be dealt with according to the Will. To ensure this happens, you should put your intentions in your Will.

Property in Another Jurisdiction

Jurisdictions outside Newfoundland and Labrador may have different requirements for the validity of your Will and impose other taxes upon property located in that jurisdiction. If you have property in another jurisdiction, your lawyer will help you ensure that your Will is recognized in that jurisdiction and lessen the tax consequences.

Money Matters

Taxes

All of your debts, including taxes, must be paid by your estate. Strictly speaking, there are no taxes that flow solely from your death. However, it is very likely that your income taxes will be affected by the administration of your estate. There are several reasons this may happen, for example:

- Payment of certain benefits (RRSPs, paid vacation time, pension, etc.) and life insurance policies may be classified as income.
- If you give real property to a beneficiary in your Will, you may be deemed to have sold it at fair market value and this "sale" will be taxed as income.

The income tax laws are very complex and we recommend that you ask a tax lawyer or your financial planner for advice in this matter. Hiring such professionals may greatly reduce the tax burden for your estate. Hiring a financial planner or experienced lawyer may also help you decrease the costs associated with administering your estate in other ways.

Proceeds from the deemed sale of your principal residence are ordinarily exempt from taxation. This exemption may also be available if your principal residence forms part of a trust. If you are intending on forming a trust containing your principal residence, seek advice from a professional.

RRSPs

As mentioned in the Taxes section, your entire RRSP may be taxable as income when you die. This is not the case if you designate your spouse as the beneficiary of your RRSPs. There are special allowances and elections that allow you to transfer some or all of your RRSP to your spouse upon your death without having it included as part of your taxable income. The RRSP will then be included in your spouse's income. If your RRSP has yet to mature, they may use it to offset the tax consequences.

If you do not wish to do so or cannot leave your RRSP to your spouse and wish to leave it to one of your dependents, you should consult a financial planner or experienced lawyer to lessen the impact of taxes in this area.

Tax Exemptions for Spouses

The courts and government have created other exceptions for spouses to allow them to obtain the benefit of your estate without an undue tax burden. You should consult your lawyer to ensure that your Will is structured in such a manner that it takes maximum benefit of these exceptions.

Life Insurance

You may designate who you wish to have as the beneficiary of any life insurance policies in the policy itself, or you may specify this in your Will. You may even change the beneficiary specified in your policy by explicitly stating this intention in your Will. However, there are three issues that must be considered when determining which approach to use. The first issue is that, depending upon the timing of the reading of your Will, your insurance company may have already paid out your policy. Secondly, the payment of your policy is outside of the administration of your Will and may be paid as soon as the benefit is approved. Requiring your executor to handle payment through your Will may increase the time it takes for your beneficiary to receive the benefit. Finally, there are probate filing fees associated with the administration of your estate. The amount of this fee is linked to the value of the portion of your estate that passes through your Will. If you designate a beneficiary using your Will, then that money is deemed to pass through the estate and the probate filing fee will increase accordingly. However, if your policy designates your beneficiary, the amount will not be considered in calculating your probate filing fee.

Trusts

A trust is a fund handled by one person, called a trustee, for the benefit of another person. You may want to set up a trust for the long term care of dependents who are unable to manage their own funds. If you create a trust during your life, the assets placed in this trust will not flow through your estate and do not affect your probate fee. However, it is your choice and you may also create a trust using your Will. You may wish to do this if some of your dependents are still minors or are otherwise incapable of managing their own finances. This will ensure that their funds are properly managed.

There are different types of trusts. For example, you may specify the benefits that your beneficiary is to receive and when, or you may create a discretionary trust and leave that up to your trustee. Whatever type of trust you choose to create, you should ensure that your trustee is young enough to administer the fund for the appropriate period, can handle such a responsibility, and is financially stable so that they will face less temptation to borrow from the money intended for your beneficiary.

As always, you should discuss the possibility of creating a trust and which methods or types to use with your lawyer or financial planner. This will be specifically useful if you wish to arrange for long term care for a beneficiary.

Choosing an Executor

The person you choose as your executor will be your personal representative after you have passed. They will have the power and responsibility to make all decisions related to the administration of your Will. They will be in charge of ensuring a proper burial, paying your debts, obtaining all monies owed to you, and distributing your estate. This may be a complicated process and you must ensure that the person you choose is up to the task.

The individual you choose as your executor must be able to devote time and concentration to the potentially complex task of administering your estate. Once you have narrowed down your list of possibilities based upon the capacity of the individuals to administer your Will, there are other considerations. The age of your executor should be considered. Younger individuals are more likely to outlive you and be able to administer gifts or trust to young dependents. Your executor will have to interact with your family for a period. You will want to choose someone who can deal fairly and personably with each of your beneficiaries even if they face animosity due to the process or the contents of the Will. Finally, your executor should be an individual who is financially stable. Individuals that fall into this category may be more comfortable managing sums of money and are less likely to be tempted to "borrow" from your estate.

Your executor will be devoting time and effort into administering your estate and may be compensated for administering your estate. The degree of compensation will depend upon the size of the estate, the care, responsibility, skill and ability they have shown, the time they expended and the success they achieved. You may limit the amount of compensation they will receive by setting an amount in your Will. However, remember this can be a lengthy and

complicated process that will require a certain degree of attention and time from your executor.

The person you choose as your executor has the right to decline to act in this capacity. Therefore, you may wish to discuss your choice with this individual before you complete your Will to ensure that they are willing to Act as your executor. You should ensure they are fully aware of their rights and responsibilities. To that end, we have a separate brochure available that outlines the duties and responsibilities of an executor. You may pass this brochure on to them to ensure that they understand the role they are undertaking.

If you do not specify compensation for your executor, they will be compensated in accordance with rules set by the court known as the Registrar Compensation Rules. These are set out in the Newfoundland and Labrador Rules of the Supreme Court. Trustees will be compensated in accordance with the Trustee Act which also references the Registrar Compensation Rules.

Related Matters of Importance

Now that you have begun to plan for the future, there are several other possibilities you may wish to address. Please allow us to provide you with some guidance.

An Advance Health Care Directive

Your Will instructs your loved ones on what you want to have happen in the event of your death. An Advance Health Care Directive will instruct your loved ones and medical professionals on what health care treatment, or types of treatment, you do or do not want if you are not able to communicate these wishes yourself. In addition to or instead of setting out specific treatments or guidelines, you may appoint an individual you trust to make your decisions for you should you become incapacitated. This document will only come into effect in the event that you are incapacitated. Otherwise, it has no effect.

An Advanced Health Care Directive can also contain instructions for events surrounding your death. For example, you may indicate your preferences regarding tissue and organ donation, your funeral or burial arrangements and whether you consent to the performance of an autopsy. Including these instructions in an Advance Health Care Directive is advisable because your Will will likely not be read until after your funeral. An Advance Health Care Directive will ensure that you have control over these decisions and help your loved ones address difficult decisions.

If you do not make an Advance Health Care Directive and you suddenly become incapacitated, your relatives may decide upon the appropriate medical treatment and events surrounding your death. Without written direction from you, there may be confusion and conflict in your family as to your wishes and the correct path to be taken by your closest next-of-kin. A written declaration as to whom you wish to represent you may also help your other loved ones accept their decisions.

Similar to a Will, your Advance Health Care Directive requires certain formalities. It is revocable at any time that you are competent, and it is affected by changes in marital status.

If you do not have an Advance Health Care Directive, a substitute decision maker will be selected for you. Your decision maker will be the first person, or group, in the following list that is over the age of 19: your spouse, child, parent, sibling, grandchild, grandparent, uncle or aunt, nephew or niece, any other relative, and your responsible health care professional. If more then one person fits into the relevant category, then all the individuals in that category will make the decision as a group.

You may also use an Advance Health Care Directive to specify persons that you do not want to have the responsibility of making decisions on your behalf.

Guardianship of Adults

If your loved one suffers from a brain injury or mental infirmity, or if a mentally disabled child is about to reach the age of majority, you may want to apply to Court to become the Guardian of their estate under the *Mentally Disabled Persons Estates Act*. You will thereby gain power to deal with their financial affairs, including property and contracts entered into before they became mentally disabled. The guardianship may be temporary or long term depending on the nature of the mental disability.

An application for guardianship may need to be filed if an individual suffers from a gradual mental deterioration such as dementia or Alzheimer's. However, if action is taken early, you or your loved one may execute an enduring power of attorney and bypass the need to apply to a court at a later date. This will avoid any neglect of the estate during the period when the exact extent of the deterioration may be up for debate. It will also avoid the emotional costs of an application for guardianship.

A separate application will be necessary to become the guardian of your loved one's medical treatment.

Power of Attorney

A Power of Attorney is a document that gives a person of your choosing the power to manage your finances. In the document you may give the person specific defined and limited rights or you may give them broader allowances. You define the powers they hold. You can sign a Power of Attorney to allow someone to sign certain documents while you are away, to take care of your banking if you are no longer able to or to manage your affairs if your mental state is deteriorating.

As a general rule, a Power of Attorney is no longer effective if you become incapacitated. However, if you desire to do so, you may make an enduring Power of Attorney that will survive your incapacity. An enduring Power of Attorney must contain a paragraph stating that it is intended to survive the legal incapacity of the maker. This may avoid or delay

the need to apply for a guardianship, which can be a costly process. Alternately, you can grant a power of attorney that only becomes effective after you have become incapacitated.

The person you choose will have control over your financial affairs during a period in which you will be unable to oversee their actions. You should satisfy yourself that they are trustworthy and capable of handling such a responsibility. This is for your protection and theirs, as your attorney may be held financially responsible to your estate if they fail to act in your best interests. Only those over the age of 19 may be named as your attorney.

Will Instruction Form

These questions will help you develop your instructions to your lawyer. This form should be completed before you meet with your lawyer. If you require more room please attach additional pages.

1. Who do you want to be your executor? (Remember the job may be demanding, they may face liability, litigation and pressure from your beneficiaries. If you are forming a trust that may operate for an extended period you should choose a younger person)

Primary________________________________from____________________(Town/City)
Secondary______________________________from____________________(Town/City)

2. Who will be the physical guardian of any minors or dependent adults? Why?

____
____

3. Who will be the financial guardian of any minors or dependent adults? Why?

____
____

4. List all of your dependents and their ages (this includes spouses, dependent adults and all minors even illegitimate children that you are not in contact with):

Name	***Relation***	***Age***
___________________________	________________________	______
___________________________	________________________	______
___________________________	________________________	______
___________________________	________________________	______

5. Would you like to complete an Enduring Power of Attorney to give someone the power to look after your affairs if you become incapacitated?
____

6. Would you like to leave instructions about what health care you desire if you become incapacitated or to deal with post-death decisions such as, funeral and burial arrangements or organ donation?
____

7. What real property do you own (i.e. land/buildings)? Does anyone else have an interest in this property?

Property	***Interest held by whom***
___________________________	______________________________
___________________________	______________________________
___________________________	______________________________

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8. What do you want done with this real property?

Property	***Disposition***
______________________	______________________
______________________	______________________
______________________	______________________

9. What bank accounts do you own?

Bank	***Account Type***
______________________	______________________
______________________	______________________
______________________	______________________

10. Are any of these accounts held jointly and if so what is your intention with respect to these accounts?

Account	***Intention***
______________________	______________________
______________________	______________________
______________________	______________________

11. Do you hold any life insurance? Who would you like to be the beneficiary/beneficiaries? Are these individuals named in the policy (Yes/No)?

Policy	***Beneficiary/Beneficiaries***	***Named?***
________________	____________________	_____
________________	____________________	_____

12. Do you have any employment benefits (RRSP, pension, etc.)? Who would you like to be the beneficiary/beneficiaries? Are these individuals named in the documents (Yes/No)?

Benefit	***Beneficiary/Beneficiaries***	***Named?***
________________	____________________	_____
________________	____________________	_____

13. Are any of your assets located outside of Newfoundland and Labrador?

____

14. Are there any specific gifts you would like to make and if so, to whom?

Gift	***Beneficiary/Beneficiaries***
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________

15. How do you want your residue distributed? This will include everything you did not specifically gift and any gift that was not successful.

____

____

16. What do you want to happen with your estate in the case of a common accident (if your loved ones all mentioned in your Will pass with you)?

____

____

17. Are there any dependents for which you are not making adequate arrangements in your Will? Why not? (You should come back to this question after you have completed the questionnaire. You may refer to it to ensure you do not omit anything).

____

____

18. Is there anything else you think we should know?

____

____

19. Please attach an estimated value of your assets in the following categories:

GENERAL DESCRIPTION OF PROPERTY	***VALUE or AMOUNT***
Land, Buildings, and any interest in Land	
Household Goods and Furniture	
Motor Vehicles	
Stock in Trade and any interest in Business . . .	
Book Debts and Promissory Notes	
Money Secured by Mortgage	
Moneys due under Life Insurance	
Bonds, Stocks and Shares in Companies	

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Securities for Money	
Cash on Hand	
Cash in Bank	
Other Property not before mentioned (if any)	
***TOTAL**. . . . .*	

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