Wills
Personal Directives
Powers of Attorney
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GENERAL
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IMAGES
What type of document do I need if I want to...

- Decide what happens to my property after I die
- Choose someone to make FINANCIAL and LEGAL decisions if I become incapable
- Choose someone to make MEDICAL and FAMILY decisions if I become incapable

**Will**
- Typed
  - Formal Will
- Do it yourself in handwriting?
  - Holograph Will
  - Soldier or Mariner’s Will

**Power of Attorney**

**Personal Directive**

**Help from a Lawyer?**

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

If you do not have a will OR the will is incomplete OR lacks the necessary formalities, any property that is not dealt with in the will is distributed according to the Alberta Wills and Succession Act.

This act can be found online at http://www.qp.alberta.ca
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CHANGES IN LEGISLATION
The Alberta legislature has made significant changes to the laws governing wills and estates. The *Wills and Succession Act*, effective February 1, 2012, combines the old laws dealing with wills, support for surviving dependents and the distribution of intestate estates into one act. Specific sections of the new Act only apply if the testator died after February 1, 2012. If you wrote a will before February 1, 2012, it is recommended that you review it to see if the changes affect you.

IMPORTANT TERMS

Testator: A person who made a will and whose estate is to be distributed according to it.

Testatrix: A female testator. This term is not used often.

Estate: All the property owned by a person, whether inside or outside of Alberta, at the time of that person’s death.

Net Value: The value of the testator’s estate after payment of the charges, debts, funeral expenses, administration expenses, estate tax and succession duty, if any.

Beneficiary: An individual who receives or will receive some property from a will or intestacy.

Executor: A person named by the testator to gather the assets (property) of the estate, pay all outstanding debts of the estate, and ensure distribution in accordance with the terms of the will.

Administrator: Fulfills the role of an executor but is appointed by the Court when an executor is not named by the testator in his/her will, or:
   a. The named executor cannot serve his/her duties as an executor, or
   b. No will exists.

Minor: In Alberta, a minor is anyone under 18 years of age.

Intestate: A person who dies without allocating his or her property in a will. When someone dies completely intestate he/she has not allocated any of his/her property through a will. Incomplete intestacy is when someone dies having allocated only a portion of his/her property through a will.

A person who dies intestate in Alberta AFTER February 1, 2012 will have his or her property distributed in accordance with Part III of the *Wills and Succession Act*. For persons who died intestate BEFORE February 1, 2012, please refer to the *Intestate Succession Act*. See the section on Dying Without a Will (pg. 8) for more information.

Simultaneous Death: This occurs when there are two or more deaths that occur at the same time, or when it is uncertain which person died first. When this happens, if the will does not demonstrate a contrary intention, courts will distribute the property as if each person died before the other.
Adult Interdependent Partners (AIP):
In Alberta, a “common law” relationship is now referred to as an Adult Interdependent Partner. There are three ways in which you can become an Adult Interdependent Partner with another person, regardless of gender:

1. Live with that person in a “relationship of interdependence” for at least three years continuously;
   - A “relationship of interdependence” means that two people:
     a. Share in one another’s lives;
     b. Are emotionally committed to one another; and
     c. Function as an economic and domestic unit.
2. Live with that person in a “relationship of interdependence” that is of somewhat permanent and where there is a child by birth or adoption; or
3. Make an adult interdependent partner agreement with the other person.

Family Members (Previously referred to as Dependents)

a. A child of the testator under the age of 18;
b. A child who is at least 18 years of age and unable to earn a living because of mental or physical disability;
c. A child between the ages of 18-22 who is a full-time student;
d. A grandchild or great-grandchild, under 18, where the testator assumed the role of a parent;
e. A spouse; or
f. An adult interdependent partner.

WHAT IS A WILL?
A will is one or more written legal document(s) that establishes how a testator’s property will be divided when the testator dies. All wills must be in writing and must follow the formal requirements specified in the Wills and Succession Act to be valid.

Having a will is important because it can ensure that your property will go to those whom you want to receive it after your death. Any property that is not dealt with in a will shall be distributed in accordance with Part III of the Wills and Succession Act (see the section Dying Without a Will for more information).

There are a few situations where a person’s will can be overridden. For example, a Court can alter a will to provide for the proper care and support of dependants (see the section Applications for Adequate Provisions for more information). Also, creditors (people to whom a testator owes money) are paid before any beneficiary receives a gift from a will. Therefore, gifts in a will can be decreased if the estate has substantial debt.

There are three (3) types of wills in Alberta:
1. Formal Wills;
2. Holographic Wills; and
3. Soldiers’ or Mariners’ Wills.
FORMAL WILLS

Formal wills are generally written with the help of lawyers.

The formalities required include:

1. The will must be in writing
2. The will must be signed. Either by the testator, or someone on behalf of and in the presence of the testator must sign the will;
   a. The testator’s signature must be placed where it is clear that the signature applies to all of the writing in the will. The signature is usually at or near the end of the document.
   b. A signature will not give effect to provisions made underneath the signature or that were added to the document after it was signed.
3. A formal will requires two witnesses to be valid. Witnesses can either be present to watch the testator sign his/her will; OR the testator can sign the will alone, and then later acknowledge to the witnesses that he/she has signed the will. However, the witnesses must both be present when the acknowledgement is made.
   a. In either case, the witnesses must sign the will in the presence of the testator.

These formalities safeguard against fraud, forgery, and pressure. The formalities establish the intention of the testator to create a will, and help to highlight the seriousness and importance of making a will. A formal will that does not have these formalities is invalid.

HOLOGRAPH WILLS

A holograph will is entirely handwritten by the testator and is signed by him/her. There CANNOT be any typing in a holograph will. No witnesses are required. Because they are informal, holograph wills are often incomplete.

To be valid, a holograph will must show:

a. A testamentary intention, meaning that the will must clearly demonstrate an intention for the gifts to only take effect when the testator dies; AND
b. A clear intention to make the gift.
   i. So, it is best to use clear phrasing like: “I bequeath when I die…”

Common problems associated with holograph wills include:

a. A failure by the testator to distribute the entire estate (resulting in intestacy)
b. They can be difficult for a Court to interpret. Often the testator does not have enough legal knowledge to make his/her intentions clear to the Court through a holograph will.
c. Holograph wills are valid in Alberta, but they are not valid in all provinces.

Holograph wills are often appropriate in emergencies when people do not have time to create a formal will.
SOLDIERS’ OR MARINERS’ WILLS

Members of the Canadian Armed Forces or any other naval, land or air force may make a will using a written document signed by him/her or by someone on his/her behalf. No witnesses are required to create this type of will.

The formal requirements are:
1. Either the testator, or an agent of the testator, must sign the will.
   a. If a person signs the will on the testator’s behalf, the person must be in the presence of the testator and do so at the direction of the testator.
2. The testator must be on active duty (employed full-time by the military) at the time the will is created.
   a. For proof of active duty, Courts may obtain a certificate signed by the officer who has the records of the person at the time that the will was made. This document must state that the person was in active service at the time of the will’s creation. OR
   b. If this certificate is not available, a testator may be deemed to be in active service if he or she took steps to get ready for active service under the orders of a superior officer.

MUTUAL AND JOINT WILLS

Requirements for a Mutual Will:
- Require two or more people who agree to make two IDENTICAL wills.
- Each person must leave everything in his or her estate to the surviving member.
- All parties involved must clearly intend to make mutual wills; a strong similarity between wills isn’t enough.
- All parties must agree not to revoke the mutual wills.
  o The promise not to revoke may not be absolutely binding. If reasonable notice is given to the other party that one person wants to change or revoke the mutual will, the Courts will generally accept that revocation.

Requirements for a Joint Will:
- Each party signs the same will (one document).
- By signing the document, both parties demonstrate their intention to be bound by the will and their intention not to revoke the will.
- To revoke a joint will, reasonable notice must be given to the other person.

There is a major problem with both mutual and joint wills—it is very difficult to ensure that all parties involved are able to sufficiently express their wishes in the will. Instead, it is usually easier and more effective to draft your own, separate will to ensure that your interests are represented.
APPLICATION FOR ADEQUATE PROVISIONS (MAINTENANCE AND SUPPORT)

If a testator has not made adequate provisions for proper care and support of his/her dependants (for example: the testator failed to leave anything to their minor children), the dependants can make an application for maintenance and support under the Wills and Succession Act s. 88.

The appropriate amount of maintenance and support is determined by considering all of the circumstances of the applicant.

Factors include:
  a. The nature and length of the applicant’s relationship with the deceased
  b. The applicant’s age and state of health
  c. The applicant's ability to support themselves
  d. The estate’s legal obligation to support any other family member
  e. The deceased's reasons for making or not making dispositions of property to the applicant (including any signed written reasons)
  f. Any relevant agreements or waivers made between the deceased and the applicant
  g. The size and nature of the estate
  h. The nature and number of gifts made to entitled beneficiaries from the deceased’s estate
  i. Any trust properties that the deceased intended for the applicant or other beneficiaries
  j. Any property or benefit that the applicant is entitled to receive under other legislation (Matrimonial Property Act, Dower Act, other sections of the Wills and Succession Act)

Who can apply for maintenance and support?
  a. Spouses, partners, & children under 18
  b. Children over 18 who are physically or mentally disabled
  c. Adult children under 22 who are full-time students
  d. Minor grandchildren or great-grandchildren who were dependent on the deceased
  e. A representative applying on behalf of a dependent (for example, a legal guardian applying on behalf of a minor or an incapacitated person).

*The criteria listed above only apply in situations where the testator died after February 1, 2012. Please consult the Dependents Reliefs Act for testator deaths before February 2012.

THE HOMESTEAD & THE DOWER ACT

A spouse may be entitled to a part of the testator’s estate, despite conflicting provisions in the testator’s will. Under the Dower Act, a spouse is entitled to a life estate in the “homestead”. A homestead is any home in which either spouse has lived since the marriage. This law applies even if the home is entirely owned by only one of the spouses.

The surviving spouse is entitled to live in the home for the rest of his/her life, and is generally only responsible for ordinary recurring expenses (water, heat, taxes, lawn care, etc). Note, if the testator owned more than one home, the surviving spouse must choose one.

When the surviving spouse passes away, the home will go to the beneficiary that the testator named in the will. The beneficiary is generally responsible for the other expenses (i.e. a major roof repair).
For example: if John and Jane were married and lived in a house together, that house is the homestead. John passed away and left the house to his son Jack in a will; however, Jane will still be allowed to live in the house. Once Jane passes away, Jack will own the home absolutely. In the meantime, Jane is only required to pay ordinary recurring expenses. Jack will have to pay any other expenses. Lastly, if John and Jane had more than one homestead, Jane must choose to live in only one of those houses.

ALTERING A WILL

It is possible to alter a will. However, the same formalities required to create a will must be followed when making alterations:

i. Formal wills require two signed witnesses.
ii. Holograph wills require the testator to handwrite the alteration and sign the document.
iii. Alterations to a soldier’s or mariner’s will requires the testator or a person acting in the presence and direction of the testator to sign the alteration.

If the document is physically changed (ex. a name is physically cut out), and the change is not done following the correct method of alteration for the type of will, then the court may allow for the original words of the will to be determined and restored by any means that the court decides appropriate.

A “codicil” is a separate document used to modify a will. The codicil must refer to the will it is amending, and it must be dated, signed and witnessed. A testator may make more than one codicil.

If you become separated, divorced, have children, your financial situation changes, or you experience a death in the family, you should review your will.

REVOKING A WILL

A will can be revoked by the testator at any time, so long as the individual has the mental capacity to do so. A testator can revoke a will so long as it is done voluntarily and intentionally. A testator can demonstrate intention to revoke his or her will by:

a. Making a written declaration of his/her intention to revoke a will (a codicil);
   i. This declaration must follow the same formalities required to create a will.

b. Making another will; the newer document will overrule the older one.

c. Performing an act of destruction (burning, tearing, or shredding the will)
   i. The testator must both fully destroy the will and clearly intend to revoke it.

(Also note the special provisions for revoking a mutual or joint will as discussed above)

Gifts to ex-spouses or former adult interdependent partners are generally presumed to be revoked if the parties were divorced or ceased to be interdependent partners after February 1, 2012. If the beginning or breakdown of the marriage/relationship occurred prior to February 1, 2012, you should consult the Wills and Intestate Succession Acts to see how the old rules apply.

Getting married or starting an adult interdependent partnership no longer automatically revokes gifts under a will (if the marriage or new relationship began after February 1, 2012).
GENERAL ISSUES

The Testator
A testator must have the mental capacity to make a will. This means the testator must understand:
   a. What a will is;
   b. That he/she is making a will;
   c. What property he/she has to distribute of;
   d. The identity of the beneficiaries; and
   e. The ability to consider the relationship between the identity of the beneficiary and the property that the beneficiary is receiving.

Witnesses
Beneficiaries and spouses should NOT act as witnesses to the will. If these parties act as witnesses, gifts to them might be found void.

However, if only two (2) witnesses are required and a beneficiary signs as a third witness, his or her gift is still valid. Where no witnesses are required, as for holograph and soldier’s wills, a beneficiary may sign as a witness.

A will is not invalidated because one of the witnesses was, or has since become, incompetent (lacks capacity to understand the document because of mental or physical disability).

Minors
Generally, minors do not need a will. However, a minor can create a will if:
   a. the minor has or had a spouse or an adult interdependent partner
   b. the minor is on active service for the Canadian Forces or a Mariner

A minor may also apply to the Court to make a will under s.36 of the Wills and Succession Act. In the application, a minor must demonstrate that they have the mental capacity to make a will and the request must be reasonable.

Informing Others About Your Will
Make sure that people know you have written a will and where the will is located. This will help to make sure that your intentions are followed after your death.

Your will should be stored in a safe location because if the will is lost or destroyed then it cannot be used to distribute your property, and the rules used for people who die intestate (discussed below in Dying Without a Will) will be applied instead.

It is important to let people know what property you have in your estate. It is a good idea to keep a list of your property (including debts) with your will to make sure that all your property is found and distributed.
DYING WITHOUT A WILL
A person is “intestate” if they die without a will. In Alberta, an intestate estate is distributed under Part III of the Wills and Succession Act. The rules below apply to deaths that occurred after February 1, 2012. For deaths that occurred prior to February 1, 2012, please consult the Intestate Succession Act.

If a person dies:

a. With a surviving spouse or adult interdependent partner but no children then the entire estate passes to the surviving spouse;

b. With a surviving spouse/adult interdependent partner and surviving children:
   i. If the children are also the children of the surviving spouse/adult interdependent partner, then the entire estate goes to the surviving spouse/adult interdependent partner
   ii. If the children are not descendants of the surviving spouse/partner:
       1. The surviving spouse/partner receives $150,000.00 or 50% of the estate, whichever amount is larger;
       2. The remainder is distributed between the children

c. With both a surviving spouse and an adult interdependent partner, AND
   i. No children → the estate will be divided with ½ going to the spouse and ½ going to the adult interdependent partner
   ii. With children → the amount of $150,000 or 50% of the estate, whichever is greater, will be divided 50/50 between the spouse and the adult interdependent partner

d. When the testator and the surviving spouse have been living apart for at least 2 years, OR have a “declaration of irreconcilability” under the Family Law Act, OR are under an agreement showing the intention to end the marriage, the surviving spouse is not entitled to any gifts from the testator’s estate

e. Without a surviving spouse but with children still alive
   i. Each child receives one share of the estate
   ii. Each deceased child receives one share of the estate to be divided among the deceased child’s descendants

f. Without a surviving spouse or surviving children
   i. The entire estate will pass to the person’s parent(s).
   ii. If no parents are still alive, the entire estate will be split evenly amongst the deceased’s surviving siblings and their descendants (your nieces/nephews, grandnieces/grandnephews).
   iii. If there are no living relatives from the parental line, then the estate will be split 50/50 through your maternal and paternal grandparent lines (starting with your grandparents then moving to aunts/uncles, then cousins).
   iv. If there are no living relatives from one side (maternal or paternal), 100% of the estate is passed down the other side.
   v. If there are no living relatives from either grandparent line, the estate passes to relatives from your great-grandparent line (ending with great aunts/uncles).
   vi. If a relative cannot be found within 2 years then the net value of the estate will pass to the government. The government holds the value of the estate for 10 years, during which time a valid beneficiary can still come forward to claim the property. After 10 years, the remaining property belongs to the Crown.
PERSONAL DIRECTIVES (LIVING WILLS)

What is a Personal Directive?
A personal directive is a legal written document that gives authority to an agent to make non-financial decisions about personal matters on your behalf. Personal directives are like wills, but only operate while you are still living. A personal directive comes into effect when the maker lacks the capacity to make decisions regarding a certain matter.

A personal directive can give a person authority to make all non-financial decisions for you, including medical decisions and who shall temporarily care for and educate any minor children. A personal directive may include information and instructions on matters like:

- Who will act as your agent?
- Who will determine your capacity?
- Who is to be notified when the personal directive has come into effect?
- Who may access your confidential information?

If you don’t make a personal directive, in emergency situations, a health care provider may provide emergency medical services without your consent.

Formalities
To be valid, a personal directive must be in writing, dated, and signed in the presence of one witness. If you cannot physically sign the personal directive, someone else can sign it on your behalf in the presence of a witness.

Witnesses to the signing CANNOT be the designated agent, the agent’s spouse, the spouse of the maker, the person signing on behalf the maker, or that person’s spouse.

A person can choose to register their personal directive with the Personal Directives Registry.

To register by mail, call the office of the Public Guardian and Trustee at 1-877-427-4525 and ask for the personal directive registration form to be sent to you to be completed and mailed back.

To register online or to get more information about personal directives please visit: http://humanservices.alberta.ca/guardianship-trusteeship/register-a-personal-directive.html

Capacity
A personal directive will come into effect when you no longer have the capacity to make a decision. If the agent and a service provider disagree about capacity, an additional service provider will be consulted to make a determination about the maker’s capacity.

You may choose two (2) service providers (at least one of which is a physician or psychologist) who can provide a written declaration that you have lost capacity.

A personal directive no longer operates when you regain capacity (ex. recovery from an illness or injury) or pass away.
Agents
Agents must be over 18 years of age and must have the capacity to make personal decisions on your behalf. There is no limit on the number of agents you can list in a personal directive. If you have two (2) agents and they cannot agree, the first agent listed in the personal directive gets to make the decision. If there are more than two (2) agents, the majority will make the decision.

Agents generally CANNOT make decisions about**:
- a. Financial matters (requires Power of Attorney)
- b. Psychosurgery (defined in the Mental Health Act);
- c. Medically unnecessary sterilization;
- d. Removal of tissue from the maker’s body for transplant or research; or
- e. Participation in medical research that offers little or no potential benefit to the maker,

**Unless the agent has been given explicit authority in the personal directive to make such decisions.

Agents must follow the instructions of the personal directive and, if possible, ask the maker about the decision before making it. If the personal directive doesn’t have instructions, the agent must make the decisions that he/she believes the maker would have made in the circumstances (based on the maker’s wishes, beliefs, and values). The agent must make the decisions that are in the best interests of the maker.

An agent won’t be liable for a decision that is made in good faith. Actions performed in good faith do NOT disentitle an agent from a gift under the maker’s will or the proceeds of the maker’s life insurance policy.

Revoking a Personal Directive
A personal directive may be revoked by any one of the following:
- a. Reaching its expiry date, if you choose to add one to the personal directive;
- b. Creating a new personal directive that contradicts the earlier one;
- c. Destroying the personal directive document with the intention of revoking it;
- d. Creating a document that expresses the intention to revoke the personal directive. This document must comply with all the formalities of a personal directive (in writing, signed, dated, witnessed).

Termination of a Personal Directive
In addition to the methods of revocation outlined above, a personal directive will automatically terminate when you pass away.

A Court can also order the termination of a personal directive.
POWER OF ATTORNEY

Power of attorney is a legal document that gives a person the power to make financial and legal decisions on someone else’s behalf. Any competent adult or financial institution can be appointed as an attorney.

The donor is the person who creates the power of attorney document, preparing for the possibility that someone else will need to manage his or her financial and legal affairs. The attorney is the person or institution who will receive the power to manage the finances and legal affairs of the donor. The attorney should be someone who you trust and believe is capable of managing your finances and any legal matters.

There are two types of Powers of Attorney in Alberta:
1. General Power of Attorney
2. Enduring Power of Attorney

A general power of attorney is usually just called a power of attorney and is only valid while the donor has mental capacity. If the donor loses mental capacity, the power of attorney ceases to have effect.

An enduring power of attorney is similar to a general power of attorney. However, an enduring power of attorney will continue after the donor loses mental capacity. An enduring power of attorney can take effect either (1) immediately, (2) when the donor becomes mentally incapacitated, or (3) on an event that the donor specifies in the document.

Formalities
A properly drafted power of attorney must:
   a. Be in writing,
   b. Be dated,
   c. Be signed by the donor in the presence of a witness, and
   d. Be signed by a witness in the presence of the donor.
   e. If drafting an enduring power of attorney, then it must contain a statement indicating when the power of attorney will take effect.

To alter the document, the donor must have mental capacity and the formalities listed above must be followed. If the power of attorney is being revoked, it is important to notify the attorney and others who may be affected.

Terminating a power of attorney
Unless it is irrevocable, an enduring power of attorney terminates when:
   • The donor revoked the power of attorney in writing when they have capacity;
   • The person named as attorney rejects their appointment and informs the donor;
   • The donor or the attorney dies;
   • The court grants a trusteeship order respecting the donor or attorney;
   • The court grants a termination order for the power of attorney.

Although it is possible to create a power of attorney without the help of a lawyer, it is highly recommended that you retain a lawyer when creating one.
WHERE CAN I GET HELP OR MORE INFORMATION AND HELP?

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<td><strong>When you call, you will speak to an operator and you will describe the nature of your problem to them. The operator will then provide you with the contact information for up to three lawyers who may be able to assist you. When contacting these referred lawyers, make sure to let them know that you were given their information by the Lawyer Referral Service. The first half hour of your conversation with a referred lawyer will be free and you can discuss your situation and explore options. <strong>Note:</strong> This free half hour is more for consultation and brief advice and is not intended for the lawyer to provide free work.</strong></td>
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<th>Oak Net</th>
<th>Contact: Web: <a href="http://www.oaknet.ca/planning">www.oaknet.ca/planning</a></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>This website provides information for older adults, including information on wills, power of attorney, and personal directives.</strong></td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Student Legal Services – Civil Law Project</th>
<th>Contact: Ph: 780-492-8244 Admin: 780-492-2226 Web: <a href="http://www.slsedmonton.com">www.slsedmonton.com</a></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The Civil Law Project of Student Legal Services consists of law students who can provide basic legal information on various topics in civil law, such as wills, landlord-tenant matters, employment, and certain small claims. They can also provide information about various resources available if you require more in-depth assistance. Please note that Student Legal Services cannot help people create a will.</strong></td>
<td></td>
</tr>
</tbody>
</table>