

Your Last Will and Testament: Frequently Asked Questions



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What is a Will?

A will is a legal document that sets out what will happen to your money and property after you die. It is your chance to communicate your final wishes to your family and loved ones. Your will allows you to make arrangements so that it will be easier for your loved ones to wrap up your affairs.

What usually goes in a will?

Wills communicate your wishes about how your property and money will be distributed when you die. Wills commonly include the following:

- The name of an executor or estate trustee who will be responsible for carrying out your wishes.
- The name of a guardian to care for any minor children.
- Specific gifts of money, personal property or land.
- Directions about who should get the rest (or remainder) of your money and property.
- Instructions that allow money to be held in trust for certain beneficiaries (for example, children or people with disabilities).

Wills can also include funeral instructions, gifts to charitable organizations, arrangements for pets, and more.



When does a will take effect?

Wills take effect the moment you die. Your executor does not have the authority to do any of their duties under the will before you have passed away. Your beneficiaries do not have the right to access their inheritance before you have died.¹

What DON'T wills do?

Wills do not give anyone access to your money or property while you are still living. The will does not give your executor the right to take over any decision-making for you while you are alive, even if you become incapable. If you want to name someone to manage your money or make personal care decisions for you while you are still alive, you will need to complete Powers of Attorney.

Wills also do not typically include health or personal care instructions. In Ontario, the term 'Living Will' is not used, but you can include health care instructions in a Power of Attorney for Personal Care. Since your Last Will and Testament takes effect at your death, it does not deal with health care instructions.



What does a will need in order to be valid?

In Ontario, wills need to be in writing in order to be valid. Talking to your loved ones about what should happen to your money and property is sometimes useful, but your wishes are not legally binding unless they are properly written down. Wills must be signed at the end of the document. Generally, unless your will is completely in your own handwriting, it needs to be witnessed by two people.² A will that is completely in your own handwriting is called a holograph will. Holograph wills do not need to be witnessed, but they **do** need to be signed at the end.³

Witnesses

There are certain requirements for witnesses to wills: witnesses must be at least 18 years old; they cannot be a beneficiary (someone who will inherit under the will) or the spouse of a beneficiary, and; they must be competent at the time they witness the will.³ If you are working with a lawyer, the lawyer will usually arrange for the will to be properly witnessed. Often a lawyer will ask one or both witnesses to sign an Affidavit of Execution after they witness your will. The Affidavit of Execution is a sworn statement from a witness that they saw you sign your will. The Affidavit can be helpful in case the witness cannot be located after you have passed away.

Who can make a will?

In Ontario, anyone can make a will as long as they are at least 18 years old and have testamentary capacity. Testamentary capacity means that the person making the will:

- Understands the nature and effect of the will
- Knows what they own
- Understands what they will be giving away
- Remembers the people they might be expected to benefit under their will; and
- Understands the possible claims that could be made by people they are leaving out of the will⁴

If a person does not have testamentary capacity when they make their will, the will is not valid. When lawyers prepare a will for a client, they need to make sure the client has testamentary capacity. They need to ask questions and make thorough notes. If the lawyer decides that their client does not have testamentary capacity, they will not be able to help that person with their will.⁵





Can my son or daughter make a will for me?

In Ontario, no one can make a will for another person. A lawyer can draft a will for you, but they will be following your instructions about what you would like to do with your money and property. If you have named someone as your Attorney for Property under a Continuing Power of Attorney for Property, that person can manage your money and property for you while you are living. They cannot decide what will happen with your money, property or belongings after you have died.

You can choose to consult with your family about how to make your will, but all of the decisions are yours to make.



What is an executor?

An executor, also called an estate trustee, is the person who will do all the work to carry out your wishes after you pass away. They will follow the instructions in your last will and testament.

Some of the duties of an executor include:

- Making funeral arrangements
- Arranging for your home to be cleared out
- Making sure your debts and any outstanding bills are paid (out of your money and assets)
- Making sure the right people get their inheritance
- Closing your accounts
- Filing your final tax return⁶



Who can be my executor?

Your executor can be just about anyone you choose, with a few exceptions. They do **not** need to be a family member. They must not be bankrupt or incarcerated. They are not required to live in Ontario, but it is easier if they do. Your executor must be at least 18 years old at the time you pass away. Some questions to ask yourself when you're thinking about who to choose may include:

- Is the person likely to be willing and able to be your executor when you die?
- Is the person trustworthy and honest?
- Is the person good with money?
- Are they organized and good at keeping records?
- Can they do tasks involving reading and writing, or get help from someone else with these tasks?
- Can they handle stress?
- Do they live close by?
- Will they work well with the people who are going to benefit under your will?



Is my executor responsible for paying my debts?

Your executor is responsible for making sure any debts you have are paid out of the money and assets you have left over. Your executor does not generally have to use their own money to pay your debts. They could be held responsible if they do not do a proper search for your creditors, or if they mishandle your estate, even if it was not done on purpose.⁷ It is a good idea for executors to consult with professionals such as lawyers, accountants and investment advisors to avoid making expensive mistakes.



Should I have more than one executor?

It is always a good idea to have a back-up plan in case your executor cannot act for you. Your executor could move away, die before you or become ill. You can have as many substitute executors as you would like.

You can also choose to name more than one person to act as your executor at the same time. There are some important things to consider first. For example:

- Will the people you want to name be able to work together? Do they get along?
- Do the people you want to name live close together? If not, it may become difficult for them both to sign off on documents and make arrangements to do jobs together.

In general, carrying out your wishes becomes more complicated when you name more than one person to act as your executor at the same time.⁸ It is often easier to name one person to act alone, with one or more substitutes.



I have chosen an executor. Now what?

Always make sure you have talked to the person you want to name as your executor before you decide to rely on them. No one can be forced to be your executor against their wishes. Executors can also resign after they have already started in the role. If the person you named decides not to act for you and you have not named a substitute, then you will have no executor. It is better to know in advance if the person doesn't want to be your executor so you can make other arrangements.

If there are other people who might be unhappy about not being your executor, it is also a good idea to talk to those people and explain your choice. You may want to explain that being an executor is a lot of work. It involves paperwork and dealing with funeral homes, banks and the government. It is not simply a matter of choosing your best friend or favourite family member. It is about who is best suited and available for the job.

Once you have decided on an executor, give their full name to your lawyer. When your lawyer writes up the will, he or she will include the executor's name. After your will is executed, or signed, by you and your witnesses, you will not need to do anything further unless you want to make changes in the future. Your executor does not need to sign the will.

Make sure that your executor knows the location of your will so that they can find it when you die. If you don't live with your executor, make sure that your family, friends, caregivers and landlord know how to contact them when you pass away.

What if I have no one in my life who can be my executor?

Many people do not have anyone in their life who is willing and able to be an executor. Be sure to talk to a lawyer if this is your situation. There are options, including naming a legal professional or trust company to be your executor. You can also name more than one person so that jobs can be divided up, or in case one person becomes unable to continue.



Are there rules about who can benefit under my will?

Generally, you can leave money or property to anyone you choose under your will. Your beneficiaries do not have to be close family members or your children. You can even choose to benefit charitable organizations.

If you are Indigenous and living on a reserve, you may have to follow certain rules that are specific to your band. It is a good idea to talk to a lawyer with experience doing wills for people in your band or First Nation.

There are some limits on the types of conditions you can place on gifts. Also, certain beneficiaries, such as children under 18, may not be able to access their inheritance right away.

In some cases, people you leave out of your will can make claims against your estate. If you are married, your spouse will also have certain rights to your estate. If you do not wish to leave anything to your immediate family, talk to your lawyer about how to minimize the risk of claims against your estate.



How should I deal with my personal belongings?

One way to deal with your belongings is to list specific personal items that you want to go to particular people, but there are many other options for dealing with your personal belongings. These include:

- Leaving all your personal belongings to one person
- Donating your belongings to a charitable organization
- Directing that everything must be sold, and the money given to one person or divided among several people
- Allowing your executor or your beneficiaries to decide how to divide up your belongings⁹
- Give personal belongings to specific people while you are still alive.
- You can include information about the object's history as well so that the person knows why it is special to you."

Please note that if you have debts when you die and there is not enough money left to pay them, your personal belongings may have to be sold to pay off your debts.



Should I include funeral instructions in my will?

You can choose to include funeral instructions in your will, but they are not legally binding. That means that your executor will make the final decision.

If you have particular wishes, you should make sure your executor knows about them. Your executor may or may not see your will before your funeral arrangements have to be made.

If you are involved with a religious organization, you can talk to the leader about your wishes while you are living. You can also contact a funeral home or crematorium and make arrangements in advance. You can choose whether or not to pre-pay for your funeral. Make sure to let your executor know if you have made arrangements with a religious organization or funeral home.



What if I do not make a will?

If you die without a will, the court can appoint someone to administer your estate or act as your executor. Family members can apply to be your estate trustee, and so can creditors.¹⁰

The *Succession Law Reform Act* deals with what happens to a person's estate if they die without a will in Ontario. How the estate will be divided will depend on the person's family circumstances. For example, if you are married with no children, your husband or wife will generally get everything (even if you have separated and are no longer living together!).^{11*}

*This applies whether you are married to a person of the same sex or the opposite sex. It does not apply to common-law partnerships, which are treated very differently.



Can I make a will without a lawyer?

You do not need a lawyer to make a will, but it is easy to make a mistake without formal legal education and training. Estate planning and will drafting are complicated and have many technical requirements. Even people who have been formally trained can make mistakes.

If you make a mistake, your wishes may not be carried out in the way you hoped. A friend or family member may not get their inheritance, or your beneficiaries can end up arguing about your wishes in court. If your will becomes the subject of litigation, any money assets that you had can be eaten up by legal fees.

It is always best to hire a lawyer if you can. There are also some limited free community resources for people who cannot hire a lawyer (see page 23).



When is a will revoked or cancelled?

A will is revoked, or cancelled, when the person who made the will:

- Gets married
- Destroys it with the intention of revoking it
- Makes a new will
- Revokes it in writing (with certain requirements)

Getting a divorce does not revoke a will, but the will is read as though your ex-spouse has died before you.¹² If you get a divorce, it is a good idea to review your will with a lawyer to discuss how your will would be interpreted if you do not update it.

Can I change my will?

You can decide to change your will in the future, with limited exceptions. You must continue to have testamentary capacity. If you lose your capacity because of illness or disability and you do not regain it, you will no longer be able to make a new will or change your old one. The last version of the will that is valid will be used.

Do I need to register my will?

In Ontario, you are not required to register or publish your will.¹³ You should make sure that the person who is going to be your executor knows where to find your original will (and not simply a photocopy). If you do not live with your executor, make sure that your family, friends or caregivers know how to reach them.

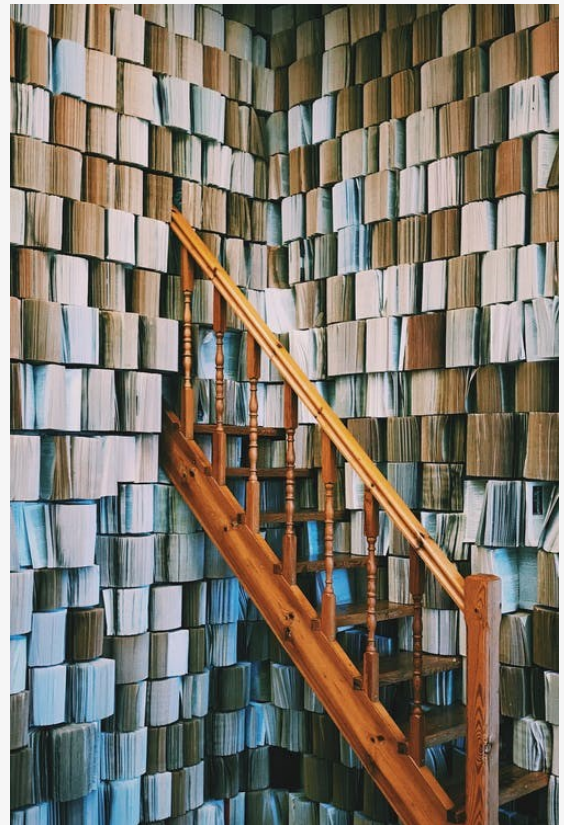
Do wills expire?

In Ontario, wills do not expire. An old will is often still valid even though the person's life circumstances have changed.¹⁴ If your relationships or personal circumstances have changed since you made your will, it is time to update it. It is a good idea to read through your will every five years to make sure it does not need updating.

What if I lose my will?

If you lose your original will (the version that is not a photocopy), then your executor will likely have a difficult task ahead of them. The court will assume that you destroyed the will in order to revoke it. The executor or your beneficiaries will have to try to prove that you did not destroy it or revoke it. Also, they will have to try to convince the court of what was actually in the will.¹⁵

Always store your will in a safe place where your Executor can get to it. They must be able to find the original will. Be aware that landlords may want to see the original will before they let the executor into your apartment. A bank would also want to see the original will before allowing your executor to go into your safety deposit box.





What should I expect when I meet with a lawyer?

When you meet with a lawyer to discuss making your will, the lawyer will ask you for a piece of valid photo identification. They will have a lot of questions for you about your finances, assets and debts. They will want information about your family. They will often ask to see paperwork confirming what assets you have so that they can properly prepare your will.

Lawyers should meet with you alone. They will need to take instructions from you, and not your family or friends. Part of their job is to make sure that no one has pressured you into doing something you don't want to do. Anything that you tell your lawyer is confidential. The lawyer cannot discuss anything with your family, friends, bank or caregivers without your permission.

After you give your instructions to the lawyer, they will prepare your will for you. Make sure you review the will carefully before you sign it. If you are not good at reading, you have a visual impairment or you are not comfortable with English, your lawyer should take extra steps to make sure you understand what is in the will. Do not be afraid to ask questions. The will is your document, and it needs to reflect your wishes.

Endnotes

- 1 *Estates Administration Act*, RSO 1990, c E22, s 2.
- 2 *Succession Law Reform Act*, RSO 1990, c S26, ss 3-4.
- 3 *Ibid* at s 6.
- 4 *Ibid* at s 12.
1. *Banks v Goodfellow* (1870), LR 5 QB 549
- 6 *Trustee Act*, RSO 1990, c T23, ss 48-59.
- 7 Albert H. Oosterhoff, *Oosterhoff on Wills and Succession*, Seventh Edition, (Toronto: Thomson Reuters Canada Limited, 2011) at p 60; *Ibid* at s 50.
- 8 Ed Esposto, Laura Kerr & Corina Weigl, “The Annotated Will 2016” (Wills and Estates Practice Basics delivered at The Law Society of Upper Canada, March 22, 2016)[unpublished] at 15-16.
- 9 Robin Solnyk, Mary-Alice Thompson and Brian Gillingham, *Drafting Wills in Canada: A Lawyer's Practical Guide*, 2nd Edition, (LexisNexis Canada, 2016) at
- 10 *Estates Act*, RSO 1990, c 21, s 29.
- 11 *Supra* note 2 at s 44.
- 12 *Supra* note 2 at ss 15-17.
- 13 *Supra* note 2 at s 10.
- 14 *Supra* note 2 at 17.
- 15 *Supra* note 7 citing *Alston v Wagar Estate* (1996), 10 E.T.R. (2d) 274 (Ont. Gen. Div.) and *Re Flaman Estate* (1997), 18 E.T.R. (2d) 121 (Sask Q.B.)

Community Resources

Renfrew County Legal Clinic Seniors' Program

236 Stewart St., Suite 101

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613-432-8146 OR

1-800-267-5871

Provides free wills and powers of attorney to low income people aged 60+