

MAKING A WILL

A self-help guide

Prepared by:

Community Legal Clinic

Simcoe, Haliburton, Kawartha Lakes

October, 2000

MAKING A WILL

This guide will give you some information about Wills and help you do your own basic, simple Will.

This is not to be construed as legal advice.

WHAT IS A WILL?

A Will is a document that you prepare which says what you want done with your property, possessions, belongings (called your “estate”) after you die. It also names the person who you want to carry out the terms of your Will (called your “executor”).

A Will is important because it simplifies matters upon your death and makes sure that your property passes to those people that you want to get it.

WHO CAN MAKE A WILL?

Anyone over 18 years of age can make a Will. When you make a Will, the law says that you have to be of “sound mind”. Sound mind means that you do not have a mental impairment that stops you from knowing what you are doing.

KINDS OF WILLS

1. *Handwritten Will*

A handwritten Will is called a “holograph” Will and is legal. It has to be totally handwritten in your own handwriting. Then you have to date it and sign it at the end.

A pre-printed form that you fill in by hand is *not* a holograph Will and must be signed with witnesses, as described in the next paragraph.

2. *Typed Will*

A typed Will has to be dated and signed in front of two witnesses. The two witnesses must also sign the Will. All three (you and your two witnesses) must be together when signing. The two witnesses cannot be people who will get something from your estate when you die.

A videotaped Will is not valid in Ontario.

DO I NEED A LAWYER?

There is no legal requirement that a lawyer needs to make your will. You should, however, get legal advice in any of the following situations:

- (a) if you are about to be married (a Will made before the marriage may be cancelled by the marriage);
- (b) if you are under 18 years of age;
- (c) if you have a past history of mental impairment;
- (d) if you are aged (to find out about the question of “mental capacity”);
- (e) if you are separated from your spouse;
- (f) if your estate is likely to be very large (to get advice on tax saving);
- (g) if you own assets outside of Canada.

HOW TO MAKE YOUR OWN WILL

Take great care in making your own Will. It is a very important document. If it is not properly done, a mistake will not be discovered until after your death. Then it is too late to correct it and your wishes may not be carried out as you had wanted.

A Will does not have to follow any special form. No legal words are needed. This kit includes a sample with standard paragraphs and a format that you can use.

Parts of a Will

1. In the first paragraph, put your full name and where you live.

Example:

This is the Last Will and Testament of me, John James Doe, presently residing at 123 Main Street, in the City of Orillia, in the County of Simcoe.

2. Paragraph number 1 of the Will states that any previous Wills that you may have made are cancelled.

Example:

I hereby cancel all previous wills I have made of every nature and kind whatsoever.

3. Paragraph number 2 appoints the person who will look after your affairs after your death. This is called an *Executor*. The person you appoint must be over 18 years of age and you need to check with that person to see if he or she would be willing to be your executor. You may name more than one person to be your executors.

Example:

I appoint my wife, Mary Jane Doe, to look after my Estate and I hereinafter refer to her as “my executor”.

4. The next number of paragraphs say what you want done with your property.

Example:

I direct my Executor to:

(1) Debt – Regardless of the terms of the Will, there is always the obligation to pay debts of the estate first.

Example:

To pay my just debts, funeral and testamentary expenses.

(2) Gifts – If you want to give a special gift, e.g., car, watch or an amount of money, list the people that you want to give them to and the item they are to get.

Example:

To my brother, George William Doe, I give my guitar:

To my sister, Jean Jane Doe, I give my coin collection.

(3) Residue – is what is left over. Name the persons who will share the portion of your estate that is left over after the debts and gifts are paid. You must do this to avoid problems later. This clause is to make sure that nothing is left out of your Will and includes things that you may get after you write your Will. Most Wills deal only with the residue and it is divided into equal shares.

Example:

To give the residue of my estate to my wife, Mary Jane Doe.

OR

To divide the residue of my estate equally between my children, William Doe, Jane Doe and Robert Doe

If you want your children to get their portion at some time after they turn 18 years old, you must put in the age when you do want them to get their share.

5. The last paragraph before the signature, is a statement testifying that you are signing it. It includes the number of pages in the Will and the date of the signing of the Will.

Example:

I sign my name to my Last Will and Testament, written on these two pages of paper, this 4th day of December 1998.

6. At the end, you have to sign the Will. **If it is not a totally handwritten Will, it must be signed in front of two witnesses** who also sign it. Witnesses can NOT be someone named in the Will. It is also a good idea for you and the two witnesses to put your initials in the bottom right-hand corner of each of the pages of the Will, except the last page where the signatures are.

7. Beside your signature is a paragraph confirming that it is being signed in front of two witnesses and that all of you are signing it at the same time. (If it is a totally handwritten Will, this paragraph is not necessary.) Below this paragraph and your signature, are the signatures and addresses of the witnesses.

Example:

Signed, Published and Declared by the said Testator, John James Doe, as and for his last Will and Testament, in the presence of us, both present at the same time, who at his request, in his presence and in the presence of each other, have subscribed our names as witnesses.

Other Clauses

These are some other clauses you may wish to consider putting in your Will, depending on your circumstances.

CHILDREN UNDER 18

a) Power to Hold Assets for Children – If children under 18 are entitled to a gift, the law says the gift must be sold and money paid into Court to be held until the children turn 18. To avoid this happening, use the following paragraph.

Example:

If any person should become entitled to any share in my estate before reaching the age of majority, the share of such person shall be held and kept invested by my Executors and the income and capital or so much thereof as my Executors in their absolute discretion consider necessary or advisable shall be used for the benefit of such person until he or she attains the age of majority.

b) Guardian – If you have young children, you should name a guardian to look after them until they are 18 years of age. You should get this person's permission before naming them in your Will. This paragraph would go in after the paragraphs that state what you want done with your property and before the signature paragraph.

Example:

I appoint my brother, George William Doe, to be the guardian of my children until they reach 18 years of age.

c) Payments to Guardian – use the following paragraph.

Example:

I authorize my Executor to make any payments for any person under the age of majority to a parent or guardian or person standing in loco parentis to such person whose receipt shall be sufficient discharge of my Executor.

POWER OF SALE

The executor may be required to sell some of the assets of the estate in order to pay debts of the estate or to divide the value of the assets among the beneficiaries. This paragraph would go in as the first item under “I direct my Executor” before “To pay my debts, funeral...”

Example:

To use his/her discretion in the realization of my estate, with power to my Executor to sell any part of my estate at such time or times, in such manner and upon such terms, and either for cash or credit or for part cash and part credit, as my Trustee may in his/her discretion decide upon, or to postpone the sale of any part of my estate as long as s/he pleases

DYING WITHOUT A WILL

Dying without a Will (called dying “intestate”) can be a problem for three reasons. *First*, your property will be divided according to the law, which may not be the same as how you would have divided it. *Second*, no one will have been appointed by you to be the Executor. An application will have to be made to the Court to appoint someone to act as your Executor. *Third*, there will be extra time delays and expenses involved in wrapping up your estate.

COMMON-LAW SPOUSE

The law that deals with the distribution of the estate of a person, who dies without a Will, speaks only of a *legal* spouse. There is no provision made for the common-law spouse. If you are living common-law, you have to specifically provide for that person. If you are living common-law and die without a Will, the property will be distributed as though the common-law spouse were a complete stranger.

ILLEGITIMATE CHILDREN

The law makes the rights of legitimate children and illegitimate children equal. Both are treated the same when an estate of a person who dies without a Will is being distributed.

POWER OF ATTORNEY

Continuing Power of Attorney for Property – is a legal document in which a person gives someone else the legal authority to make decisions about their finances and other assets. That legal authority is effective immediately on signing the power of attorney, unless there is a clause that says it is to be effective at some other time.

Power of Attorney for Personal Care – is a legal document in which a person gives another person the authority to make personal care decisions on their behalf only after they become mentally incapable.

Both of these Powers of Attorney deal with matters while you are alive. A Will deals with matters after your death.

To get more information about Powers of Attorney or to get the forms for them call Simcoe Legal Services Clinic or you local MPP's office.

AFTER YOU ARE FINISHED

- 1) Only have ONE (1) signed, original Will.
- 2) If you make a copy of the Will, write "COPY" on all the pages.
- 3) Make sure the person who is named to look after your affairs after your death knows where your Will is – keep it in a safe place.

GLOSSARY OF TERMS

BENEFICIARY	-A person named in the Will to receive something.
BEQUEST	-A gift of property other than real estate.
EXECUTOR	-The person you choose to carry out the wishes in your Will. (A female is called an Executrix.)
HOLOGRAPH WILL	-A Will written completely in your own handwriting.
INTESTATE	-Dying without a Will.
LEGACY	-A gift of cash.
PERSON REPRESENTATIVE	-Your Executor.
PROBATE	-After death, the Court process which confirms that your Will is valid and confirms the appointment of the person named to be your Executor.
REVOKE	-Cancel, nullify.
TESTAMENTARY EXPENSES	-Expenses relating to the Will, like probate fees, legal fees.
TESTATOR	-The person making the Will. (A female is called Testatrix.)
TRUSTEE	-Your Executor.

EXAMPLE WILL

This is the Last Will and Testament of me, John James Doe, presently residing at 123 Main Street, in the City of Orillia, in the County of Simcoe, and Province of Ontario.

1. I hereby cancel all previous wills I have made of every nature and kind whatsoever.
2. I appoint my wife, Mary Jane Doe, to look after my Estate and I hereinafter refer to her as "my Executor".
3. I direct my Executor:
 - (a) To use her discretion in the realization of my estate, with power to my Executor to sell any part of my estate at such time or times, in such manner and upon such terms, and either for cash or credit or for part cash and part credit, as my Executor may in her discretion decide upon, or to postpone the sale of any part of my estate as long as she pleases.
 - (b) To pay my just debts, funeral and testamentary expenses.
 - (c) To give to my brother, George William Doe, my guitar.
 - (d) To give to my sister, Jean Jane Doe, my coin collection.
 - (e) To give the residue of my estate to my wife, Mary Jane Doe.
4. If any person should become entitled to any share in my estate before reaching the age of majority, the share of such person shall be held and kept invested by my Executor and the income and capital or so much thereof as my Executor in her absolute discretion considers necessary or advisable shall be used for the benefit of such person until he or she attains the age of majority.

5. I authorize my executor to make any payments for any person under the age of majority to a parent or guardian or person standing in loco parentis to such person whose receipt shall be a sufficient discharge of my Executor.

6. I appoint my brother, George William Doe, to look after my children until they reach 18 years of age.

I sign my name to my Last Will and Testament, written on these two pages of paper, this 4th day of December, 1998.

SIGNED, PUBLISHED AND DECLARED)
by the said Testator, John James Doe)
as and for his last Will and Testament)
in the presence of us, both present at)
the same time, who at his request, in his)
presence and in the presence of)
each other, have subscribed our)
names as witnesses.)

John James Doe

Witness

Witness

Address

Address