

Ten Common Questions about **Wills & Estates**

What if you die
without a will?

Can you
change your
will?

Why should you
have a will?

What should
you put in your
will?

What makes a
valid will?



Yukon Public Legal Education Association is a non-profit society providing Yukoners with information about the law. We are funded by Department of Justice, Canada and Department of Justice, Yukon.

Anna Pugh, Barrister and Solicitor, prepared the information for this fourth edition of *“Ten Common Questions about Wills and Estates”* in 2013.

We are grateful to the Government of Canada’s New Horizons for Seniors Program for funding support to produce this fourth edition.

We also thank the following people:

- Aletta Anne King for preparing the original information in 1986
- Geraldine Hutchings for updating the information in 1992
- Norma Lee Shier Farkvam for updating the information in 2001-2002 and
- Gordon Scurvey and Tanya Handley for the original graphics.

Design and layout by Tanya Handley.

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Second edition 1993

Third edition 2003



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TO OUR READERS

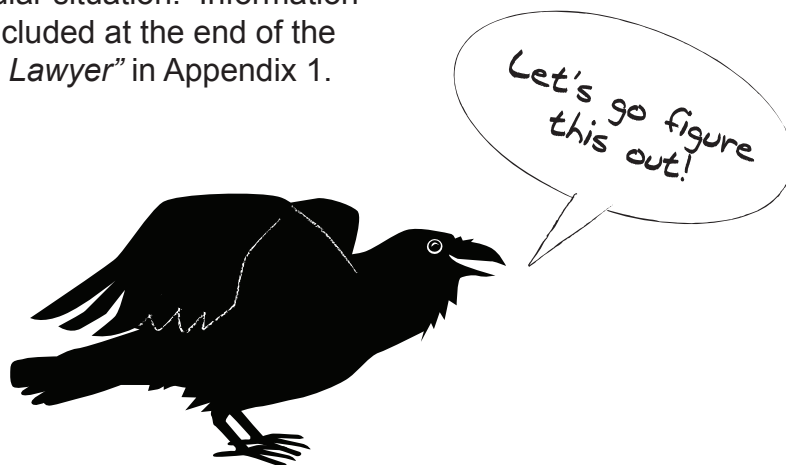
Yukon Public Legal Education Association provides people with general information about Yukon law. There are a few things to keep in mind as you read this booklet.

- This booklet describes Yukon law, which is not necessarily the same as the law in other territories or provinces.
- The information was accurate at the time of publication, but the law, like the weather, can change without notice.
- General information about the law is not a substitute for legal advice, just as a textbook on health cannot replace a doctor's advice on a specific problem. We recommend that you talk to a lawyer for legal advice.
- We could not possibly include every detail on this subject and still make our booklet brief and understandable.
- The examples included are based on actual problems with wills, but are not actual situations. Any resemblance to actual situations is not intended.

Legal terms are written in **bold** letters. These are explained at the end of the booklets under "*Legal Words*" in Appendix 2.

We hope you will find this material helpful in learning about the law. If you decide to make important decisions for yourself after reading this booklet you may wish to consult a lawyer to make sure that your decision is appropriate for your particular situation. Information about finding a lawyer is included at the end of the booklet under "*Choosing a Lawyer*" in Appendix 1.

Happy reading!



QUESTION 1: **What is a will?**

A will is a written document setting out your wishes about dealing with your **assets** (the things you own) after you have died.

You can sell or give away any of your assets during your lifetime, even if the asset is mentioned in the will. The will only applies to those assets still owned at the time of your death. Those assets are referred to as your **estate**.

A will can also include other wishes for after your death, although none of them are legally binding in the way that the giving of your assets is.

- Your will may name a **guardian** for children under 19 years of age, although this appointment can be challenged in court after your death.
- Your will may include special wishes about burial or cremation, ***though your executor is not bound by law to follow them.***

Your will may also include directions about how to deal with assets, and give powers to your **executor** (the person who carries out the instructions in your will).

In order to be **valid** (meaning, legally enforceable), your will must be properly signed and witnessed.

If you make a will, you are called a **testator**. The person who inherits part of your estate as a gift or **bequest** (a specific item or amount of money) under your will is called a **beneficiary**.

A will *is not the same* as an **advance directive** (sometimes referred to as a living will), nor an **enduring power of attorney**. Each of these specialized documents can be part of a total **estate plan**, but they are not wills. For information on either of these, consult other public legal education publications or a lawyer.

When you die, your beneficiary does not receive the inheritance or gift immediately upon your death. First, the estate assets go to your **personal representative**. This is either your executor (appointed by your will to manage your estate) or, if there is no executor, the **administrator** (appointed by the Supreme Court of Yukon to handle your estate if you die without naming an executor or without a will).

A will can be updated or changed while you are alive and mentally capable to make a change. A will only becomes legally binding after you die. Unless there are unusual circumstances, you do not need to obtain the permission of the executor or any beneficiary to make changes.



QUESTION 2: **Why should you have a will?**

A will ensures that your estate is distributed in a way that you want, with the least uncertainty or difficulty as possible. Without a will, there can be delays, complication and uncertainty as to how your estate will be dealt with and who it will go to.

Some specific reasons for a will are:

- you want to choose your own personal representative (**executor**) and not have that decision made by your relatives and the court;
- you have children but want your estate to go only to your spouse unless your spouse dies before you do;
- you are living **common law** (defined for estates as living in a marriage-like relationship for more than 12 months before death);
- your family includes step-children, children from more than one relationship or estranged children;
- you are separated or divorced;
- you want your property to only go to certain relatives when you die;
- you wish to provide something for someone not related to you (for instance, a friend);
- you want your children to receive their inheritance at an age other than 19 years;
- you want to record your wishes for naming a **guardian** (person who becomes legally responsible for your children who are under 19 years of age);
- you want to record your wishes for burial, cremation or type of funeral.

QUESTION 3: **What if you die without a will?**

If you die without a valid will, you die **intestate**.

Someone, such as your spouse or other relatives, or the **public guardian and trustee** (a public official appointed by the government) may apply to court to be appointed as administrator to act as the estate's personal representative.

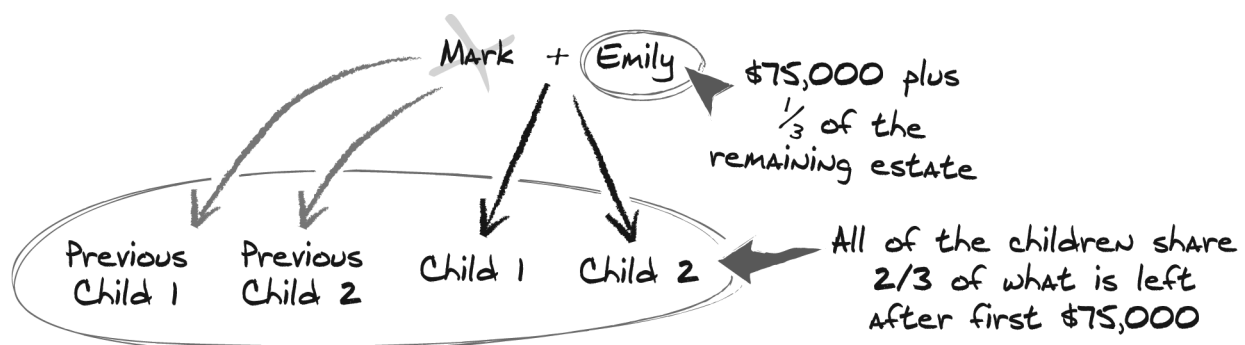
The law says an intestate person's property must be used to pay his or her debts and what is left over then goes to relatives in a specific order of priority. The order for who inherits the estate is set out in Part 10 of the Yukon's *Estate Administration Act*.

If you are a status Indian residing on a reserve, land set aside for a reserve or Crown Land, the information in this booklet may not apply to you. When this book was published, several changes were being considered under the federal *Indian Act*, and you may need to seek other information with respect to your situation.

Example 1: Remarriage

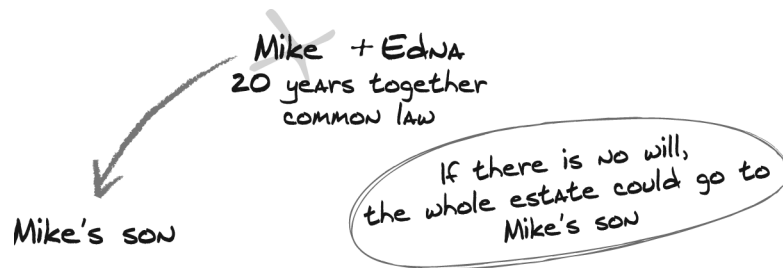
Mark has two children with his wife, Emily. He also has two children from a previous relationship, who he hasn't seen in over twenty years. Mark dies without a will. His wife, Emily, receives the first \$75,000.00 of the estate, under the *Estate Administration Act*. The rest of the estate is split so Emily receives $\frac{1}{3}$ and the four children split equally the remaining $\frac{2}{3}$. This isn't what Mark would have wanted, but because he did not have a will, the law says this is how the estate will be divided up.

Distribution of the person's property depends entirely on which relatives are alive at the death of the intestate person. It does not matter what the intestate person's unwritten wishes were or might have been. You are also considered to have died intestate if your will is invalid for some reason. (See Question 5: *What are the requirements of a valid will?*)



Example 2: Common law relationship

Mike has been living with Edna for twenty years, but they have never married. Mike owns the house in his name only. Mike keeps meaning to make a will, and he always tells Edna that everything will go to her, anyway. Mike dies without a will. Soon, Mike's son comes to Mike's house, where Edna also lives, and tells Edna she has to leave. He says that since Mike had no will, according to the *Estate Administration Act*, everything goes to him. Edna is grieving for Mike, but now she also has to go to court and make an application to a judge to be recognized as Mike's common law partner. She also needs to ask a judge to change who inherits the estate, so Mike's son doesn't receive the whole estate, pursuant to the law for intestate estates.



A **common law** spouse is not automatically entitled to share in an estate, and it is at the discretion of a court to give a common law spouse any share. In other words, a common law spouse must go to court to ask for an interest in the estate.

You should seek legal advice as soon as possible if you are the common law spouse of a person who dies without a will. You may need to prove that you are the common law partner and that you are entitled to share in the estate. Under the *Estate Administration Act*, if you are living with another person in a marriage-like relationship for 12 months before the person's death, you are considered common law.

QUESTION 4: Who can make a will?

Any adult who is **mentally capable** can make a will. In the Yukon, an adult is someone over the age of 19 years.

If you are writing a will, you must be mentally capable. In other words, you must understand that you are writing a will, and you must appreciate the nature and extent of the property (assets) you own when you are writing the will.

Your will must be made freely and voluntarily by you, with no undue influence. It must be clear that you weren't forced into leaving someone out of a will, or pressured into making gifts to someone you did not want to give a gift to.

Example 1:

Marion is 86 years old. She has two daughters. One of her daughters Caroline, lives nearby and helps out. Her other daughter, Heather, is far away but keeps in touch with her mother by phone. Caroline is angry that she does a lot of work and her mother still wants to split her estate equally between Caroline and Heather. Caroline starts to say nasty things to her mother about Heather. Every time she visits, Caroline asks her mother to change her will to "make it more fair". When Marion says she does not want to talk about it, Caroline says she will not bring over the groceries Marion needs until she talks about the will with her. Marion can get no peace, and finally, in order to have Caroline happy again, she agrees to change her will.

A new will made by Marion under these circumstances would be made under undue influence, and therefore not legally binding.

Example 2:

Anna is getting on in years and has been diagnosed with early Alzheimer's. Her husband died ten years ago and she had been living on her own, but now her children are worried about her. She has been talking about doing up a new will. She keeps saying that her grandson, Jimmy, is the only one who cares about her. Jimmy has recently moved in with Anna, and other family members have heard Jimmy asking Anna for money. He drives her car on a daily basis, and claims he is doing errands for her. Yesterday, Anna's daughters went over and found Anna crying and confused. She told them it had been months since anyone had come to visit, and that since her husband had died Jimmy was the only one who helped her out. She said again she was going to do a new will.

A new will made by Anna under these circumstances might be made by an adult who is not mentally capable of preparing a new will. The adult, Anna, may also be unduly influenced by Jimmy.

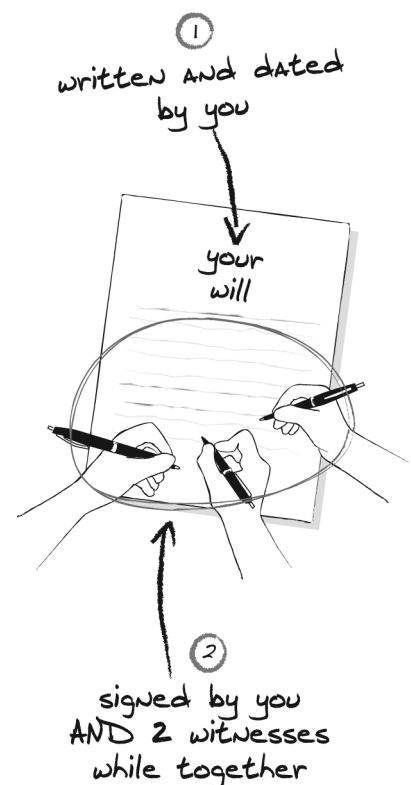


QUESTION 5: What makes a valid will?

The requirements of a will are set out in the Yukon's *Wills Act*. Unless each of these requirements is met, your will is not **valid**, and you will be considered to have died **intestate** (without a will). In that case, your estate **assets** will be distributed among your relatives according to the law and not according to your wishes. (see *Question 3*)

The requirements for a valid Yukon will are as follows:

- Your will must be in a written or printed document and dated.
- You must sign your will (or have it signed on your behalf by another person in your presence and by your direction) at the very end. In most cases, any words written after your signature will not be considered part of your will.
- Your signature must be permanent (use ink not pencil).
- You must sign your will in the presence of two witnesses, present together when you sign. (In other words, three people are there when your will is signed: you and two witnesses.) See Sample Affidavit of Execution of Will in Appendix 4.
- The two witnesses must also sign their names on your will, in your presence and in the presence of each other.
- It is a policy that social workers/home care workers or other Health & Social Services employees are not authorized to act as a witness to the signing of a will or other document.
- If a beneficiary or a spouse of a beneficiary named in your will is a witness of your will, then any gift you make to them under your will is invalid.



There are different requirements for wills in other provinces and territories in Canada and other countries. You should consult a lawyer to ensure that your will is valid in the places where your property (especially land) is located. Your will must be valid in any jurisdiction where you own land in order to have your will apply to that land.

Handwritten Wills

The exception to the requirements for a will to be valid is a **holograph will** (meaning: handwritten).

A holograph will is written entirely in your handwriting and then signed by you. In the Yukon, a court will usually recognize a holograph will as valid even if it is not witnessed. Please note that holograph wills are not recognized in some parts of Canada, the United States and other countries. Holograph wills can create problems of uncertainty about when they were made and under what circumstances.

Will forms which are partially pre-printed and partially filled in by you are not holograph wills and must still meet the proper wills requirements (i.e. having two witnesses). If another person writes out a will and you sign it, that is not a holograph will. (see Question 6 “What about pre-printed forms or will kits?”).

Simply telling someone what your wishes are is not enough. If your will does not meet the requirements, it will not be followed in distributing your estate.

Avoiding Problems

In addition to the requirements listed above, there are other rules which you should follow to avoid potential problems:

- Do not alter or correct your will on the original paper after the will has been signed. (see Question 8: Can you change your will?)
- If you alter or correct the will while it is being signed, cross out the incorrect words and clearly write the changed wording. You and your two witnesses must initial every change in the presence of each other.
- There should be only one original will (bearing the original signatures) so that if you decide to destroy it in the future no other “originals” are mistaken for an existing valid will. You can make copies after the will is signed and witnessed, if you would like to do so.
- Your original will must be kept in a safe place, and you should tell your **executor** (the person you appoint in the will to carry out your instructions) where it is and how to obtain it. Some examples are a safety deposit box or personal safe. You may want to also provide a copy to your executor.
- When signing the will, you and the two witnesses should initial the bottom of each page that comes before the signature page so there is no question of pages in your will being replaced after the original was signed.
- Lawyers usually have at least one of the two witnesses swear and sign an Affidavit of Execution of Will (a sworn statement) stating they saw you sign your will in the presence of each other. Your will must be proven to have been properly signed, and the affidavit, signed at the time your will is signed, is the easiest way to do this. You will need to have a notary or a lawyer notarize the Affidavit.
- If your will is contested, it is helpful if your witnesses can be located to give more evidence about your mental capability, intention and freedom from undue influence when your will was made. You should choose witnesses who are reliable adults and can be located later if necessary.

Example 1: The improperly signed will

Harold lives out of town. He is close to his neighbours, Jim and Jennifer. One night he asks them to come over to witness his will. Jennifer comes at 7:00. Harold has his will typed out, and he signs it in front of Jennifer, who also signs and then goes home. Jim is cutting firewood and comes over at 9:00. He signs the will too.

Because Jennifer and Jim did not sign the document at the same time and did not both see Harold actually sign the will, the will is not validly signed and witnessed.

Example 2: The handwritten will

Harold decides he wants to do a will, but his writing is bad and he doesn't like typewriters. He gets Jennifer to write up a will for him. Jennifer writes down exactly what Harold says. Then Harold says that he wants to read through the will before signing it. Jennifer goes home, and later that night Harold signs the will with no one witnessing it. The will is handwritten, but not by Harold.

The will is not witnessed when Harold signs it. The will is therefore not a holograph will and it is not validly signed and witnessed.



QUESTION 6: What about will kits or forms?

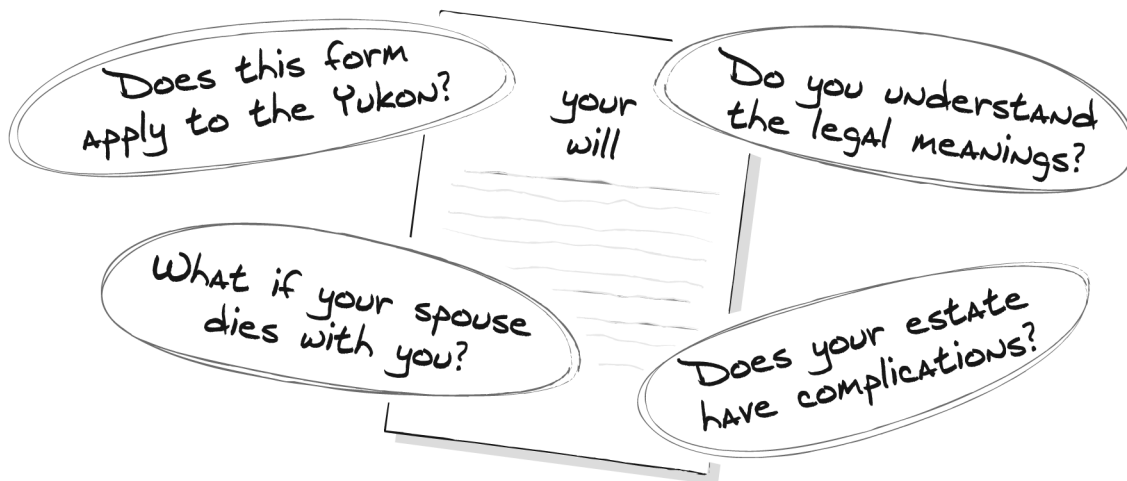
Will forms, also known as will kits, can be used to prepare a valid will. However, some frequent problems can arise with will kits.

Here are some examples:

- It can be difficult to fill in the blanks with words that are clear enough for a court and/or your survivors to know what you meant. Many words in common use today have a different meaning in law. For example, the word “money” does not include RRSPs, term deposits or Canada Savings Bonds. Words such as “personal possessions,” “family members” and “spouse” are words that mean different things to different people, and sometimes the legal meaning is different than what you might mean. This can create confusion or lead to arguments.
- Forms and kits are generally designed for use in places other than the Yukon (for example, in Ontario or British Columbia). Laws of inheritance, laws about family responsibilities and legal requirements for valid wills vary from one jurisdiction to another. In particular, wills laws in the Yukon are very different from British Columbia. Therefore, even if you follow the instructions of the kit, you cannot assume the document will be appropriate for use in the Yukon.
- Often, what the kits and forms do not say is as important as what they do say. If you have not considered all possible facts that might exist when you die, a serious problem could arise.

Example 1: Mario's use of a wills kit

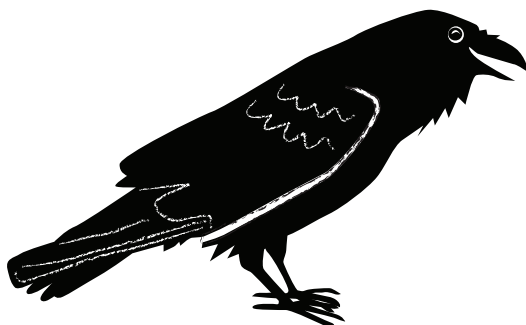
Mario buys a wills kit and begins to fill it out. He thinks it will be straightforward. He leaves his house and land to his wife, Mary, and then to his "issue". Mario means his sons with Mary, who are 12 and 10, but he also has a daughter from a previous relationship, who he doesn't know very well and isn't in contact with much. He leaves his trapline to his brother, Ray, in Vancouver. He leaves his business to his other brother, Jeff, to even things out between his brothers. Mario and Mary die at the same time. His children with Mary are too young to legally own land, and Mario has not named a Trustee to take care of the land until his children are old enough to own it. His daughter from the prior relationship (also Mario's "issue") demands the property be sold so she can get her share. His brother is not a Yukon resident and cannot actually own the trapline. The children's guardian challenge whether Ray should get the cash value of the trapline or if it should go back into the estate, to the children. Jeff gets his gift of the business without a problem, which seems unfair to Ray. The will kit did not cover all the issues that Mario's estate might have, and now there are problems for his family to try to sort out the difficulties left by the will.



Example 2: Betty's assets

Betty runs a construction business. She owns a big property, and she uses most of the property to operate the business. She lives in an apartment above the main office. Betty finds out she has an illness and decides to do a simple will using a form she found online. She leaves her shares in the business to her business partner, Gary, and the rest of the estate to her brother, John. Betty thinks this should be fair, but hasn't really done the math. The property is in her name, not the business. Some of the equipment is owned by Betty personally, but is used by the business. Betty's bank accounts are confusing, and she uses a business credit card for personal trips. Betty also hasn't done taxes for the last 5 years. Gary and John start to argue about the will and what Betty meant to leave to each person. Betty may have created a bigger problem for the estate by not discussing these issues with a lawyer, who might have advised to start sorting out the business and personal assets and debts before Betty died.

Lawyers are trained to reduce the possibility of problems arising by identifying possible issues and using language that has a precise legal meaning. Because of training and experience, a lawyer will raise many ideas that may not occur to you if you are writing your will for the first time. For this reason, a lawyer may be able to assist in will preparation that covers issues or possible situations that a do-it-yourself will does not address.



If you do make your own will, either from a kit or by yourself, it is a good idea to have a lawyer review it.

QUESTION 7: What should you put in your will?

If you make your own will, it should follow a standard format, which is discussed below. If you have more complicated issues, you may need a lawyer to write your will so it meets your needs and the legal requirements.

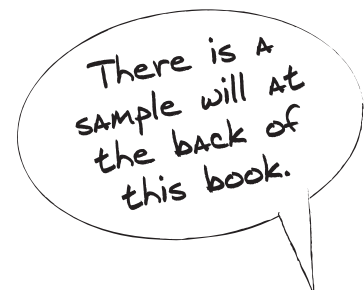
While a lawyer may be helpful for all people making a will, here are some examples of situations that might require a lawyer to help make a will:

- Karen received a big inheritance five years ago. She still lives in a modest way and doesn't think of herself as "rich" but she has a large estate with money and assets in various sources;
- Margaret has a modest estate, but wants to leave gifts to many different people and to set up a charitable foundation for nursing students;
- Greg has two grown adult children, and has now had three other children with his second wife, Jenny. They also take care of two foster children, and Jenny's elderly mother lives with them;
- Donald is a shareholder of a company. There are five other shareholders in the company and he wants to make sure the company buys his shares from his wife, who is the beneficiary of his estate;
- Marie has a son who is still in high school, another son who is earning a good salary as a teacher, and a daughter who is dealing with addictions issues. She wants to leave her estate to her children, but wants to make sure her daughter's share is protected from her spending it unwisely, and also that her younger son has money for college;
- Michael and Molly have three adult children who are self-sufficient and a disabled adult child who lives with Michael and Molly and will need care for his whole life.

STANDARD FORMAT

Most wills follow a standard format.

1. Declare who you are and your intention that this document is your last will.
2. Say that previous wills and **codicils** (documents created to change a previous will or wills) are revoked or cancelled by this new will.
3. Name a person as your personal representative (**executor**). The executor is the person who deals with paying debts and taxes and transferring your assets according to your will. The executor may be a beneficiary, and you may choose more than one person as executor. You should also name an **alternate executor** in case your first choice is unable to act.
 - A good executor is someone familiar with how you handle your affairs, who lives close by, and who has the time, ability and willingness to do the work and can manage your estate for a long period. Sometimes it takes months or years to settle depending on the complexity of your estate.
 - Once an executor holds assets and money on behalf of the estate, the executor becomes the trustee of the estate. A **trustee** might hold the estate assets only until taxes and debts are paid, and then distribute the estate or for a longer term trust, discussed below.
4. You must state in your will what property is to be given to your beneficiaries. What you give under a will is sometimes called a **bequest** or a gift. You can leave specific items or amounts of money to named individuals, or to classes of people (such as “all my nieces and nephews”).
5. It is very important to mention what is to be done with all the property which is left over after these specific bequests. This property is known as the **residual estate, or residue**.



6. If you have a beneficiary who is under 19 or a person with a disability who requires on-going help, you should make a trust for that beneficiary's gift under the will. You will appoint a trustee to handle the assets on the specific terms of the trust. This trustee may be the same person as your executor or could be a different person.
7. If you intend your executor to have special authority or power to deal with some of your assets, you must say this in your will. For example, you might want your executor or the trustee to take advantage of income tax reducing laws, or to decide when certain assets should be sold, or if certain assets should go to a beneficiary as-is, without being sold.
8. You can appoint a guardian for your children in the will. This appointment does not override the law or existing custody arrangements between you and the children's other parent. For example, if a mother's will appoints a guardian for her children, but the children's father already has custody of the children, then the father will continue to have custody. Although this is an expression of your heartfelt wishes, the court has ultimate authority to appoint a guardian for any child.
9. You may choose to set out in your will your preference for burial or cremation or a particular type of funeral or memorial service. It is also a good idea to let your wishes be known to your family before you die, since your will might not be read until after the funeral. Your executor is legally responsible for disposing of your remains, and will normally want to carry out your wishes. However, your executor is not legally bound by the wishes you express about your burial, cremation, type of funeral or memorial service in your will.
10. Your signature and the signatures of your two adult witnesses are required at the end of the will.

If you have minor or disabled beneficiaries or if you intend to create special trusts, it is strongly recommended you discuss your will with a lawyer, as the rules for trusts are specific and go beyond the information in this booklet.

QUESTION 8: **Can you change your will?**

You can change or cancel (revoke) your will at any time before you die, if you are mentally capable to do so.

To change your will, you must either write a whole new will or make a **codicil** (a change to a specific section) to attach to your original will. Do not write the changes on your original will. This creates a question as to whether the changes were properly witnessed and signed, and it might lead to the will (or parts of it) having no legal effect.

A codicil must meet the same legal requirements for validity as the original will. It must be signed with the formalities set out in the *Wills Act*. The witnesses may be different from the witnesses who signed your original will. Because of the confusion that can arise from a codicil, you must ensure that you attach the codicil to the will so they are always together. You should seek legal advice about preparing a codicil properly.

To intentionally cancel your will, you must do either of the following:

1. You can choose to write and properly “execute” (meaning to date, sign and have properly witnessed) a new will (which then has the effect of invalidating your former will). You should say in the new will that you are revoking all previous wills, so it is clear you are totally replacing your former will, and not simply changing part of it.

OR,

2. You can deliberately destroy the existing will with the intention of revoking it. This is best done in the presence of a witness or with some other evidence that you have done this act on purpose. It is possible for your survivors to bring forward a photocopy of the original (now destroyed) will to court and try to prove that although the original was not found, the court should treat the copy as if it were your final, valid will. A witness to your destroying it, or a note, signed by you and indicating you destroyed it, is a good way to avoid this.

Marriage voids a will

There is one other event which will invalidate your existing will. Yukon law states that a will becomes void (cancelled) if you marry after it is made, even if it was not your intention to change anything about the previous will after your marriage. The only exception is if you say in your will that you are making the will in contemplation of your marriage.

Separation and divorce

Your entire will is not automatically cancelled upon separation or divorce. The *Estate Administration Act* says that separation or divorce might have an effect on your will, but the parts of your will which do not relate to your former spouse remain valid.

If you are separated or divorced and your former spouse is still included in your will, you should complete a new will if you do not want your former spouse to be involved in your estate. Likewise, if you are separated or divorced but still want your spouse to benefit from your estate, you should complete a new will showing that is what you want.

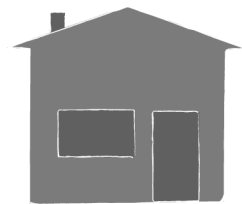
QUESTION 9: **What can't you give away in your will?**

Some assets cannot be given away in a will. The law is clear that only property which is owned by the deceased at the time of death can be transferred to another person by a will. The following are some types of property that cannot be disposed of by a will:

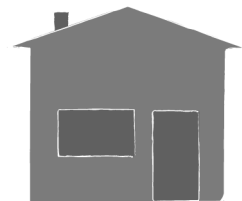
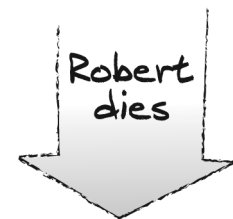
1) **Jointly owned property**

If you own a property with more than one other person in a **joint tenancy**, normally you cannot give away your interest by will. Joint tenancy means that if one owner dies, the surviving joint tenant(s) receive the deceased person's interest in the property. Examples of joint tenancy ownership are a joint bank account or a house registered in joint tenancy. The moment one joint tenant owner dies, the property is no longer "owned" by that person and that person's estate does not have any ownership rights to it. The surviving owner or owners now own the entire property. For this reason, in your will, you cannot leave your share in a joint tenant asset to another person.

There are exceptions to the rule that a joint tenancy goes to the survivor. One such exception has been created by banks, where some banks have joint accounts where two people can sign on the account, but the account does not have a right of survivorship. Another exception has been created by courts, where the Supreme Court of Canada has said that in some cases, if it is not clear a person meant their property to go to the surviving joint tenant, the property will become a part of the person's estate.



house owned by
Shirley + Robert



house owned by
Shirley

Example: Joint Bank Account

George is widowed and has three children. His oldest son, Peter, lives in Whitehorse, and his two other children live in Calgary and Vancouver. Peter helps with George's banking, and the bank suggested making Peter a joint account holder. The money in the bank account is George's and Peter doesn't put his own money in the account. On George's death, Peter claims that the joint bank account goes to him as the surviving joint tenant. The law says that unless George stated clearly this is what he wanted, the bank account is a part of George's estate, and not Peter's.

The other type of co-ownership, sometimes called **tenancy in common**, is an ownership of a portion of a property (as opposed to 100% interest as is the case with joint tenancy). For example, this can include having a bank account which requires more than one signature for withdrawal, or registering a house in more than one name as "tenants in common." In this case, in your will, you have the right to give your share of such co-owned property to any other person. It is important to keep records during your life of the proportionate share of each person's ownership of such assets, so that after your death, the surviving owners and the personal representative of the estate can easily divide the shares.



2) Life insurance

If you have named a particular beneficiary on a life insurance policy, on your death the payment from the policy is paid directly to that person and does not form part of your estate. You can name your “estate” as a beneficiary of a life insurance policy, but if you do this, the insurance becomes a part of your estate. It can be used to pay debts and taxes owed by your estate before any amounts are paid to the beneficiaries named in your will. In most cases, you can change the named beneficiary of life insurance by saying clearly that is your intention in your will. It is best to seek the advice of a lawyer to do this.

You can also name a beneficiary on your Registered Retirement Savings Plan, Tax-Free Savings Plan or superannuation or other pension plans. The money or the plan will be transferred directly to that beneficiary and does not form part of your estate. Again, you can change the beneficiary by naming a new beneficiary of that plan in your will, but you should consult a lawyer about the best way to do this.

3) An interest in reserve land

On the date this booklet was published, the Minister of Aboriginal Affairs and Northern Development had the power to approve or disapprove the transfer of any person’s interest in reserve land. If you are a First Nations person who is governed by the *Indian Act*, (i.e. if you are not a citizen of a self-governing First Nation) it is possible for you to give your interest in reserve land to another person by your will, but the beneficiary of that interest must have a right to possess or occupy land on the reserve. If no right exists, the interest must be sold and the sale proceeds could then be paid to that beneficiary.

5) Life interests


If you were given a **life interest** (an interest that lasts as long as you live) or any temporary right to an asset, the right to that asset ends with your death. Therefore, you cannot give that interest by your will to another person, since you do not own that asset beyond your lifetime.

6) Other special interests in assets

Trapping concessions, outfitting concessions and non-titled land interests are special kinds of ownership rights that people may have through agreements with a government (such as the Yukon Government or a self-governing First Nation). While these interests might be valuable, they may not be easily given to another person by a will. The beneficiary of this sort of gift may need to have certain qualifications or meet certain requirements in order to own these rights. If you want to leave a trapline, an interest in an outfitting business, mining claims, a traditional cabin, or a land use application such as an agricultural application or a grazing lease to a beneficiary, you should speak to a lawyer, who can review your paperwork and give you advice. If you decide not to speak to a lawyer, you should discuss your plan with the government agency who gave the rights to you.

Example 1: Bob's trapline


Bob owns a trapline and he and his brother Frank like to go out on the trapline every spring. Frank has another trapline. Bob and Frank go to Frank's trapline in the fall. Bob makes a will and leaves his trapline to Frank. After Bob dies, Frank finds out that he is not legally allowed to own two traplines. The estate must either dispose of Bob's trapline or Frank must give up his trapline in order to take Bob's.



Bob should have discussed his will with a lawyer, with Frank and possibly with the Department of Environment to find out the trapline rules.

Example 2: Fred's agricultural land – not titled

Fred has agricultural land through a land lottery. He has to do certain work on the land in order to be able to apply for legal ownership. He builds a cabin and lives there but hasn't really started the clearing and work he needs to do. Fred leaves the land in his will to his two sisters. When Fred dies, his sisters discover that they will need to do a lot of work in order to get title. If they don't do any work and get title, the land goes back to the government. One sister wants to do the work and own the farm. The other sister says she wants to be paid half of what the farm will be worth. The sisters start to argue about the land because it is hard to value, and there is no actual ownership of the land in its present state.



Fred should have discussed his estate plan with a lawyer to find out more about the conditions on owning the land.

QUESTION 10: Are there other considerations?

Dependents

Under the Yukon's *Dependent's Relief Act* and the *Estate Administration Act*, the court may order that the estate assets be used to provide for a dependent person. A dependent person may include the deceased's husband or wife, common law partner, child under 16 or child with a mental or physical disability, or a family member who was dependent upon the deceased for three years prior to death. It may also include a former spouse or common law partner who was dependent upon the deceased for maintenance for three years prior to death.

The court's authority is not actually to change the will, but a court can order that the gifts under the will are not made until the obligations the deceased had to any dependents are dealt with. If you are making a will that does not adequately provide for people who are dependent on you during your lifetime, your estate may be challenged.

Dependent does not mean that the person cannot get by without any of the assets of the estate. Dependent, especially in terms of a spouse, means that the deceased and his or her spouse shared and benefitted from each other's contribution to their relationship. If you intend to make a will that might not make adequate provision for a spouse (married or common-law) you should discuss your estate plan with a lawyer.

Debts

When you make a will, you should have a clear picture of what your debts are and what your assets are. If you think you might owe more than your estate will be able to pay, it is important to discuss this with your executor and with a lawyer.

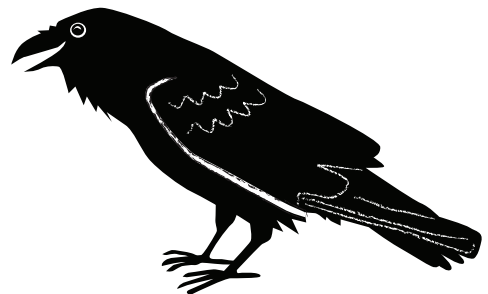
Former spouses

If you are involved in family law proceedings that have not been resolved at the time of your death, your estate may be responsible to finalize your separation and divorce before anything else can be done with the estate assets. Likewise, if you have an obligation to pay child support or spousal support, your estate might be responsible to keep paying that support, depending on the wording of your separation agreement or court order. If you are in this situation, you should consider discussing this with a lawyer before preparing a will.

Assets in places other than the Yukon

If you own land, bank accounts or other assets in a different jurisdiction than the Yukon, it is strongly recommended that you speak with a lawyer about your situation. The information in this booklet may not apply to assets outside of the Yukon, and the estates process is different in other jurisdictions.

There is a lot to think about when making a will but, done right, it will ensure that your estate is divided as you want.



APPENDIX 1: Choosing a lawyer

You can obtain the names of lawyers who prepare wills from the Law Society of Yukon. The society operates the Lawyer Referral Service for the public. The office, open during normal business hours, is located in Suite 202, 302 Steele Street (upstairs in the T.C. Richards Building). The phone number is (867) 668-4231 and the website is lawsocietyyukon.com.

In Whitehorse

For people in Whitehorse, the Lawyer Referral Service works this way:

1. Phone or visit the Law Society office to obtain the list of lawyers and a certificate entitling you to a half-hour consultation with one of the lawyers on the list for \$30 plus GST.
2. Make your own appointment with any lawyer on the list.
3. Bring the certificate with you to the appointment and you will be charged \$30 plus GST for the first half-hour consultation with the lawyer.
4. You are under no obligation to hire that lawyer. You may make whatever arrangements you wish with the lawyer for further work or advice on your behalf.
5. If you wish, you can get another certificate to obtain another opinion before deciding which lawyer to hire.

Outside Whitehorse

Yukon people outside Whitehorse can also use this service. Phone (867) 668-4231 collect and explain your legal question. The Law Society office worker will explain how you can use the Lawyer Referral Service.

Services offered

The service will not recommend a particular lawyer. You will be given the names of lawyers who practice wills and estates law and who have agreed to allow their names to be on the Lawyer Referral Service list.

Lawyers set their own rates for preparing wills, and the rates can vary widely. Expect to pay between \$300 and \$500 for a simple will. You can phone law firms and ask for their standard rates for wills before you choose which lawyer to hire.

Some lawyers will come to the hospital or go to a person's home if the person is too ill to go to the lawyer's office. If you have difficulty going to an office because of mobility or health reasons, ask your lawyer if he or she is willing to do this.

APPENDIX 2: LEGAL WORDS

ADMINISTRATION OF THE ESTATE The settlement and distribution of the estate of a deceased person by the estate's personal representative.

ADMINISTRATOR A person appointed by the Supreme Court of Yukon to handle the estate of a person who dies without a will or whose will does not name an executor. The administrator is the personal representative of the estate and has a fiduciary relationship to the creditors and beneficiaries of the estate. Sometimes a female administrator is referred to as an administratrix, but the term administrator applies equally to men and women.

ADVANCE DIRECTIVE A legal document which is dated and signed by an adult giving the person named in the document (called a "proxy") the authority to make health care and end of life decisions for the adult, if the adult becomes incapable of expressing his/her wishes. This is sometimes called a "living will". An Advance Directive is a part of an "Estate Plan" to appoint people to make decisions when you are not able to yourself.

ALTERNATE EXECUTOR A person appointed by a will to handle the deceased person's estate in the event the original executor is unable or unwilling to do so.

ASSETS The things that you own such as land, vehicles, artwork, bank accounts.

BENEFICIARY A person (including an individual, an institution such as a charity or a corporate body) who inherits property from a deceased person under a will, or under the intestate rules of the *Estate Administration Act* or the *Indian Act*. A beneficiary is also the person who is named to receive the proceeds of an insurance policy or a retirement or pension plan.

BEQUEST A gift of a specific item or amount of money under a will.

CODICIL A document created to change a will. It must be signed, dated and witnessed by two adult witnesses with the same formalities as a will.

COMMON LAW Defined for estates as living in a marriage-like relationship for more than 12 months before death'

DEPENDENT Refers to a situation where someone depends upon another for maintenance and support. The relationship of dependent persons to a deceased person is defined in the *Estate Administration Act* and the *Indian Act*.

ENDURING POWER OF ATTORNEY A written legal document which is dated and signed by an adult (called a donor) giving the person named in the document (the attorney) the power to act on behalf of the adult with respect to his or her property and/or finances; "enduring" means this power does not come to an end if the donor becomes mentally incapable of managing his or her own affairs.

ESTATE A general term used to mean all of the property owned (or interests held) by a person at the time of his or her death.

ESTATE ADMINISTRATION ACT (R.S.Y. 2002 C.77) Legislation passed by the Government of the Yukon in 2002, which describes how estates of deceased people are to be administered and who inherits if a person leaves no will.

ESTATE PLAN An overall plan for what happens to your estate when you die or if you become incapable. The plan can include your will, insurance policies, enduring powers of attorney and advance directives, and reviewing how jointly owned assets are held.

EXECUTOR A person appointed by a will to manage the deceased person's estate, including arranging for the funeral, paying all debts and expenses, filing tax returns and transferring property to the beneficiaries. The executor is the **personal representative** of the estate and has a fiduciary (trust) relationship to the creditors and beneficiaries of the estate. Sometimes a female executor is referred to as an executrix, but the term executor applies equally to men and women.

FIDUCIARY Someone who is in a special position of trust, confidence and responsibility for another person or persons. An executor has a fiduciary duty to act for the benefit of the beneficiaries of an estate, to avoid conflict of interest and not to profit at the expense of a beneficiary.

GRANT OF ADMINISTRATION (also called **LETTERS OF ADMINISTRATION**) An order of the Supreme Court of Yukon appointing a person to administer the estate of a deceased person who died without a will, or who died without naming an executor in the will. This order declares that the person named administrator is authorized to administer the estate without further proof of his or her authority.

GRANT OF PROBATE (also called **LETTERS OF PROBATE**) An order of the Supreme Court of Yukon confirming that: (a) the will is valid; and (b) the person named as executor in that will is authorized to administer the estate of the deceased person without further proof of his or her authority.

GUARDIAN A person appointed by the court to make decisions on behalf of someone who is not mentally capable of making his or her own decisions or managing his or her own affairs.

HOLOGRAPH WILL A will written entirely in the handwriting of the deceased and signed by the deceased.

INTESTATE A person who dies without a will is said to die intestate.

ISSUE The direct descendants of a person, including children, grandchildren, great-grandchildren, and so on.

JOINT TENANCY A type of co-ownership of property by more than one person, when there is a "right of survivorship." Each owner holds an equal interest in the entire property. On the death of an owner his or her share or "interest" in the property passes to the surviving owners. See the definition for "tenancy in common" which is a different kind of co-ownership.

LETTERS OF ADMINISTRATION See "grant of administration."

LETTERS OF PROBATE See “grant of probate.”

LIFE INTEREST An interest in a property that only lasts as long as you are alive. A person who holds a life interest in a property cannot dispose of the property in his or her will.

LIVING WILL see “advance directive”

MENTALLY CAPABLE A person’s ability to make decisions that may have legal or other consequences. A capable adult must be able to understand information and appreciate the consequences of decisions. “A judge can declare that an adult is incapable, based on evidence. A person may be incapable of some decisions or types of decisions. For example, a finding of incapacity may be limited only to financial matters or a particular subset of personal care decisions.” (From *A Practical Guide to Elder Abuse and Neglect Law in Canada*, January 2011, Canadian Centre for Elder Law, B.C. Law Institute, UBC.)

PASSING ACCOUNTS This is the process by which a personal representative or a trustee brings an accounting to the Supreme Court for review and approval. This is not necessary if all beneficiaries or other parties with rights in an estate agree to the accounting.

PER STIRPES A type of distribution that results in a beneficiary’s share being transferred to the beneficiary’s issue if the beneficiary dies before the maker of the will dies. This distribution is alternative to the beneficiary’s share being divided amongst only the other named beneficiaries under the will (called per capita). For example, if the maker of the will leaves all of his or her property to his or her issue (three children, A, B and C) per stirpes, but C dies before the maker of the will, then C’s one-third share is to be divided amongst C’s issue rather than being split between A and B. The presence or absence of this technical term and the way in which it is used in a will has very significant consequences and it is wise to seek a lawyer’s advice about its use.

PERSONAL REPRESENTATIVE This is the person with legal authority to administer the estate of a deceased person. The personal representative is the executor if appointed by a will or an administrator if appointed by the court (where there is no valid will, or no executor was appointed in the valid will). If a person is still alive but incapable of managing his or her affairs, a guardian may be appointed as a personal representative.

PROBATE The process of proving a will by filing the will and other necessary documents in the Supreme Court of Yukon to establish that the will meets all legal requirements, and is the last will of the deceased.

PROPERTY A general term used to mean everything owned by a person. This includes real property (land and buildings) as well as personal property (all other assets, such as money, investments and moveable items).

PUBLIC GUARDIAN AND TRUSTEE A government-appointed official authorized by law to act as the personal representative of a deceased person who dies without a will, if no competent Yukon relative or creditor applies to the court to act as administrator. The Public Guardian and Trustee cannot be ordered to act and it is at the Public Guardian and Trustee's discretion whether it will handle an estate.

RESIDUAL ESTATE Property remaining in the estate after debts and taxes have been paid and special bequests have been distributed to designated beneficiaries. Also called the residue, or remainder.

RESIDUARY BENEFICIARIES The beneficiaries who are to receive all the property remaining in the estate (the residual estate) after debts and taxes have been paid and bequests have been distributed. Also called "remaindermen".

TENANCY IN COMMON A type of co-ownership of property by more than one person with no "right of survivorship" for the remaining owners after one of the owners dies. This means that the deceased person's share in that property is part of the deceased person's estate, and can be transferred or given to a beneficiary in a will or by the laws of inheritance. See also the definition for "joint tenancy," which is a different kind of co-ownership.

TESTATOR A person who makes a will. Sometimes a female testator is referred to as a testatrix, but the word testator properly applies equally to men and women.

TRUSTEE A person who holds property on behalf of another person. An executor is a trustee because he or she holds the property of a deceased person in trust for the beneficiaries and creditors of the deceased. A trustee is also the name for a person who is required to manage a child's inheritance or the inheritance of any person who is not to receive his or her part of the estate for some time.

APPENDIX 3: SAMPLE WILL

This sample will was prepared as a project of the Continuing Legal Education Society of British Columbia in 1992. It involved a team of wills lawyers and plain language experts who developed and tested the will. Our thanks to C.L.E.S. Plain Language Project for permission to include it here.

Readers are cautioned that every will is unique, and a lawyer's advice is always preferable.

LAST WILL OF PETER JOSEPH JONES

LAST WILL

1. This is my last will. I am Peter Joseph Jones, of 5555 West Water Street, Vancouver, British Columbia.
2. I cancel all my former wills and testamentary dispositions. Testamentary dispositions include all gifts I have made in the past that would have taken effect on my death.

APPOINTMENT OF PERSONAL REPRESENTATIVE

Executor and Trustee

3. In this will I refer to the person who is both the Executor of my will and the Trustee of my Estate as my "Trustee."
4. I appoint my wife, Genie Jean Jones ("Genie"), to be my Trustee. If Genie:
 - (a) dies before me,,
 - (b) refuses to act or cannot act as Trustee,
 - (c) refuses to or cannot continue to act, or
 - (d) dies before the trusts in this will are completed,then I appoint my brother, Barton Louis Jones, to be my Trustee.

Guardian of my children

5. If Genie dies before me, I appoint my sister, Hope Ina Jones, to be the guardian of my children.

ADMINISTRATION OF MY ESTATE

Trustee to administer my Estate

6. I give my Trustee all my property of every kind and wherever located (my “Estate”) to administer as I direct in this will. In administering my Estate my Trustee may retain or convert my Estate as set out in paragraph 16 of this will.

Debts to be paid from my Estate

7. I direct my Trustee to pay out of my Estate:

- (a) my debts,
- (b) my funeral and other expenses related to this will and my death, and
- (c) all duties and taxes that must be paid in connection with my death.

My Trustee has the authority to prepay or delay payment of any of the duties or taxes.

Special gifts

8. If my brother, Barton Louis Jones, survives me, I give to him:

- (a) my 1925 Hardy fishing reel, and
- (b) my Champion boat, named the Black Fish.

If Barton dies before me, I give this reel and boat to my friend, Dave Brown, if he survives me.

Remainder of my Estate to Genie

9. I give the remainder of my Estate to Genie if she survives me for at least 30 days.

Estate in trust for my children if Genie has died

10. If Genie does not survive me, I direct my Trustee to hold the remainder of my Estate in trust in equal shares for my children who are alive at my death.

Estate in trust for my child’s descendants if my child has died

11. If any child of mine dies before me but leaves descendants alive at my death, the descendants will stand in place of my deceased child and will take that deceased child’s share of the remainder of my Estate in equal shares per stirpes.

The term per stirpes means that my Trustee will divide the share among those descendants of my deceased child equally according to the branches of the family, and not equally according to the number of persons.

My children who are 25 years or more

12. If a child of mine is alive at my death and is at least 25 years old, I direct my Trustee to give that child his or her share of my Estate outright.

My children who are under 25 years

13. I direct my Trustee to set aside the share of each child of mine alive at my death who is under 25 years old, and to invest each share on these terms:
 - (a) Until the child is 19 years old, my Trustee may pay as much of the income or capital of that child's share as my Trustee decides to, or for the benefit of, that child. My Trustee may pay these amounts to that child's parent or guardian, or may otherwise use the amounts for that child's benefit. I direct my Trustee to add any unused income to the capital of that child's share.
 - (b) When the child is 19 years old and until he or she is 25 years old, I direct my Trustee to pay to that child the income from his or her share. My Trustee may also pay as much of the capital from that child's share as my Trustee decides until that child is 25 years old.
 - (c) When that child is 25 years old, I direct my Trustee to give the rest of the capital of that child's share to that child.
14. If any child of mine dies before age 25, I direct my Trustee to hold the rest of that child's share as follows:
 - (a) If a child dies before he or she is 25 years old but leaves descendants alive at that child's death, I direct my Trustee to hold the rest of that child's share in trust for those descendants in equal shares per stirpes.
 - (b) If a child dies before he or she is 25 years old and leaves no descendants, I direct my Trustee to hold the rest of that child's share in trust in equal shares per stirpes for my descendants who are then alive.
 - (c) If any child of mine is under 25 years old and becomes entitled to some or all of the share of a deceased child of mine, I direct my Trustee to add that share to the share my Trustee already holds for that living child. My Trustee will hold the share of the deceased child on the same terms as apply to that living child's original share.

Others who are under 19 years

15. If a person other than a child of mine is under 19 years old and becomes entitled to any share in my Estate, I direct my Trustee to invest that share on these terms:
 - (a) My Trustee may use as much of the income and capital as my Trustee decides for the benefit of that person until that person is 19 years old;
 - (b) My Trustee may pay these amounts to that person's parent or guardian, or may otherwise use the income and capital for that person's benefit;
 - (c) I direct my Trustee to add any unused income to the capital of that person's share and then to pay the capital to that person when he or she is 19 years old.

POWERS OF MY TRUSTEE

To convert or retain

16. When my Trustee administers my Estate, my Trustee may convert my Estate or any part of my Estate into money, and decide how, when, and on what terms to convert it.

My Trustee has the separate power to retain my Estate or any part of my Estate in the form it is in at my death for as long as my Trustee wishes, even for the duration of the trusts in this will. My Trustee's power to retain any part of my Estate in the form it is in at my death applies even if there is a debt owing on my property or even if the property retained does not produce income.

To invest my Estate

17. My Trustee may invest my Estate as my Trustee decides and is not limited to investments authorized by law for trustees.

To manage real estate

18. As long as any real estate forming part of my Estate is unsold, my Trustee may manage the property generally, and my Trustee may:
 - (a) rent the property for any period of time and on any terms that my Trustee decides,
 - (b) accept cancellations of tenancies and leases,
 - (c) spend money for repairs and improvements,
 - (d) give options to purchase or lease, and
 - (e) subdivide.

To employ agents

19. My Trustee may employ agents or qualified advisers to give advice or services for my Estate, and my Trustee may pay the fees and expenses of these advisers from either the income or the capital of my Estate. These advisers may include real estate agents, lawyers, accountants, counsellors and consultants.

To borrow money

20. In carrying out the trusts in this will, my Trustee may borrow money by placing a mortgage or other charge on my Estate. My Trustee has the power to sign all necessary documents to do this. My Trustee may pay the normal rate of interest to the person who has loaned the money, even if that person is a Trustee or beneficiary of my will.

To allot my Estate

21. In this will I have directed my Trustee to divide my Estate into shares. When my Trustee distributes my Estate, my Trustee may allot any item that forms part of my Estate to any share or portion of a share. To do this, my Trustee may place a value on that item, and whatever value my Trustee decides upon will be final and will bind everyone interested in my Estate.

OTHER MATTERS

Trustee’s fees in addition to gift

22. My Trustee is entitled to a fee for acting as Trustee in addition to any gift or benefit I give to my Trustee under my will or under any codicil to it. A codicil is a legal addition or change to this will.

Headings

23. The headings in my will are for convenience only and do not form part of my will.

I have signed my name to this will on _____
date

Signed by Peter Joseph Jones as his last will in the presence of us, both present at the same time. We have signed our names as witnesses to this will at the request of Peter Joseph Jones and in his presence, and in the presence of each other.

Peter Joseph Jones

Witness #1:

Printed name _____ Signature _____

Address _____ Occupation _____

Witness #2:

Printed name _____ Signature _____

Address _____ Occupation _____

APPENDIX 4: Sample Form - Affidavit of Witness

According to the *Wills Act*, a person making the will (the “Testator”) must sign his or her will in front of two witnesses (see Question 5). After the Testator dies, the will may be used to apply for a grant of probate from the court. The judge who reviews the application may want to have proof that the two witnesses were there at the same time, and both witnessed the Testator signing his or her will. To give that proof to the court, it is recommended to have one of the witnesses also sign a document called an Affidavit of Execution of Will. An Affidavit is a sworn statement, made before a notary public. Generally, the Affidavit must state that Witness 1 was present, along with Witness 2, and saw the Testator sign the document, after which Witness 1 and Witness 2 also signed the document, in front of the Testator. The Affidavit can also state that Witness 1 personally knows or was introduced to the Testator, that Witness 1 believed that the Testator was 19 years or older, and that the Testator had read over the will and knew what he or she was signing.

Example situation:

Mary has decided to do a will. She has the will all ready, and calls her friends, Verna and Louise, who live in the same building to come over for tea. While they are there, she produces the will, explains to her friends she wants to sign it, and then she signs in front of them. Verna also signs, and then Louise signs. Verna takes the Affidavit of Execution of Will to a notary public, and signs an oath that:

- she was present, with Mary and Louise;
- she saw Mary sign the will, in her presence and in the presence of Louise;
- she knows Mary;
- she and Louise signed the will as witnesses in front of Mary;
- Mary appeared to understand what she was signing; and
- Mary is 19 years of age or older.

By completing the Affidavit of Execution of Will, there is less likelihood of any person contesting whether the will was actually signed by Mary, or whether the formalities of the signing were properly followed.

CANADA

YUKON TERRITORY

TO WIT:



AFFIDAVIT OF EXECUTION OF WILL

I, _____, of _____, in
(full name of witness #1) (town/city)

_____, _____, MAKE OATH (OR
(province/territory) (occupation)

SOLEMNLY AFFIRM) AND SAY AS FOLLOWS:

1. My name, address and occupation are correctly set out above.
2. Attached to this Affidavit is the Original Last Will and Testament of _____, who is referred to in this Affidavit as the Testator.
(name of will maker)
3. I know the Testator, or I have been introduced to the Testator.
4. On the ____ day of _____, 201__, I was personally present and witnessed the signing of the Will by the Testator, who signed his/her name at the end of the Will.
5. The Will was signed by the Testator in the presence of _____, of _____ in
(full name of witness #2) (town/city)
_____, and me. We were both present at the same time.
(province/territory)
6. _____ and I signed the will as witnesses, in front of
(full name of witness #2)
the Testator.
7. Before the Testator signed the Will, it was read over by him/her and I believe that the Testator understood it.
8. The Testator is 19 years of age or older.

SWORN (or AFFIRMED) BEFORE ME
at _____, in Yukon, this
____ day of _____, 201__.

A NOTARY PUBLIC in and for the
Yukon Territory

Witness:

(sign and print name)



Yukon Public Legal Education Association

J-FLIC, 2134-2nd Avenue, Whitehorse Yukon, Y1A 5H6

Phone: 867-668-5297 or toll free 1-866-667-4305

E-mail: ypleayt@gmail.com • Website: www.yplea.com