Wolastoqey
Tribal Council Inc.

New Brunswick Law Foundation
Fondation pour le droit au Nouveau-Brunswick

MAKING A WILL

A **will** is a legal document that states who will receive your property after you pass away. The property you own at the time of your death is called your **estate.**

There are different rules around wills and estates, depending on your situation. Generally:

- If you are a Status Indian who lives on a reserve or on Crown lands at the time of death, federal rules under the *Indian Act* and *Indian Estates Regulations* will apply.
- If you are not a Status Indian or you are living off reserve or on private lands at the time of death, the New Brunswick **(NB)** *Wills Act* will apply, or the NB *Devolution of Estates Act* if you die without a will **(intestate).**

The term "Indian" is not an appropriate contemporary term; however, it remains a defined legal term in the Indian Act. We use it only when necessary to reflect the statute.

This document is not legal advice. Please speak to a lawyer for specific advice on your situation.

This document reviews common issues to consider when creating a will.

The key difference between provincial rules and the *Indian Act* is that under the *Indian Act*, the Minister of Indigenous Services Canada **(ISC)** has a lot of power over wills. Importantly, the Minister must approve the will, before any money or property can be distributed to anyone named in the will. The Minister is also in charge of confirming who is responsible for dealing with the will (or appointing someone to deal with the estate if there is no will).

It is also important to note that there are some differences in how assets on reserve can be dealt with in wills. For instance, the right to possess reserve land (e.g. under a Certificate of Possession) can only be given to another band member. This document will review some key differences below, where applicable.

Why Should I Make a Will?

Although having a will is not mandatory, it is a good idea to have one. Through a will, you get to decide things like:

- Who gets your property (also known as your **beneficiaries**);
- Who carries out your wishes and distributes your estate after you die (also known as an **executor**);
- Who will be a guardian for your children under age 19 (subject to court approval).

Having a will can save time, money, and help avoid confusion after your death. It is important to make a will as early as possible, especially if you have children, to ensure they are taken care of after your death.





What Can I Do in My Will?

Give Specific Property to Certain People

In your will, you can leave your property to people, organizations, or charities and may include things like:

- Money;
- Real estate;
- Vehicles;
- Jewelry;
- Furniture;
- Art;
- Points from reward programs;
- Pets and livestock.

Consider if you have already chosen who will inherit the property in a different document, outside of the will. These documents could include:

- A pension plan;
- Life insurance;
- Registered retirement savings plan;
- Bank accounts, credit union accounts, or other investment accounts.

For example, a life insurance contract may ask you to name someone to receive the benefits (beneficiary) of that contract if you pass away. The life insurance would go directly to that person when you pass away. It would **not** be included in your estate and would not be addressed in your will.

You can also name your estate as the beneficiary in the contracts for those properties. They would then become part of your estate and be distributed according to your will.

You can decide whether to give specific gifts (e.g. a certain amount of money or a particular heirloom) or a general type of property to a specific beneficiary.



Limits

Before any of your beneficiaries are paid, **your estate will be used to pay off your debts** (e.g. funeral expenses, costs of administering the estate, taxes, bills, etc.). Your beneficiaries will only receive what is left over after these debts are paid.

You may have a **legal duty to provide for dependants** in your will. If you do not provide enough for them, your dependants may seek more than what is in your will. Under the NB *Provision for Dependants Act*, for instance, a dependent spouse, child, or parent could go to the court to increase the amount they receive from your estate. Under the *Indian Act*, the Minister of ISC may say your will is invalid if it "would impose hardship" on people you had a responsibility to provide for.[1]

Different rules apply to property that is **jointly owned** by someone else. You should seek legal advice on how to deal with jointly owned property in your will.

If you have the right to possess certain reserve land (i.e. as set out in a Certificate of Possession), you may gift this right in your will (with the approval of the Minister of ISC). However, you can only give this right to another member of your First Nation. If you live in a home on reserve with your spouse, they may have certain rights to the house after you pass away, under the *Family Homes on Reserves and Matrimonial Interests or Rights Act* **(FHRMIRA).**

For more information about housing on reserve, please see the *On-Reserve Housing: What You Need to Know* document.

For information on matrimonial interests and rights on reserve, please see the *Matrimonial Property Rights on Reserve* document.

[1] *Indian Act,* s. 46(1)(c).

Set Up a Long-Term Arrangement for Dependants

Guardianship

If you have minor children (under the age of 19), you should consider naming a guardian. This is to protect your children if you and your spouse die at the same time.

Being a guardian is a big responsibility. You should talk to the person you want to appoint as a guardian before naming them in your will. You should also name an alternate guardian in case the first one cannot or does not want to be a guardian after you pass away.

Trusts

You can also set up a trust to decide how your beneficiary will get their property. In a trust, a person you choose (a **trustee**) will manage the property for another person in a way that is beneficial to them. For instance, for a child, you might set up a trust to invest certain funds, which will be given to them when they reach a certain age. A trust may also help a dependant with a disability receive property from the estate, while still qualifying for government benefits.

There are various benefits to using a trust, including income tax advantages. You should seek legal advice if you wish to set up a trust.

Choose an Executor

You can choose a person or a trust company as your executor. Generally, an executor is responsible for:

- Arranging your funeral;
- Finding the original copy of your will;
- Apply to the court (also known as **letters probate**) or to the Minister of ISC for official recognition to act as an executor, if necessary;
- Making a list and taking control of your estate;
- Paying your taxes, bills, and other debts from your estate;
- Distribute your remaining estate according to your will.

An executor has a critical role.
The job requires time, paperwork, and diligence. So, when choosing an executor, consider who you trust and their ability to get the job done.

You should confirm that your proposed executor will accept the position. They are not required to take the role, even if you name them in your will. You should also consider appointing an alternate executor, in case your first choice ultimately cannot or does not want to do the job.

Executors have a right to be paid for their services. If you agree with your executor that they do not need to be paid, you should say this in your will.

For more information, visit Choosing an Executor.





How Do I Make a Will?

Do I Need a Lawyer?

Technically, you do not need a lawyer to make a will. However, hiring a lawyer is the most common and safest way to make a valid will. A lawyer can advise you on:

- What you can and cannot include in your will;
- Legal duties to your dependants or spouse;
- Different options for achieving your goals;
- Tax implications of your will.

If you decide to use a lawyer to prepare your will, and you have Indian status and live on reserve, make sure your lawyer is aware of this before preparing your will.

Can I Use a Standard Will Form or Kit?

Many websites or stores sell standard forms or kits to create a will. You should consult a lawyer before using such forms or kits. These methods do not necessarily reflect the legal requirements for wills in NB. Your will may be partially invalid if it does not follow NB law.



What Should I Prepare Before Making My Will?

The Public Legal Education and Information Service of New Brunswick has a helpful checklist of things to prepare when making a will.

Other key documents and information include:

- A list of the full names and addresses of people you want to give things to;
- A list of all your property;
- A list of the full names and addresses of people you want to appoint as your executor, trustees, or guardians for your children;
- A list of any special wishes you have;
- A copy of your marriage certificate or separation agreements and information about where you were married;
- A copy of your previous will, if you have one;
- A list of general instructions about how you want to divide your property.

Where Should I Keep My Will?

Your will should be kept in a safe, fireproof place, such as a safety deposit box. There is only one original will, and your executor will need the original (not a copy) to deal with your estate. You should tell your executor and your family where to find the will.



What Are the Basic Requirements of a Will?

Generally, under NB law, the will must be in writing and signed by the **testator** (a person who makes a will). You must also acknowledge in the will that you signed in the presence of two or more witnesses, and those witnesses must confirm that on the will. Usually, you must be 19 years old and have capacity (i.e. be of "sound mind") to make a will.

There are a few limited cases where you can make a will under the age of 19; namely, if you:

- Are or have been married;
- Are a member of the Canadian Forces on active service;
- Are a member of any other naval, land or air force while on active service;
- Are a mariner or seaman when at sea or during a voyage.

The formal requirements for making a valid will under the *Indian Act* are slightly less than the provincial rules. The *Indian Act* simply requires that a will be in writing, be signed by the testator, and indicate the testator's wishes about how they want their property to be dealt with when they die. The will does not need to comply with provincial rules.

Having said this, the Minister, through ISC, must first approve the will before it can be carried out. The Minister may declare a will void in whole or in part if the Minister is satisfied with any of the following:

- The person who wrote the will was pressured to do so and not mentally sound.
- The will unfairly harms people that the will maker was support to support (i.e. dependants).
- The will tries to dispose of reserve lands in a way that is against the Band's interests.
- The terms of the will are too vague or uncertain.
- The terms of the will are against the public interest.

If a will is declared completely invalid, then it is as if the person never made any will. The persons estate will be dealt with as if they died without a will (e.g. intestate). If just part of the will is invalid, then only the gifts or property mentioned in the invalid part will be treated as it they weren't in the will.

Regardless of which laws apply, it is best to speak with a lawyer to ensure your will is valid.

How Do I Change My Will?

As a rule, you should review your will (with a lawyer if applicable) once every three to five years to make sure it still reflects your wishes. You may also wish to change your will immediately after big life events like:

- A change in your marital status (marriage, separation, divorce);
- A change in your family status (having a child, the death of family members);
- Moving to a new address;
- Getting a large or valuable piece of property (e.g. a house, jewelry);
- A beneficiary, executor, guardian, trustee, or someone else you have named in your will has passed away.

Under NB law, there are very specific rules around changing your will. The most straightforward way to change your will is usually to make a new will, with a statement revoking all previous wills.

The *Indian Act* does not have explicit rules around changing your will. Instead, the Minister has a lot of power to decide whether to accept any written document as a valid will or not.

In any event, you should speak to a lawyer before making any changes to your will, to ensure the validity of your changes.



What Happens if I Don't Have a Will?

If you pass away without a valid will, you will be considered intestate. Your property will be distributed according to the NB *Devolution of Estates Act*, or the *Indian Act*, depending on your situation.

These laws aim to distribute property in a manner that most people would typically choose. But these default rules may not reflect how you want to distribute your property.

For more information on what happens if you die intestate, you do not have Indian status, and do not live on a reserve, visit Dying Without a Valid Will.

If you have Indian status and live on reserve, there are different rules for what happens if you die intestate. One major difference is how the estate is distributed to a deceased person's spouse (including common-law spouses). The first $75,000 of a deceased person's estate will automatically go to the spouse. If the estate is worth more than $75,000, the amount above $75,000 will be divided between the spouse and any children.

If you wish to distribute your estate differently from the default rules under NB law or the *Indian Act*, it is important to write a will and ensure it is valid.

Resources

Visit the following links for additional information:

- Public Legal Education and Information Service of New Brunswick
  What Can You Put in a Will
- Public Legal Education and Information Service of New Brunswick
  How to Make a Will
- Public Legal Education and Information Service of New Brunswick
  Wills & Estates Overview

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