Terms and Definitions:

What is a "will"?

A will is a legal document that explains what a person wants done with things he or she owns after he or she dies.

What is an "estate"?

An estate is everything owned by the person who has died.

What is a "testator/testatrix"?

A testator is a person who makes a will. The female person is referred to as a "testatrix".

What is an "executor/executrix"?

The person who is named as being responsible for carrying out the instructions in a will is referred to as an "executor" when the person is male, or an "executrix" when is female.

What is an "administrator"?

An administrator is appointed by the Court, upon application of next of kin, if there is a will but it does not name an executor.

What is a "personal representative"?

This is a person or an institution that is given the authority to administer and distribute the estate of the deceased person. A personal representative is referred to as an executor or administrator.

What is a "beneficiary"?

A beneficiary is a person or organization who is given something in a will or is designated to benefit from a trust.

What is "probate"?

Probate is the process of proving that a will is valid and gives power to the personal representative of an estate to administer and distribute it.

What is a "grant of probate"?

A grant of probate is the document issued by the Supreme Court certifying that a will has been accepted by the Court as the last will and testament of the deceased and has been registered with the Court. The grant of probate also grants the executor the authority to administer and distribute the estate according to the instructions in the will.

What are "Letters of Administration"?

This is a document issued by the Court when a person dies without a will. Upon application by next of kin, the Court appoints an administrator to take control of the deceased's property and distributed it according to the law.

What are "Letters of Administration, C.T.A?"

This is a document issued by the Court when there is a will but the will does not name the executor. The Court appoints an administrator through a grant of Letters of Administration, C.T.A upon application of next of kin.

What are "Letters of Administration, D.B.N."?

This is a document issued by the Court when an administrator of estate dies or becomes incapable of continuing his or her duties prior to the completion of the administration.

What is an "intestate"?

An intestate is someone who dies without a valid will.

What is a "codicil"?

A codicil is an addition or amendment to a will. It must comply with the same technical requirements as the making of the original will.

What is a "holographic will"?

It is a will entirely in the handwriting of the testator. A holographic will does not need to be witnessed.

What is a "trust"?

A trust is created when property is held by a person or organization (the trustee) for the benefit of another person. See the *Trustee Act* in Newfoundland and Labrador for rules trustee must follow.

What is a "Caveat"?

A caveat is a document filed by any person who wishes to oppose the grant of probate or letters of administration, or wishes to be heard by the Court before a grant is made.

Making a Will:

Why should I make a will?

A will gives you some control over what happens to your estate after you die. You can know that your things will go to the people who you want to have them.

If you die without a will (an intestate), your estate will be divided amongst your living relatives according to provincial law, the *Intestate Succession Act*. This may mean that your possession will not go to the people that you want.

Is it worth it to make a will if I do not have very much money?

Making a will ensures that your loved ones are able to access what you do have, that includes possessions that may be of more sentimental than financial value.

If you do not have a will, your loved ones will need to apply for a grant of administration to access even a small estate. This process can be both expensive and time consuming.

What are the requirements for making a will?

In Newfoundland and Labrador the *Wills Act* sets out the requirement. Based on how the courts have interpreted the law there are additional requirements.

Here are some of the requirements:

- A will must be in writing to be valid. For example, typed or written by hand.
- A video tape or audio recording is not considered a valid will.
- The person making the will (the testator or testatrix) must be at least 17 years of age to make a will.
- The testator must make the will free from pressure from other people.
- The testator must have capacity.
- Most wills are signed by the testator/testatrix and two witnesses. The witnesses need to see you signing your will, and you must be present when the witnesses sign. The witnesses do not need to read your will.
- A holographic will does not need to be witnessed to be valid.

What does "capacity" means?

"Capacity" means that the testator or testatrix must understand what he or she is doing, must remember and understand the type and the amount of property being given in the will, and must understand that the will may be benefiting certain people and excluding others.

Who can be a witness?

One of the witnesses will be relied on after your death to prove that your will is valid. Therefore, it is a good idea to choose someone who will outlive you as your witness. A witness should also be mentally competent and old enough to understand a legally binding oath.

It is generally not a good idea to have a beneficiary or his or her spouse to be your witness, or else the gift to the beneficiary may not be valid.

What can I put in my will?

- **The Date**: If you have more than one will, the date will clarify which is the most recent will.

- **The Executor**: The executor will be responsible for doing such things as proving your will is valid by having the will probated, filing your final income tax return and paying any tax, ensuring that all debts are paid, and distributing estate to your beneficiaries. It is also wise to appoint a back-up executor just in case the first person is not able to perform the role.

- **Beneficiary**: Your will should contain clear instructions as to who you want to get your possessions and property after you die. You may also want to name a residual beneficiary, someone who gets what remains of your estate. This may make it easier of your will to access assets that were forgotten when you were writing your will or that you acquired after you wrote the will.

- **Guardianship**: If you have underage children or adult children with disabilities who you are responsible for, you can identify who you want to be responsible for caring for these children. You should discuss this with these people beforehand, and make sure they are willing to act as the guardians to your children. Please note that if there is a legal dispute over who should be appointed guardian of your children, the court is not bound by this appointment. The guardianship of your children will be determined based on the best interests of your children. Your wishes regarding who should act as guardian would be one of several factors to be considered.

- **Providing for Dependants**: You are legally required to provide for the financial support of your dependants after you die. Your dependants include your spouse, underage children, or adult children who are physically or mentally incapable of taking care of themselves. If you have reasons for not providing such support, it is a good idea to write down these reasons in a letter, and keep the letter with your will.

- **Debts**: If you have debts, you should identify in your will how you want your debts to be dealt with.

- **Common Disaster**: You can also say in your will how your estate should be dealt with if your primary beneficiaries die at the same time as you.

What are some special considerations I should take when making a will?

- **Matrimonial Property**: According to *Family Law Act*, your spouse is entitled to apply to the court for one half of your shared assets when you die. If the court finds that your spouse is entitled to more than he or she is given in your will, this will override your will.

- **Joint Bank Accounts**: If you have placed money in a joint bank account and named someone else as the joint account holder, the account will not necessarily be considered to be the asset of the joint account holder when you die. What happens to the money in that account will be determined by your intention. You should make your intention about the distribution of the account and its asset clear, for instance, by stating your intention in your will. If the beneficiaries of the estate cannot agree on what the deceased's intention was, the issue will normally be determined by a court. The issue of joint bank account in the context of estate planning should be discussed with a financial advisor and/or lawyer.

- **RRSPs and RRIFs**: Gifts of RRSPs and RRIFs in your will should be written very carefully. Usually when you open an RRSP or RRIF, you name a beneficiary for that account. If you will a RRSPs or RRIFs to someone other than the beneficiary named on the policy this can create confusion and conflict for your heirs.

- **Funeral Arrangements**: You can include details of funeral arrangements in a will. However, please note that wills are not always read before the funeral. Therefore you may want to inform your next of kin and your executor of your wishes.

- **The Matrimonial Home**: In Newfoundland and Labrador if you are married and own your home, in most cases, your spouse will receive title to the property when you die. This does not apply to a home you share with a common-law partner.

- **Life Insurance**: If you wish to will the proceeds of a life insurance policy to someone other than the person named in the policy, it is a god idea for you or your lawyer to consult with your insurance company. In some cases the naming of a beneficiary in a life insurance policy in considered "irrevocable" and cannot be changed without the consent of the beneficiary.

What should I do with my will?

You should put your will somewhere safe and let your loved ones and your executor know where it is.

Do I need a lawyer to make a valid will?

You do not need a lawyer to make a will; however, a lawyer's advice can be extremely helpful. For instance, a lawyer can help ensure that your will meets all the legal requirements; the meaning of the words you use in your will are clear and legally accurate; identify different options for disposing of your estate; give you valuable advice on minimizing the amount of income tax that will be charged to your estate after you die, etc,.

Be prepared when you are visiting your lawyer. This will help keep the time spent less, and the cost down.

Can I change my will?

Yes. You can change your will at any time, as long as you have the legal capacity to do so. (For details on capacity, see the question "What does 'capacity' means?" on a previous page.)

If you make a new will, your old will is normally considered to be cancelled.

To change part of your will, you can make a codicil (see definition of a codicil on the first page).

If you cross out part of your will, or add something to it after is it signed, the will is not changed unless the will is signed and properly witnessed again near the alteration.

Can I cancel my will?

Yes. You can do so by writing a document stating your intention to cancel your will. This document must meet the same requirements as a will to be valid.

You can also cancel your will be destroying the original or by having someone else, on your instruction, destroy it. If your will is destroyed by mistakes or against your wishes, it remains valid.

Do I need to make a new will if I move?

If you have made a valid will in another place, it will remain valid if you move to Newfoundland and Labrador. You may want to review your will to ensure that it still accurately reflects your wishes and the possessions that make up your estate.

When should I consider updating my will?

Here are some scenarios where you will want to consider updating your will:

- **Marriage**: if you get married, or remarried, your will is considered to be cancelled unless it states in the will that you intend to marry the person you married. You will either need t make a new will, or make a codicil to your old will before the marriage.
- **Divorce or Separation**: In Newfoundland and Labrador a divorce between married spouses, or separation from a common-law partner will not affect your will. In this case you may want to change the gifts given t your now ex-spouse.

- **Death of a Beneficiary**: If a beneficiary of your will dies, you may want to update your will to specify a new beneficiary.
  In most cases, if a beneficiary dies, the gift to him or her is considered cancelled, and the property that was being given becomes part of the residual estate.
  If the beneficiary who dies is your child or sibling, the gift will normally go to that beneficiary's next of kin.
- **Birth of a Child**: if you have a child, this will also not affect your will. You may want to update your will to include your child.
- **Disposal of Assets**: If you give away or sell something that is mentioned in your will before you die, the part of your will before you die, the part of your will that refers to them is void, but the rest of your will remains valid.

Probate and Administration:

What is a probate?

Probate is the process of proving that a will is valid and gives power to the personal representative of an estate to administer and distribute it.

Does a will have to go through probate?

In most cases, a will must go through a probate.

A grant of probate acts as a guarantee that the will is valid, and that the executor has the right and bears the responsibilities of distributing the estate. This helps protect everyone involved in the process, including the executor.

If your estate is particularly small, or if the executor is the only beneficiary, it may be possible to avoid probate. However, an executor who acts without a grant of probate may be liable if the will he or she acted on is later proved to be invalid.

Does an estate have to go through probate or administration?

The type of assets in the estate, but not the value of the estate, usually determines whether an estate should be probated or administered. If there are property transactions or access to financial institutions of the deceased, the estate normally has to be probated or administered.

What is the cost of going through a probate?

The cost of an application for probate is a percentage of the value of the estate. The executor will need to provide an inventory and evaluation of the estate, and the fees will be calculated accordingly. You can ask the Court for a schedule of fees.

What happens if a person dies without a will?

If a person dies without a will (this person is also known as an *intestate*), someone with an interest in your estate (a relative, a creditor, or a representative of the government) will need to apply for a grant of administration in order to distribute the deceased's estate.

The estate will then be distributed according to a provincial law called the *Intestate Succession Act*.

What happens when there is a will but it does not name an executor?

If there is a will but it does not name an executor, the Court can, upon application of next of kin, appoint an administrator through a grant of letters of administration, C.T.A.

C.T.A. is the abbreviation of the Latin phrase "cum testamento annexo", which means "with the will annexed".

What happens if a named executor/executrix does not want to take on the role?

The person named as an executor would normally have to fill out a renunciation form in which he/she abandons the right to act as a personal representative of the estate.

In such a case, where there is a will but the named executor is unable or unwilling to act, the Court can appoint an administrator through a grant of letters of administration, C.T.A referred to the question immediately above.

Who can apply to be appointed as administrator, and who would take priority?

The Rule of the Supreme Court states that where a person dies without a will, there is an order of persons who are entitled to apply for a grant of administration. For instance, normally a wife or a husband of the deceased would have priority over a sibling of the deceased.

Please note, however, this priority list is subject to the discretion of the judge.

What if an administrator of an estate dies before completing their duties of administration?

The Court issues Letters of Administration, D.B.N. when an administrator of an estate dies or becomes incapable of continuing with his or her duties prior to the completion of the administration. The grant involves the appointment of a person or institution to complete the administration of the estate.

What are "Letters of Administration, C.T.A, D.B.N"?

This application is made when there is a will but the executor or the administrator CTA (the appointed representative when there is a will but no named executor) dies or becomes incapacitated, and therefore is unable to continue with his or her duties prior to the fulfilment of the administration (and there is no other person to step in to that position according to the terms of any will).

The grant of Letters of Administration, C.T.A, D.B.N involved the appointment of a person or institution to complete the administration of the estate.

What is an Administration Bond, and why is it needed in most cases?

An Administration Bond is legal document held by the Court. It contains the name of the administrator and two individuals who have promised to act as sureties.

The sureties are the persons who take responsibility for another's performance of an undertaking. The named sureties must own property which has a value of at least half of the amount of the bond.

The bond is signed acts as a guarantee that the appointed personal representative(s) will carry out their duties faithfully and honestly. The value of the bond may be forfeited if the personal representative fails to do so.

In short, the sureties are guaranteeing that the administrator will do his/her duties honestly and faithfully, and are willing to forfeit money in the event that the person fails to do so.

Does a common-law relationship partner automatically have the same rights as a married spouse?

No. A common-law spouse, regardless of how long he/she has lived with the deceased, is not currently considered a "spouse" under the definition in the *Intestate Succession Act*. In such a case, it is strongly suggested that you seek legal advice regarding your options.

Will I have to go to Court before a judge?

In many cases you do not need to go to Court to obtain a grant of probate or letters of administrations. However, if the judge has questions about the application, you may be asked to appear in court.

Also, if there is a caveat opposing the issuing of a grant of probate, or letters of administration, you may also need to appear in court to obtain the grant or administration (see definition of caveat on the first page).

What happens if the grant of probate or administration is opposed?

A caveat is filed when one wants to oppose the grant of probate or administration. Once a caveat is filed, which means that there is opposition, a grant cannot be issued by the Court without the individual being notified and given an opportunity to be heard.

If a caveat is posted, the person filing the notice and the application must commence a Court proceeding within one year to either remove the caveat, or prove the validity of the will in order to obtain a grant.

OTHER CONSIDERATIONS FOR SENIORS

Regarding Your Finances: Enduring Power of Attorney

What is a Power of Attorney?

A Power of Attorney is a written document that gives someone else authority to act for you in relation to your financial affairs. A Power of Attorney can involve a specific purpose or last for a specific period. It can also be very general.

Unless it is enduring (see the question below), a Power of Attorney is no longer valid if the person giving the Power of Attorney (referred to as a **donor**), becomes legally incapacitated.

What does "legally incapacitated" mean?

When a person is not mentally capable of understanding the effects of his or her actions, this person is considered legally incapacitated.

What is an Enduring Power of Attorney?

An Enduring Power of Attorney is a kind of Power of Attorney. It continues to be valid if the donor becomes legally incapacitated.

Why should I make an Enduring Power of Attorney?

Making an enduring power of attorney lets you decide who will manage your affairs when you are no longer able to do so.

What happens if I do not have an Enduring Power of Attorney and I become mentally incapacitated?

In this case, an application can be made under the provincial *Mentally Disabled Persons' Estate Act* in order to have a **guardian** appointed for you.

A guardian is a person who is responsible for the financial affairs of a child or mentally disabled or legally incapacitated adult.

The Act dictates which persons may be entitled to bring such an application, and includes a person with an interest in your estate. The person making an application to have a guardian appointed can propose a guardian. In some cases, the Public Trustee may be appointed to act as your guardian.

Who can be my Attorney?

You will want to choose someone you trust who is willing and capable of managing your financial affairs.

The person you choose must be legally capable and at least 19 years old.

Do I need a lawyer to make an Enduring Power of Attorney?

You can make an Enduring Power of Attorney without a lawyer, although a lawyer's advice can be very helpful.

What are the requirements for making an Enduring Power of Attorney?

The *Enduring Powers of Attorney Act* sets out the requirement for making an Enduring Power of Attorney in Newfoundland and Labrador.

Generally, an Enduring Power of Attorney must state that it applies when the donor is legally incapacitated. (A donor is the person who gives someone else control over their financial affairs.)

An Enduring Power of Attorney needs to be signed by the donor and a witness. The witness cannot be the person being given the Power of Attorney or that person's spouse.

For more details and additional requirement, see the *Enduring Powers of Attorney Act*.

How can my Enduring Power of Attorney be changed or cancelled?

As long as you are legally capable, you can change or cancelled your Enduring Power of Attorney.

If you are legally incapacitated, a person with an interest in your estate can apply to the court to have the person acting as your attorney changed.

Who is "a person with an interest in your estate"?

Any person who is legally entitled to receive money from you, or is likely to inherit money from you when you die can be considered as "a person with an interest in your estate". For instance, your spouse, your children, adult children, or people you owe money to.

What if my Power of Attorney is being abused, but I am no longer legally capable?

A person with an interest in your estate can apply to court to require your attorney to provide a review of your finances. This person may also apply to the court to have the attorney relieved and have another attorney take over the duties.

Regarding Your Medical Care: Advance Health Care Directives

What is an Advance Health Care Directive?

This is a document in which you can explain your wishes about health care and treatment if you are not able o make decisions or communicate them at a future time.

In your direct, you can designate an individual or individuals to make health care decisions for you if you are no longer able to do so.

How about a "living will" or "Power if Attorney for Personal Care"?

These two documents are similar to Advance Health Care Directives. However, please note that in Newfoundland and Labrador, only Advance Health Care Directives are legally recognized.

What happens if I don't have Advance Health Care Directives?

Advance Health Care Act sets out a list of people who will be asked to act as your substitute decision maker.

If no family member is available or willing to do so, your health care professional will be asked to act as your substitute decision maker.

Your substitute decision maker will be required to make health care decisions for you based not on his or her own beliefs, but based on what he or she thinks you would want.

How do I make an Advance Health Care Directive?

You must be at least 16 year old and be competent. To be competent, you should be able to understand the type of decision being made and the positive and negative effects of that decision.

An Advance Health Care Directive must be in writing and must be signed by you (the maker), and at least two independent witnesses.

If you are not able to sign, someone else can sign for you and you must acknowledge this signature in the presence of at least two independent witnesses.

For details on how to make an Advance Health Care Directive, how to appoint a substitute decision maker, how to update your Directive, etc., you may find a booklet prepared by Coalition of Persons with Disabilities Newfoundland and Labrador (COD-NL) helpful. A sample Advance Health Care Directive is also attached to the end of the booklet.

You can access the booklet on http://www.assembly.nl.ca/lgislation/sr/statutes/a04-1.htm

What should I do with my health care directives?

Keep an original of your Advance Health Care in a safe place. Give copies to your doctor and your substitute decision maker and make sure they know where the original can be found.

It is also a good idea to keep a copy in your wallet in case you need emergency medical treatment.

When does an Advance Health Care Directive not apply?

Health care providers will not follow any instruction in a directive that is illegal or unethical.

In cases of emergency health care, a health care professional may proceed with treatments that are medically necessary to preserve the patient's health or life, if a delay in obtaining consent from the substitute decision maker would pose a significant risk to the patient.

In addition, neither you nor your substitute decision maker has the authority to refuse involuntary psychiatric treatment or involuntary admission to a psychiatric facility.