



PUBLIC LEGAL INFORMATION
Association of NL

LEGAL PLANNING GUIDE

FOR NEWFOUNDLAND AND LABRADOR



Guidelines and Information
to help you understand how to create a
• **Will** • **Enduring Power of Attorney** • **Advance Health Care
Directive** •

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INTRODUCTION

It is not easy for anyone to think ahead to a time when we have lost the mental capacity to make financial or medical decisions for ourselves or to think about what will happen to the things we own after we die. These are difficult decisions to face and difficult conversations to have with family members, friends, and others who care for us.

However, the risk of not planning ahead for these difficult times can be even worse. Not having a will, an enduring power of attorney, or an advance health care directive may lead to conflict within families and confusion about what your wishes are when it comes to your health care treatment, financial affairs, or ownership of your assets.

The process of creating legal documents to plan ahead can also be overwhelming. There are several different legal documents involved, and many different legal terms and phrases that are confusing for many people.

This guide is intended to help ease some of that confusion and to help you start the process of legal planning. We do not intend this guide to be a template that you simply fill out to complete your own will, enduring power of attorney, or advance health care directive. As you will see throughout the document, **nothing in this booklet should be considered as legal advice or opinion**, and it is recommended that you consult with a lawyer to create your own will, enduring power of attorney, or advance health care directive.

The information contained in this publication is current based on Newfoundland and Labrador legislation as of January 2016. Legislation does change over time, and users of this publication after January 2016 should review applicable laws to see if any changes have been made that may impact the legal documents discussed in this guide.

That being said, we hope this guide serves as a starting point for discussions between you, your family, and others who care for you about your wishes and plans for later in life. This booklet can give you an idea of what wills, enduring powers of attorney, and advance health care directives look like and what basic legal requirements there are to create valid legal documents of your own.

If you have further questions or if you would like a referral to speak with a lawyer who practices in the areas of will and estates or legal planning, please do not hesitate to contact the Public Legal Information Association of NL by phone (1-888-660-7788) or email (info@publiclegalinfo.com).

Kevin O'Shea
Executive Director, PLIAN

WILLS

DISCLAIMER: The following information is intended as general legal information only and does not constitute legal advice or opinion. You are encouraged to consult with a lawyer before creating your own will. For a referral to a lawyer practicing in the area of wills and estates, please contact PLIAN's Lawyer Referral Service at 1-888-660-7788 or info@publiclegalinfo.com.

Introduction

A will is a legal document that gives a person control over what will happen to the things they own (known as the **estate**) after death. A will also allows you to name who will be assigned to settle your affairs after your death.

The Newfoundland and Labrador **Wills Act** sets out requirements for creating a legally valid will, and other requirements have been developed through cases involving wills decided through the court system.

The person making a will, also known as the **testator**, must be at least 17 years of age and have legal **capacity**.

Capacity is a legal term meaning that a person has the mental ability at the time the will is made to understand the consequences of what they are doing in the will and the fact that they are making a legal document. Capacity has been interpreted by the courts to mean that the person making the will understands the type and amount of assets he or she is including in the will, and the fact that the will benefits some people and excludes other people from receiving assets.

Secondly, a will must be written.

If a person dies without a will, they are considered to have died **intestate**. In that case, their estate will be distributed according to the Newfoundland and Labrador *Intestate Succession Act*, which might be different from what they wanted had they made their own will.

Witnesses and Signatures

One of the many requirements that may impact the validity of a will is that it must be written and properly executed.

The **Wills Act** states the following in relation to witnesses and signatures required to create a valid will:

“A will is invalid unless it is made in writing, and it is either in the handwriting of the testator, and signed by him or her, or, where not so written and signed, is signed by the testator in the presence of at least 2 witnesses, who shall, in the presence of the testator, sign the will as witnesses, and where the will is made by a person who cannot write, it must first be read over to or by the testator in the presence of the witnesses.”

A lawyer should be involved in directing this procedure.

Choosing an Executor

A testator must appoint an **executor** in their will. The job of an executor is to control and protect the estate’s assets, pay off any debts, and distribute property as instructed by the will. In almost all cases, the executor will also have to go through the process of applying for a **grant of probate** for the will in Supreme Court. It is advisable that the executor consult with a lawyer to determine if the will is required to be probated.

The most important consideration for selecting an executor is choosing someone who is willing and able to take on the role. You may also wish to consider choosing an individual who lives close to you as your executor, as well as someone likely to outlive you. An executor has many duties and responsibilities and it can take years to completely distribute an estate, so it may be a good idea to select someone who would not need to travel frequently.

It is important for a testator to inform the person they choose to be the executor of this decision. An individual named as an executor has the right to refuse the role. Telling the person chosen to be executor prior to drafting the will allows the testator to select a different executor if the first person refuses the role. This could eliminate the need of going to court in the future. It is also important for the executor to be informed of the location of the original copy of the will so that they can easily locate it upon the testator’s death.

You may want to designate one or more alternate executors in your will. At the time of your death, the executor’s circumstances may have changed which prevents them from being an executor or they may have changed their mind about accepting the task. Also, if your executor predeceases you, then there will be no need to amend your will if an alternate executor is named.

Categorizing Your Assets

A person often has many different types of assets, including bank accounts, investments, land, personal possessions, real estate, and others. It is important to understand your assets before deciding how to distribute your estate. There are two types of assets: non-estate and estate.

Non-Estate Assets

Non-estate assets are assets that are not distributed in your will. These types of assets typically pass automatically to specific individuals upon your death. As a result, you do not need to include them in your will.

A type of non-estate asset are assets that you own with another person(s) in joint tenancy. Assets you own in joint tenancy have a right of survivorship. This means that your share of ownership in the asset automatically passes to the surviving owner(s) upon your death. As an example, a family home that is considered to be a “matrimonial home” under the Newfoundland and Labrador *Family Law Act* will often be owned in joint tenancy and in many cases pass automatically to a surviving married spouse upon death of the other spouse.

Another type of non-estate asset are assets that designate beneficiaries. An example of this includes insurance policies, where a beneficiary of that asset is selected. Assets such as this automatically pass to the designated beneficiary upon death.

It is strongly advised to check with a lawyer about what assets need to be included in your will. Keep in mind that in some cases, joint bank accounts may be determined by a court to be estate assets, depending on how that bank account was used and the intention of the primary account holder. In some cases, the account may not automatically pass over to the other person named on the account, but would have to be distributed to beneficiaries through a will or through the *Intestate Succession Act*.

Estate Assets

Estate assets are part of your estate and are to be distributed as part of your will. These types of assets can be gifted to any individual or organization of your choosing.

A type of estate asset includes assets that are in your own name. Another type of estate asset is an asset that you own as a tenant in common. Owning an asset as a tenant in common means that you own an individual and undivided share in the asset. Owning an asset in this manner means you have the right to transfer ownership of your share by deed, will, or other conveyance. The right of survivorship, where an asset would pass automatically to a joint tenant upon death, does not apply to assets owned as a tenant in common.

Distributing Your Assets

Before the executor can distribute your estate to your beneficiaries, they need to ensure that all of your outstanding debts, expenses, and income tax are paid in full. It is important to consider your debts, expenses, and income tax before you decide on the distribution of your estate and the person you choose as executor. Consulting with a financial advisor regarding this might be helpful.

When deciding how you would like the executor to distribute your assets, keep in mind that there are options.

You may want to gift an asset directly to a beneficiary. This involves the executor giving the asset to the beneficiary as soon as legally possible, which generally means after the will has been probated.

Another option is to put the asset in trust, which involves the executor (or trust company) holding the asset in trust until the moment that your will describes as the appropriate time to give the asset to the beneficiary. The distribution of an asset in the form of a trust is often used when the beneficiary is a minor or lacks mental capacity.

Lastly, there is an option to transfer your asset to a beneficiary in the form of a life estate. A life estate distributes an asset to a beneficiary for their use and enjoyment during their lifetime with a provision that upon their death, the asset goes to someone else. As an example, an individual who ultimately wants their child to own their home but wanted their sister to have a place to live until she dies may elect to transfer the asset to their sister in the form of a life estate.

Trusts

If you want to create a trust for someone, such as a minor, this will create new duties and responsibilities for the executor as they must set up and manage the trust until the minor reaches a certain age where they receive full control of the asset. These duties will continue as long as the trust exists. Typically, an executor's duties will end once the estate has been distributed.

If you're interested in creating a trust for any beneficiaries that are minors or mentally incompetent at the time of your death, you may want to consider appointing a separate person or a trust company to act as a trustee for the minor or mentally incompetent beneficiaries. You are strongly encouraged to consult with a lawyer and obtain legal advice if you are interested in setting up a trust.

Guardianship

Wills are typically known for outlining the distribution of an individual's estate, but wills are also important for decisions such as guardianship. If you have minor children or other dependents, then a will can designate individuals as their guardians. It is important to note that any decisions about the custody of minor children must ultimately be in the best interests of those children, and could potentially be challenged and changed by a court.

Conclusion

The information listed above deals with just some of the considerations a person making a will must contemplate. There are many decisions to be made when creating a will, and these issues should be discussed with a lawyer.

ENDURING POWERS OF ATTORNEY

Disclaimer: The following information is intended as general legal information only and does not constitute legal advice or opinion. To obtain legal advice and for assistance in writing an Enduring Power of Attorney document, you should consult with a lawyer. For a referral to a lawyer practicing in the area of Enduring Powers of Attorney, you may contact PLIAN's Lawyer Referral Service at 1-888-660-7788 or info@publiclegalinfo.com.

Introduction

A **Power of Attorney** is a legal document that gives another person the legal authority to act on your behalf in relation to your finances while you are living and still have capacity. This power can be granted for a specific period of time and for specific financial tasks, or it can be very general. Note that the Power of Attorney deals only with **financial** matters, and does not involve decisions about health care treatment or the authority to deal with a person's estate after they die. There are separate roles and documents for these areas, which are discussed in other parts of this guide.

An **Enduring Power of Attorney** is a specific type of Power of Attorney meant to be exercised after the person granting the power of attorney loses his or her legal capacity. Completing this document and granting this power gives someone else the authority to handle your finances if you no longer have the mental capacity to understand the effects of your decisions and actions related to your financial affairs.

Note that an Enduring Power of Attorney may be its own separate document, or may be included as part of a General Power of Attorney, as long as language is included to make the Power of Attorney enduring and allow it to continue having effect after the donor (the person making the document) loses capacity.

In Newfoundland and Labrador, the ***Enduring Powers of Attorney Act*** sets out the basic requirements for creating an Enduring Power of Attorney document.

Requirements

Some of the requirements for creating a legally valid Enduring Power of Attorney in Newfoundland and Labrador include that the document must be:

- Written;
- Signed by the person granting power of attorney (the “donor”) and signed by one independent witness (meaning someone other than the person receiving power of attorney or that person’s spouse or cohabiting partner);
- Include language that makes clear the Power of Attorney is meant to continue having effect after the donor loses legal capacity. This is what makes this document an “Enduring” Power of Attorney as opposed to a General Power of Attorney. Note that there is no specific language required for this condition, but the section must either explicitly state or imply that the document will continue having effect during the mental incapacity of the donor.

The primary aim of the Enduring Power of Attorney is to name someone who will act as attorney and manage your financial affairs when you are no longer able to do so because of the loss of legal capacity. This person must be at least 19 years of age or older.

As well, you may be as specific or as general as you wish in the Enduring Power of Attorney in terms of granting authority to the person acting as your attorney. What this means is that you may grant the attorney authority to handle all of your financial affairs or you might restrict the power to only certain areas and transactions. For example, a power of attorney might be completed only to allow someone else to sell your house on your behalf, but to do nothing else when it comes to your finances.

Please note that you may cancel or revoke any Enduring Power of Attorney documents you have made, as long as you still have the legal capacity to do so.

Note as well that these requirements are related to creating a legally valid Enduring Power of Attorney under the *Enduring Powers of Attorney Act* of Newfoundland and Labrador. Individual financial institutions, such as banks, may have their own policies, procedures, and forms for creating an Enduring Power of Attorney or General Power of Attorney for use at that institution. It is recommended to check with banks, financial institutions, or other locations where an Enduring Power of Attorney may be used to ensure that the specific policies and requirements for that institution are met.

Sample Enduring Power of Attorney Document

DISCLAIMER: This sample form is intended for general legal information purposes only. It is not intended as legal advice or opinion, and PLIAN cannot guarantee that completing this form will result in a legally valid document. You should consult with a lawyer to complete an Enduring Power of Attorney document. For a referral to a lawyer practicing in the area of Powers of Attorney, you may contact PLIAN's Lawyer Referral Service at 1-888-660-7788 or info@publiclegalinfo.com.

This ENDURING POWER OF ATTORNEY is given on _____,
(date)
_____, by _____,
(year) (Donor)
of _____.
(Donor's address)

1. Appointment of Attorney

I appoint _____
(Name of Attorney)
of _____
(Attorney's full address)

to be my attorney in accordance with the *Enduring Powers of Attorney Act*.

OR

I appoint _____
(Name of Attorney 1)
of _____
(Attorney 1 full address)

AND _____
(Name of Attorney 2)
of _____
(Attorney 2 full address)

To be my attorneys in accordance with the *Enduring Powers of Attorney Act*.

Note that you may appoint more than one person as your attorney if you wish

2. Authority

I give my attorney general authority respecting all of my financial affairs.

OR

I give my attorney specific authority respecting my financial affairs, subject to the following conditions and restrictions:

You may limit the authority of your attorney in whatever way you like, including to only specific financial areas of transactions. Those restrictions may be outlined in the section above.

3. Decision Making

If you decide to appoint more than 1 person as attorney, this section may be used to describe how their decision-making should take place.

The decisions of my attorney must be unanimous.

OR

Decisions by my attorneys must be made as follows:

4. Accounting/Transparency

Note that some Enduring Powers of Attorney include an optional section on accounting and transparency as a safeguard against financial abuse. This could include instructions to the person given Power of Attorney about requirements for bookkeeping, accounting, receipt tracking, meetings with other family members and/or financial advisors, and other similar measures. Note that this section is optional and at your discretion. It is advisable to consult with a lawyer and/or a financial advisor to determine which specific conditions would be best for your situation.

5. Enduring Power of Attorney

I declare that this document is an Enduring Power of Attorney and may be exercised during any subsequent legal incapacity I experience.

6. Signatures

(signature of donor)

(date)

(signature of witness*)

(date)

****Witness must be person other than person granted Power of Attorney or that person's spouse/cohabiting partner***

ADVANCE HEALTH CARE DIRECTIVES

Disclaimer: The following is intended as general legal information only and does not constitute legal advice or opinion. To obtain legal advice and for assistance in writing an Advance Health Care Directive, you should consult with a lawyer.

You are also encouraged to consult with a doctor to discuss the decisions about different types of medical treatment you may have to make. For a referral to a lawyer practicing in the area of Advance Health Care Directives, you may contact PLIAN's Lawyer Referral Service at 1-888-660-7788 or info@publiclegalinfo.com.

An **Advance Health Care Directive** is a legal document that allows a person to write down instructions for their medical care for a future time when they have lost the competence to make or communicate their own healthcare decisions. This document also allows a person to appoint a **Substitute Decision Maker** who can make health-care decisions on behalf of that person, as well as to communicate with medical professionals.

The requirements for creating a legally valid Advance Health Care Directive can be found in the Newfoundland and Labrador ***Advance Health Care Directives Act***.

A valid Advance Health Care Directive may only be created by a person 16 years of age or older who is competent to make their own health care decisions at the time the document is created. The Advance Health Care Directive must be in writing, signed by the person making the document, and also signed by 2 independent witnesses.

An independent witness is someone other than the person appointed as Substitute Decision Maker or that person's spouse.

If the person making the Advance Health Care Directive is unable to sign it themselves, they may make a mark other than their signature as a substitute, as long as this is done in the presence of 2 independent witnesses. The person making the document may also direct another person to sign the Advance Health Care Directive for them, as long as the person signing is not the Substitute Decision Maker or that person's spouse. The signature occurs in the presence of the person making the Advance Health Care Directive and 2 independent witnesses, and the 2 independent witnesses attest to witnessing the signature.

Also note that the person appointed as Substitute Decision Maker must accept that responsibility in writing. The Substitute Decision Maker must also be 19 years of age or older.

Sample Advance Health Care Directive Document

DISCLAIMER: This sample form is intended for general legal information purposes only. It is not intended as legal advice or opinion, and PLIAN cannot guarantee that completing this form will result in a legally valid Advance Health Care Directive. You should consult with a lawyer to complete your Advance Health Care Directive. For a referral to a lawyer practicing in the area of Advance Health Care Directives, you may contact PLIAN's Lawyer Referral Service at 1-888-660-7788 or info@publiclegalinfo.com.

I. Introduction

I, _____, of _____,
(NAME) (ADDRESS)

on this _____, _____,
(DATE) (YEAR)

make this Advance Health Care Directive.

II. Instructions and Principles for Medical Treatment

Note that this section is optional. You may choose to complete only this section, or only the section appointing a Substitute Decision Maker, or both sections.

The following instructions and principles are to be followed in the event that I am not competent to make my own health care decisions or communicate those decisions:

It is advisable to speak with a doctor before completing this section outlining the instructions for your future medical care. A doctor can help you anticipate some of the decisions you may have to make and the treatment that may be involved.

Decisions about future medical treatment may include, but are not limited to, issues such as:

- Life-sustaining treatments like CPR or artificial resuscitation;
- Artificial nutrition and hydration (i.e. use of a feeding tube);
- Comfort care (meaning treatment to keep you as comfortable and free of pain as possible, even if such treatment may prolong dying or shorten life);
- Treatment in case of a terminal condition;
- Treatment in case of being in a persistent vegetative state

As difficult as it may be to think about these issues, it is important to have an open discussion with the people who care for you when preparing these instructions. These people may include your Substitute Decision Maker, other family members or friends, or medical professionals. It is advisable to discuss the realities of different forms of medical treatment and the values you wish to have followed if you have lost the competence to make your own health care decisions, especially as you near the end of your life.

III. Appointment of Substitute Decision Maker (if appointing one)

Note that this section is optional. You may choose to complete only this section, or only the section on Instructions and Principles for Medical Treatment, or both sections

I, _____, appoint _____
(NAME) (NAME of SUBSTITUTE DECISION MAKER)

to be my Substitute Decision Maker, to make health care decisions on my behalf if I do not have the competence to make health care decisions for myself or communicate those decisions, in accordance with the instructions and principles listed in this document and in my best interests.

Name of Substitute Decision Maker: _____

Address of Substitute Decision Maker: _____

Phone Number for Substitute Decision Maker: _____

Alternate Phone Number for Substitute Decision Maker: _____

IV. Appointment of Multiple Substitute Decision Makers

Note that this section is optional. You may appoint multiple Substitute Decision Makers if you wish. If you do appoint multiple Substitute Decision Makers, it is advisable to indicate in your Advance Health Care Directive if the Substitute Decision Makers must make decisions together, or if one is the primary Substitute Decision Makers, and the others you name are to be backups.

I, _____, appoint _____
(NAME) (NAME OF SUBSTITUTE DECISION MAKER 1)

and _____
(NAME OF SUBSTITUTE DECISION MAKER 2)

to be my Substitute Decision Makers, to make health care decisions on my behalf if I do not have the competence to make health care decisions for myself or communicate those decisions, in accordance with the instructions and principles listed in this document and in my best interests.

Name of Substitute Decision Maker 1: _____

Address of Substitute Decision Maker 1: _____

Phone Number for Substitute Decision Maker 1: _____

Alternate Phone Number for Substitute Decision Maker 1: _____

Name of Substitute Decision Maker 2: _____

Address of Substitute Decision Maker 2: _____

Phone Number for Substitute Decision Maker 2: _____

Alternate Phone Number for Substitute Decision Maker 2: _____

Procedures for Multiple Substitute Decision Makers:

(Check one)

_____ I want my Substitute Decision Makers to act JOINTLY. If there are 2 Substitute Decision Makers, they must agree on all health care decisions. If there are more than 2 Substitute Decision Makers, the decision of the majority will be considered the decision of all the Substitute Decision Makers.

_____ I want my Substitute Decision Makers to act SUCCESSIVELY. The first Substitute Decision Maker I have named in this Advance Health Care Directive is to be my only Substitute Decision Maker. If that person is unable or unwilling to act as my Substitute Decision Maker, then the second Substitute Decision Maker I have named will act as my Substitute Decision Maker, followed by any subsequent persons I have named in this document.

_____ I want my Substitute Decision Makers to act according to the following instructions for making decisions on my behalf:

(Another arrangement for determining how Substitute Decision Makers should act and make decisions different from the two options listed above)

V. Acceptance of Substitute Decision Maker

I, _____, hereby accept the
(NAME OF SUBSTITUTE DECISION MAKER 1)

appointment made by the maker, _____
(NAME OF PERSON MAKING DIRECTIVE)

of myself as Substitute Decision Maker. I agree to make health care decisions on behalf of the maker of this Advance Health Care Directive when (he/she) does not have competence to make (his/her) own health care decisions. All health care decisions made on behalf of the maker shall be in accordance with the instructions and principles set out in this document, the wishes expressed to me by the maker prior to the maker's incompetency, and in the best interests of the maker.

Signature of Substitute Decision Maker 1:

Dated _____ of _____, _____
(DATE) (MONTH) (YEAR)

(for multiple Substitute Decision Makers):

I, _____, hereby accept the
(NAME OF SUBSTITUTE DECISION MAKER 2)

appointment made by the maker, _____
(NAME OF PERSON MAKING DIRECTIVE)

of myself as Substitute Decision Maker. I agree to make health care decisions on behalf of the maker of this Advance Health Care Directive when (he/she) does not have competence to make (his/her) own health care decisions. All health care decisions made on behalf of the maker shall be in accordance with the instructions and principles set out in this document, the wishes expressed to me by the maker prior to the maker's incompetency, and in the best interests of the maker.

Signature of Substitute Decision Maker 2:

Dated _____ of _____, _____
(DATE) (MONTH) (YEAR)

VI. Additional Specific Medical Procedures

I, _____, the maker of this Advance Health Care Directive,
(NAME)
expressly authorize my Substitute Decision Maker, _____
(NAME OF SUBSTITUTE DECISION MAKER)

to make the following decisions about specific medical procedures if I have lost competence to do so on my own. I recognize that if I do not consent to these procedures in this document, my Substitute Decision Maker will not be able to consent to them if I have lost competence to make my own health care decisions.

1. I _____ to medical treatment for
(CONSENT or DO NOT CONSENT)

the primary purpose of research.

2. I _____ to sterilization that is not
(CONSENT or DO NOT CONSENT)

medically necessary for the protection of my health.

3. I _____ to the removal of
(CONSENT or DO NOT CONSENT)

tissue from my body while living for transplantation to another person or for the purpose of medical education or for medical research.

Please note that you are strongly encouraged to seek the advice of a doctor about providing or not providing consent in an Advance Health Care Directive for these specific medical procedures.

VII. Signature

I, _____, confirm that I am at least 16 years of
(NAME OF MAKER)

age and that I have the competence to make my own health care decisions, to appoint my Substitute Decision Maker(s), and to understand the effect of this document, including the instructions I have written and the appointment(s) I have made.

Signature of Maker: _____

Dated at _____
(LOCATION)

_____ of _____,
(DATE) (MONTH) (YEAR)

Signature of Witnesses:

Must be persons other than a person named as Substitute Decision Maker or the spouse of a person named as Substitute Decision Maker:

Signature of Witness 1: _____

Dated at _____
(LOCATION)

_____ of _____,
(DATE) (MONTH) (YEAR)

Signature of Witness 2: _____

Dated at _____
(LOCATION)

_____ of _____,
(DATE) (MONTH) (YEAR)



PUBLIC LEGAL INFORMATION

Association of NL

The information provided in this booklet is not intended as legal advice, but rather to provide a general overview. In order to discuss your situation and receive specific legal advice, we suggest you speak with a lawyer who practices in wills and estates.

For further information, contact PLIAN:

Phone: 1-888-660-7788

Email: info@publiclegalinfo.com

Twitter: [@PLIAN_NL](https://twitter.com/PLIAN_NL)

Facebook: facebook.com/publiclegalinfoNL

Location: Suite 227, 31 Peet Street, St. John's NL

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