



Writing Your Own Will

A Guide for First Nations People Living on Reserve

prepared by

**Aboriginal Financial Officers Association
of British Columbia**

Acknowledgements

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IMPORTANT NOTE

This publication explains the law in general. It is not intended to give you legal advice on your particular problem. Each person's situation is different, so you may need to get legal help.

This Guide is written for First Nations people who are registered under the Indian Act and are "ordinarily resident on reserve" in British Columbia. (See page 4 for definition of "ordinarily resident on reserve".)

We say "First Nations person" throughout this Guide, but the information in the booklet does not apply to First Nations people living off-reserve or on treaty settlement lands (for example, Nisga'a or Tsawwassen members). This Guide also does not apply to Métis or other aboriginal people who are not registered under the Indian Act. We also say "band member" in this Guide to refer to

people who are registered under the Indian Act and living on-reserve.

We say "Certificate of Possession" and "CP land" throughout this Guide to refer to a person's interest in a parcel of land on-reserve that is registered in the Indian Land Registry. Most parcels registered in the Indian Land Registry have a certificate, but some don't have a certificate because they haven't been surveyed.

All the names of people used in examples in this Guide are made up. They are not real people.

ABBREVIATIONS USED IN THIS GUIDE:

- | | |
|------|--------------------------------------------------------------------------|
| INAC | Estates Unit of Indian and Northern Affairs Canada |
| CP | Certificate of Possession for land on reserve (see definition on page 5) |

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1. Introduction: Why have a Will?

1.1 What is a Will?

A Will is a written statement of what you want to happen to your possessions after you die. The person who writes a Will is called the “testator” or the “will-maker”. Will-maker is the term we will use in this Guide.

1.2 What happens if a First Nations person dies without a Will?

If a First Nations person who is ordinarily resident on reserve or Crown land dies without a Will, their property is distributed according to the Indian Act. Spouses, children, grandchildren, great grandchildren, parents and brothers and sisters can inherit (in that order), but if the only next-of-kin are nieces and nephews, they cannot inherit an interest in CP land on reserve unless the land is left to them in a written Will (see Section 1.3).

Family members who are not registered Indians and who are not living or entitled to be living on that reserve cannot inherit CP land either.

When a person dies without a Will, the person looking after the estate may have to sell everything and then divide the cash among the family members. This may not be the best way to distribute your property. Also, more distant family members will get left out. The result can be hard feelings and complications that could have been avoided with a written Will.

“Ordinarily resident on reserve”

means that the person makes his or her home on reserve. A person may be considered ordinarily resident on reserve, even if they are away from the reserve for a while.

For example, someone may have lived on reserve all of their life, but when they are elderly they have to move into a care facility off-reserve. That person is still be considered to be ordinarily resident on reserve, even if they live in the care facility for many years.

Someone who is away from home to attend school or do seasonal work is also still considered to be ordinarily resident on reserve.



1.3 Why should a member of a First Nation have a Will?

Oral tradition (simply telling your wishes to friends or family) may not work in modern times for many reasons. Families are more complicated. People live on and off-reserve. Some are band members, some are not. And different legal rules apply to different types of property.

When there is a written Will, there are fewer reasons for family members to argue about the division of the property, because your wishes will be clear to everyone. It is also easier for the will-maker to make gifts of various possessions to friends who are not family members. Finally, there is less need for the Estates Unit of Indian & Northern Affairs Canada (we call it "INAC" from now on) to be involved in your estate.

Here are some other reasons for writing a Will.

- If you have children under 19, you can leave directions for who is to become their guardian and look after them.

A **Certificate of Possession**, or CP, is a document that shows that a person's parcel of land on reserve has been surveyed and registered in the Indian Land Registry.

CP land can only be held by a person who is a member of the band. A person with a CP has the right to decide what happens to their CP land. They can sell it or give it away while they are alive, and they can choose who will inherit it in their Will.

- You can name the person or people who you want to manage your estate when you die.
- If you have a Certificate of Possession ("CP") for land on reserve, a Will gives you more choice about who you can leave that land to. Without a Will, nieces and nephews cannot inherit CP land (see box). With a Will you can leave CP land to any family members as long as they are able to inherit your CP land (they must be members of your band).
- You can also leave other property to people who are not registered or not living on reserve to compensate them for not being able to receive a gift of land.
- You can make a gift to people who are not family members.
- You can leave instructions for how to distribute your household goods and personal possessions.

Nieces and Nephews: If there is no Will and the only people entitled to inherit a deceased person's CP land are nieces and nephews, the CP land is returned to the Band. *Section 48(8) of the Indian Act.*

Here is an example of what can happen when there is no Will.

An elder lived in his own trailer (manufactured home) on band land. He had many children and grandchildren who were entitled to share in his estate. Some of his family lived off-reserve in the city. Only one family member wanted to live in the trailer, but not everyone in the family agreed that this person should be given the trailer. Unless everyone entitled to inherit from the elder could agree, the law required that all the elder's property be sold and divided equally among his descendants.

The trailer was old and worth very little money, and it was hard to sell. The amount each family member finally got from the sale was so small that it wasn't much use. If the elder had written a Will, he could have given the trailer to the person who wanted to live in it. That would have been a real benefit and a lot less trouble.

1.4 When do I need a lawyer?

You can make a simple Will yourself, without a lawyer, but you should probably get legal advice if:

- you own and run a business
- you own land off-reserve
- you own a great deal of property (such as bank accounts or investments), especially if any of it is off-reserve
- you are in the middle of a complicated divorce or child custody case
- you are planning on giving nothing to a close relative and you think they will argue about being left out of the Will.

Lawyers usually charge a flat rate of around \$500 for preparing a Will.

At the back of this booklet is a list of places to go for more information or assistance with making a Will.

2. What Makes a Will Legal?

There are rules about what form a Will must be in to be valid (legal). A Will is proved to be legal when it is approved by an official at INAC after the will-maker has died.

INAC has to be involved because of federal law. The Indian Act (sections 42 to 50) and the Indian Estates Regulations say how to handle the affairs of a deceased First Nations person who lived on reserve. This is why the Will of any First Nations person living on reserve has to be sent to INAC for written approval.

If the will-maker was not ordinarily resident on reserve, the Will must be approved by the British Columbia Probate Registry, and the law that applies to the estate is the law of British Columbia, not the Indian Act. However, if the will-maker had CP land, it must still be transferred in accordance with the Indian Act (so the land can only be passed on to someone who is a member of the same First Nation as the deceased).

INAC's written approval of a Will, and the documents given by the British Columbia Probate Registry, do the same thing. These documents give the executor of the deceased person's estate the legal right to settle the estate. For example, the executor takes those documents to the bank to transfer money from the deceased persons' bank account, or they take the documents to the Indian Land Registry to transfer the CP land. An estate cannot be settled without these papers.

2.1 Rules for Wills under the Indian Act for First Nations people living on reserve

Under the Indian Act, will-makers must:

- be 19 years of age or older, unless they are married or in the armed forces, and
- be able to understand what they are doing when they write the Will, and
- be free from extreme influence or pressure by people wanting a share of their possessions. (This is called "duress" or "undue influence". See section 8.1.2 on page 20 for more information.)

The Will must:

- be in writing (handwritten or typed on a computer and printed out), and
- be signed by the will-maker, and
- give instructions on distributing the will-maker's property after death, and
- those instructions have to be clear and easy to understand.

If these rules are followed, INAC usually approves the Will. If there are problems in understanding the Will or if relatives complain to INAC, the Will may not be approved, or the approval may be delayed while the complaints are investigated.

The following people can challenge a Will by writing to INAC:

- anyone who is entitled to share in the value of an estate under a Will
- anyone who would be entitled to part of the estate if there were no Will
- anyone who the will-maker was legally required to support.

If a Will is challenged, INAC staff will read the Will carefully, and look for written evidence from family members and the executor to try and figure out what the will-maker intended and why. This is one reason why it is a good idea to have witnesses when you make your Will. They can answer any questions that might come up later.

INAC can usually make a decision without going to Court. However, if the situation is complicated and can only be decided by having witnesses testify in person, INAC may go to the BC Supreme Court for a decision. If this is necessary, the estate and/or family members must pay the legal expenses involved.

2.2 Rules for Wills under the laws of British Columbia

INAC recommends that Wills written by First Nations people also follow the Wills law of British Columbia. These are the BC rules:

Form:

- The Will must be written on paper, either in handwriting or printed out from a computer. Electronic forms, such as audio tape or video recording, are not valid.
- The will-maker must sign their name at the bottom of the document.
- The will-maker must state that they are writing their final Will and that the document replaces any former Will they may have written.

Capacity:

- The will-maker must be 19 years or age or older to make a Will, unless the will-maker is married or in the armed forces. (This is expected to be changed to 16 years of age in 2010.)

Witnesses:

- Two people must witness a signature on a Will. The people must each be over the age of 19 and mentally capable of knowing what they are doing. (More details about witnesses in the Sample Will with Instructions on page 28.)
- The witnesses cannot be named in the Will to receive gifts, and they cannot be spouses of people who are to receive gifts in the Will. If the witnesses will receive gifts in the Will, those gifts are void (the gifts are not legal).

3. Who Should Benefit from the Will?

A person writing a Will is free to make gifts of their property to anyone they want. They can give their property to family members, to friends or to charity. There are no rules about who to leave your property to in a Will. You can leave part of your estate to some members of your family and none to other members. You can leave some to family and some to friends.

3.1 Identifying the People in your Will

Every family member who might be entitled to share in your estate must be notified of your death and of your Will by your executor, whether you have included them in your Will or not. For that reason, you should make a list with names and addresses for your executor. Make sure that you include nick-names and any names that a person is known by as well as their legal name.

This list should include all of your immediate family and descendants. Identify any children who are custom-adopted (see box on page 11). If you have a large family you might not list all of your cousins or nieces and nephews. Instead you might list all the families that are related to you and how. That way the executor can find them. It is especially important to identify any friends you might want to leave something to. Also if you want to leave something to a charity, you should find out the charity's legal name.

If you have all this information prepared for your executor, and keep it up-to-date after you've made your Will, then you don't have to put details like addresses into your Will, just the name of the person or charity. If you have not prepared a list, then all the details

have to go into the Will to ensure that your gifts go to the right people.

3.2 Leaving a Family Member out of your Will

You may decide NOT to leave property to one or more family members. If those persons were being supported by you or were dependant on you in some way, you should state why you are not leaving them anything. This makes it harder for them to prove that the terms of your Will should be changed for their benefit. (See Section 8, page 20, on Disputing a Will).

EXAMPLE PARAGRAPHS

I love all my children equally, but I am leaving most of my money to my daughter Susan Johnson because she has serious health problems and is unable to work. My other children are supporting themselves.

OR

I am not giving a share of my estate to my son, Charles Johnson. He left my home when he was 17 because he wanted to do drugs. He has been living on the streets in Vancouver. I only see him when he needs money. I have given him thousands of dollars over the years, more than I have given my other children. For this reason I do not want to give him anything in my Will.

4. Common Types of Wills

4.1 Wills written by Spouses

4.1.1 Joint Wills

Joint Wills are very common and are written by spouses (either married or common-law). The wife writes a Will giving all her property to her husband, if he survives her. The husband writes a Will giving everything to his wife, if she survives him. Without a Will, the surviving spouse would have to share the estate with the children of the deceased.

Joint Wills also state that if the spouses die together, their descendants (such as children or grandchildren) inherit all their property. Usually they are each other's executor.

4.1.2 Mutual Wills

Mutual Wills are written by spouses (either married or common-law) who have young families. The spouses want to make sure that their own children inherit when they grow up, not a new spouse. Mutual Wills can also be used to make sure that all the children of a blended family inherit equally from both parents. In that case, the surviving spouse leaves their estate to both their own biological children and to their step-children (the children by a former marriage of the other spouse), but not to just the children of the survivor and not to any new husband or wife who comes along later.

Mutual Wills are not made very often, because the spouses have to agree that the surviving spouse will not alter their own Will after inheriting the property of the deceased spouse. For example, a surviving husband could write a new Will and disinherit the

children of his deceased wife in favor of just his own children or a new wife. In that case, those children would be able to sue for their share of the estate on the grounds of breach of contract.

Mutual Wills are more complicated than Joint Wills, and must be written carefully. Although we are mentioning this type of Will here, anyone considering Mutual Wills should consult a lawyer. This kind of Will is not suitable for doing yourself.

4.2 Parent to Child Wills

Parent to child (descendant) Wills are the other most common type of Will.

When giving property to children, it is a good idea to decide what to do with the share of a child who might die before you. You can write into the Will that the share of a child who dies before you (the term is "predecease"), is divided equally among the descendants of that child. Or you can divide that child's share equally among their surviving siblings.

Sample sentence: "I give the remainder of my estate to my children, John Joseph, Lisa Johnson, Sarah Johnson and Philip Johnson. If any of my children predecease me, then that share is to be divided equally among my remaining children."

EXAMPLE:

Giving Everything to Adult Children

When John's wife died, John decided to write a Will leaving all his property to his children. John was 68 years old and his children were adults with children of their own. He decided to leave his property, which included CP land, to his children, but not to his grandchildren. He thought maybe one or two of his grandchildren might not be members of his First Nation, which meant they couldn't inherit a share of his CP land. And he trusted his children to share fairly with their own children.

So John made a Will leaving everything to his children. His instructions were that Susan, Charles and Joseph were to inherit equal shares. If one of them died before John, their share would be divided equally between the two surviving children. This was much simpler than naming all the grandchildren and trying to work out their shares.

EXAMPLE:

Giving Everything to Adult Children and then Grandchildren

Ellen wanted to provide for her grandchildren if her children died before her. (She knew that they were all members of her First Nation and living on reserve.) Ellen worried particularly about her son who worked as a faller in the forest industry. So her instructions in her Will are that all her property goes to her children. She then says if any of her children die before her, that their share is to be divided among that child's children.

Custom Adoption: Who are your children?

Some First Nations people raise children who are not their own by birth and have not been legally adopted (for example, a brother's or sister's child).

If you have children who are not biologically yours, and you want to be sure they are treated the same as your biological children in your Will, be sure to mention these custom-adopted children by name, instead of just saying "I leave everything to my children".

INAC can recognize custom-adopted children, but there is a lot of paperwork involved for your family and it is much easier if you just list the children by name in your Will.

4.3 Care of Minor Children

If you have custody of children under 19, it is important to name a guardian for your children. This is especially important if there are good reasons not to give custody to their other parent. If the minor children in your care are custom adopted, not legally adopted, you may want to talk to a lawyer about what to do.

The courts do not have to appoint the guardian that you name in your Will, but they will consider your choice very seriously. When you have a good reason for not wanting the children's other parent to have custody, you should briefly state the reason in your Will (see example on right). If you have stated your reasons clearly and chosen responsible guardians for the children, there is a good chance your choice will be upheld.

Whoever you name should be responsible, and of course they must be willing and able to be a guardian. You would ordinarily name someone close to the children, such as an aunt and uncle who have been involved in their upbringing.

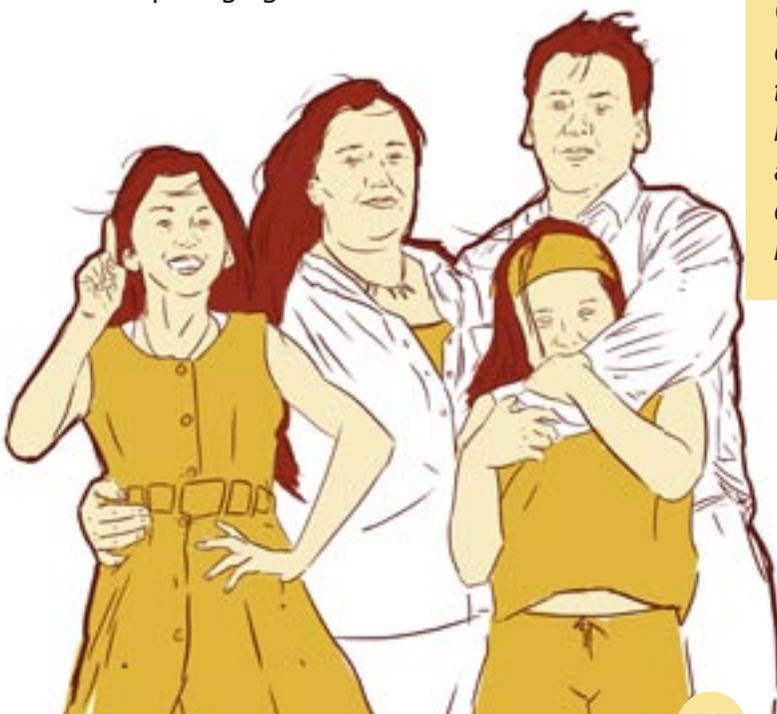
Even if you are happily married, it is a good idea to think about a guardian. Sometimes couples die at the same time, for example in a car accident.

SAMPLE PARAGRAPHS:

I direct that my sister, Judy Johnson, take custody of my children and become their legal guardian. I do not want their biological father, Robert Johnson, to have custody and guardianship because he has not lived with the children since the eldest was 4 and has never visited them more than once or twice a year. To my knowledge he has never been sober. For these reasons I am directing that my children be given into my sister's care.

OR

I direct that my sister, Judy Johnson, take custody of my children and become their legal guardian. The biological father of the children, Robert Johnson, has a joint custody order with me dated July 20, 2001. He moved to Ontario in 2002 and has not visited or communicated with the children since then. My sister has been helping me raise the children. The children know and like her. For these reasons I am directing that my children be given into her care.



5. Choosing your Executor

You must name someone in your Will to take control of your property when you die. The person whom you name to look after your estate is called an executor ("executor" is a man and "executrix" is a woman, but you can use "executor" for both). The executor is your representative and it's their job to follow the instructions in your Will.

The job of executor is important. It can involve a lot of paperwork. The executor may have to work with a lawyer to get your estate approved and distributed. You need to choose your representative carefully.

Your executor should be:

- trustworthy and able to work on their own,
- in good health (so that they survive you and can do the job),
- able to manage the paperwork involved, and
- able to communicate with and be respectful of all your family and friends (your beneficiaries).

Once you have decided on someone, it is a good idea to ask them if they are willing to do the job.

5.1 More than one Executor

You can have more than one executor so that there is more than one person to do all the work and make decisions. However, this can cause problems if they don't get along with each other. Most will-makers just have one executor.

5.2 Substitute Executor

You can also name a substitute executor, in case the first person is unable or unwilling to do the job (for instance, they are ill, or they have moved away). It is a very good idea to name a substitute.

5.3 Executor's Duties

Here are some examples of what an executor does:

- Gets your Will approved by INAC.
- Locates and takes control of your home, vehicles, bank accounts, tools, household goods, and personal possessions, including jewelry, art and crafts.
- Notifies hydro, phone, cable and all other services of your death.
- Looks after your house until it is transferred.
- Notifies your creditors and banks of your death.
- Claims death benefits.
- Makes funeral and memorial arrangements.

You can see that there are many responsibilities. This is why it is important to think carefully before you choose your executor.

5.4 Directions to the Executor

You need to put in your Will that you want your executor to pay all your debts, funeral expenses and all the expenses of winding up your affairs and settling your estate.

6. Giving Property in your Will

6.1 Specific Gifts of Property or Cash

There are two ways to give property after you die. One is to give instructions (also known as making a “bequest”) in your Will. For example: “I give my friend, Joe White, \$1,000 cash” or “I give my nephew, Dan Smith, my box of carving tools”.

A better way to give small items is to put instructions in another document, not in your Will. You can write a letter to your executor with a list of all the gifts you wish to give, and keep it with your Will.

You can change the letter any time without changing your Will.

In a letter, you can also give your executor general instructions. For example: “Let my cousins choose what they want from my tools. If they can’t agree, then you, as executor, decides who is to get what.” Or: “My children can take what they want of my household and personal belongings. The executor is to give them their choice in order from the oldest to the youngest.”

6.2 The Remainder of your property

The “residue” is all the rest of your property remaining after any specific gifts of property or cash have been given. You don’t know how much will be left after your debts have been paid and any gifts distributed. You also don’t know what the value of your CP land and house will be at the time of your death.

Most people leave all their remaining property to their spouse or children.

6.3 Naming Alternates

It is a good idea to give instructions in case any of the people named in your Will die before you.

For example, “I leave the remainder of my estate to my wife. If she predeceases me, then her share is to be given to each of my three children and if any of my children die before me, then to their descendants in equal shares.”

You can decide whether or not you want your grandchildren and great-grandchildren to take a share if any of your sons or daughters die before you. If you name each of your children in this section of the Will, then you have to specifically say that if any of them die before you, their individual share is to go to their children or grandchildren. (See examples on page 11.)

If you left your remaining property to “my children” without naming them, then the share of any child who predeceases you is divided among the surviving children unless you say otherwise.

Remember that if some of your children are custom adopted, you should include the names of all your children, not just say “my children.” See box on page 11.

6.4 Property that can be distributed by a Will

In a Will you can only give property that you own in your own name, or jointly with another person.

The property can be personal items such as household goods, jewellery, boats and vehicles, and tools or equipment. The property can also be a Certificate of Possession to reserve land or a house or land situated off reserve. Money or investments in the bank are property too.

Debts are also part of the property of an estate. These include credit card debt, bank loans, lines of credit, utility bills and funeral expenses.

6.5 Property that cannot be given in a Will

6.5.1 Joint Ownership

People often own property with one or more other people. This is called joint ownership. The property could be a bank account, land, a boat, a vehicle or a lease. If the joint title comes with "right of survivorship", the property automatically passes to the surviving owner(s) and **it does not have to be included in a Will.**

Surviving owners of joint property take the death certificate into the bank or to the Motor Vehicle Branch, and usually ownership is transferred without any problem. In the case of a Certificate of Possession in joint names, the surviving CP holder takes the death certificate to INAC (or to the First Nation, if it manages its own land under the First Nations Land Management Act) and the CP land will be transferred to the surviving CP holder.

Sometimes land is owned by more than one person as "tenants in common." In that case, the property must be included in your Will for you to give your portion of it to somebody else.

If you have CP land on reserve with someone else and you are not sure if you are joint tenants or tenants in common, call an Individual Land Holdings Specialist at INAC to find out, before you make your Will. If your First Nation manages its own land, contact the band instead. INAC or the band will give you a document with the legal description of the land and how it is owned.

6.5.2 Named Beneficiary

When you buy some kinds of property, such as life insurance or pensions, you name a "beneficiary" who will receive the property when you die. The person named as the beneficiary only has to provide proof of their identity and proof that the holder of the policy has died to receive the funds. Beneficiaries do not have to be named in your Will.

You can write a Will saying that everything you own goes to your children, but if your insurance policy names your wife or husband as the beneficiary, your wife or husband will get the insurance money.

6.6 Giving land on Reserve

First Nations people who are writing a Will because they want to say who inherits their land, can only give the land if it is registered in the Indian Land Registry System (or under the First Nations Land Management Act, for bands that manage their own land). CP land can only be given to people who are members of that band, or are entitled to become members and are not already members of another band.

If the will-maker occupies a traditional land-holding on reserve (also known as a custom allotment), that land probably cannot be given in a Will, because the band legally owns the land, not the will-maker.

An example of a custom allotment is a house, owned by the will-maker, that is built on band land. It would have to be dealt with through the band (usually, under the band's housing program). Some First Nations have very clear custom allotment systems in place, with rules that allow a will-maker to decide who in their family will get to live in their house after they die. Other First Nations do not have such clear rules.

If your house is built on band land, rather than CP land, you should check with your band to find out if you are allowed to decide who will occupy your house after you die.

6.6.1 Non-band Members

If the will-maker gives land on reserve to a person not entitled to receive it, the Superintendent of INAC must put the land up for sale (the sale will only be open to band members) and give the money from the sale to the non-band member. There are many ways to avoid this. One is for the will-maker to leave their CP land to family

members who are entitled to receive it, and give other property to family members who are not entitled to CP land.

Here is another way.

EXAMPLE 1:

David owns CP land but his wife, Debra, is not a registered Indian. The couple have lived together in a house on the CP land for 36 years. They have no children, but David has a favourite nephew who is a member of David's First Nation.

David wants to leave his CP land to his nephew, but he also wants to make sure that Debra can still live in their home after he dies, for the rest of her life. David talks to a lawyer friend and they come up with the idea of leasing the CP lot to Debra.

David hires a lawyer to help him with the lease, and contacts a Lands Management and Leasing Officer at INAC. The process takes about a year. What David gets is a 30-year prepaid lease between Canada (on David's behalf) as the landlord (lessor), and Debra as the tenant (lessee). Because it is a long term lease, it will not end when David dies. Debra will still be entitled to live on the lot until the lease ends or she dies. She can also sublease the lot and use the money to support herself if she can't manage on her own and needs to move into a care facility.

David then writes his Will, leaving the CP land to his nephew who is a band member. The nephew will inherit the CP land when David dies, but the lease to Debra will continue until Debra dies or the lease comes to an end.

Leasing reserve land is complicated, and should never be done without advice from a lawyer. A person who leases their land is giving up their right to occupy the land for as long as the lease lasts. For instance, in Example 1, if David leased the land to Debra and they got divorced, David could not just take the land back. Once the lease was in place, Debra could make David move out and she could live in the house by herself or with a new husband.

A lease also creates legal obligations for the person leasing the land, such as maintaining the land and repairing buildings. They may also have to clean up the property and remove buildings after the end of the lease. The person leasing the land needs a lawyer's advice so they understand what they are agreeing to.

Leasing your land may be an important part of your plan for your estate, but it takes time, involves INAC and a lawyer, and there are a lot of legal requirements that must be met, including environmental assessments.

A 'lease' that is made informally, and is not signed by INAC on behalf of the CP holder, is not legally valid and will not provide any protection to a non-band member spouse or children after you die.

EXAMPLE 2:

Jennifer Jones inherited CP land. Her husband has already died and she wants to pass the CP land on to her son, Jimmy, but she can't because her son is member of another band. What she can do is lease the land to her son on a 49-year prepaid lease (the longest possible lease period without approval by the band membership).

To do this, she needs to work with a lawyer and INAC. When she dies, INAC will have to sell the land, but the lease will be in effect, so whoever buys the land will have to continue the lease to Jimmy Jones until the lease ends or Jimmy dies. If Jennifer makes a Will leaving the CP land to a band member, the person inheriting the land would have to continue the lease.

Important Note: If you have CP land that is already leased or has a business on it, you should consult a lawyer about your options, before you make your Will.



6.6.2 Giving Property to Minor Children

CP land, money and possessions can be given in a Will to a person under 19, but the minor cannot lease or sell the CP land. To lease or sell the land for a minor, a guardian of the minor's interest in the CP land must be appointed by INAC to do legal transactions on behalf of the minor.

6.7 Social Housing

If you are a band member living in band housing that is rented to you, you may express your wishes about who will be able to stay in that housing after you die. The band does not have to follow your wishes, but they may listen to what you have said in your Will.

You can say you would like your surviving family members to remain in the housing unit. You could also suggest that a close family member who is entitled to live on reserve, but who hasn't been able to find housing, be placed in your unit.

6.8 What property cannot be given in a Will by a First Nations person?

- A house owned by a First Nation which only allows the band member to use it
- Traditional land holdings
- Trapline licences from the Province of BC

A will-maker may still express their wishes about these things in a Will, but the wishes are not legally binding.

6.9 If you own land off-reserve

"Real property" (which means land) must be transferred according to the laws of the place where the land is located. Therefore, if you own land off-reserve (such as fee simple or strata-titled property in British Columbia) your executor will need to have your Will approved by the BC Probate Registry as well as INAC. (See section 9.5, page 23, for more information).

In BC, probate fees must be paid up front (before the property is sold). Probate fees are based on a percentage of the value of the estate, including all of the real property (land) and personal property (bank accounts, cars etc.) located in BC. Probate fees are not charged on the value of real property and personal property located on-reserve.

If you own property off-reserve in BC, it is a good idea to make sure that your bank accounts and other investments are held at a bank branch located on-reserve. This will decrease the probate fees that will have to be paid later. Contact INAC and/or a lawyer for additional information.

If you own land off-reserve in another Province or outside Canada, you may wish to get advice from a lawyer in the place where your land is located, because your BC Will may not be valid there.

6.10 Making an Inventory of Property

It is helpful to make a list of all your property before writing a Will. The existence of the list as part of your records helps show that you were in a capable state of mind when you wrote your Will.

If you describe your property and its location, then your executor will have an easier time finding it. Often, items like artwork are stored away in a place that is difficult to find. These items can add quite a bit to the value of the estate. There are

stories of property being found after an estate was settled. Hidden property is a problem for everyone.

Your list should include any life insurance policies, home insurance, pensions you are entitled to, vehicles and boats (including registration numbers), all bank accounts, Certificates of Possession or occupancy agreements. Include property that is not part of your estate such as trapline licenses. If you own any of these jointly with another person, be sure to write that on the list.

See Inventory form, page 32.

7. After the Will is Signed

7.1 Where to keep the Will

You should keep the original Will (with the original signatures) in a metal box so that it is protected from fire and flood. The box should be locked. It could be a safety deposit box at the bank or a lock box or metal file cabinet in your home. Some band offices may arrange for the storage of original Wills for their members. Some law offices or notaries keep original Wills, some do not. INAC does not store Wills.

It is a good idea to give a photocopy of the signed Will to your executor. You should also tell him/her where you are keeping your Will and your personal records.

No matter where you keep your Will, it is a good idea to file a Wills Notice with the Vital Statistics Agency of BC. The Wills Registry doesn't get a copy of the Will. You just tell

them when your Will was signed and where it is kept. There is a small fee (about \$30).

If you leave your Will in a safety deposit box at a bank, it is a good idea to take your executor into the bank with you and have them co-signed on the box. That way they can get into the box quickly and easily when they need to.

7.2 Changing the Will

A Codicil is a written change to a Will. It is added as a new last page. You refer to the Will by your name and the date it was made, and say you want to make changes. Then you write out the sentences you want to change. To be legal, a Codicil has to be dated and signed. If your Will was witnessed, then the Codicil should be too. You can use different witnesses.

8. Disputing a Will

Anyone who is entitled to share in the value of an estate under a Will, or who would be entitled to part of the estate if there were no Will, or who the will-maker was legally obliged to support, can challenge a Will. They can challenge the way the Will was written, and they can also challenge the choices made in the Will by the will-maker.

INAC approves Wills and deals with disputes about Wills if the deceased was a First Nation person who was a registered Indian under the Indian Act and made their home on reserve. It does not matter where the Will was written or where the person was at the time of death, so long as they were ordinarily resident on reserve. (See page 4 for a definition of "ordinarily resident on reserve.")

8.1 Grounds for Disputing a Will

8.1.1. Mental Capacity

The will-maker must have the mental ability:

- to know what property they own,
- to know who all their family members are,
- to understand what a Will is, and
- to know what they are doing when they write a Will.

The will-maker may be showing signs of dementia or may have some mental illness. The person may be an addict. The will-maker can have all sorts of problems, but if he or she understands those four points on the day they write and sign their Will, then the law says they have the mental capacity to make a Will.

8.1.2. Duress and Undue Influence

Sometimes family members and friends have strong opinions about how somebody should leave their property, and they put pressure on a will-maker to leave property to them in a Will or to make a new Will. There are many ways to pressure someone, especially if the person is old or sick. Family members may argue or threaten. They may withhold care. They may sit beside the person and tell them what to write.

If the executor or anyone else has reason to believe there was a problem with the way a Will was made, they can challenge the Will by writing to INAC. The challenge must be in writing and must refer to one or more of the grounds for disputing a Will stated in Section 46 of the Indian Act. These grounds are discussed on the next page.

8.1.3 Obligation to Provide Support

The Indian Act has a section saying that your Will should provide for people that you are responsible for. If you do not leave a share of your estate to a family member who you supported for many years, that person may be able to challenge your Will.

Under the law of the province of British Columbia, a spouse or children who are left out of a Will (or who are given much less than expected) can go to court to get a share of the estate. The Indian Act is even broader. Any family member can challenge the Will if they were financially dependent on the deceased person and if they will suffer hardship by not being given anything.

Here are some examples of financial dependence:

- An adult child is being supported by the will-maker while they go to school.
- The will-maker is helping support a family member who is sick or disabled.
- The will-maker is paying child support for minor children.

If you want to leave a dependent family member out of your Will, you need to give a good reason why. (See section 3.2, page 9.)

8.1.4 Vague or Confusing Terms

The Indian Act uses the words “vague, uncertain or capricious” to describe a Will that is hard to understand or doesn’t make sense.

For example the will-maker might write a Will that says “I direct my executor to distribute my property to my family so that everyone is happy.” That is too vague to be legal.

As another example, the will-maker might say “Everyone in my family is to be given a share in my estate.” But they have not said what size of share (such as an equal share) so it is uncertain how much each person is to get.

Another example of uncertainty: “I give my tools to my neighbour”. Since the neighbour isn’t named, it is not clear which neighbour is meant.

If it is unclear who a gift should be given to and a family member contacts INAC, INAC might void (cancel) the gift.

Sometimes people make peculiar Wills because of feelings they have that get in the way of being sensible. Perhaps a will-maker was feeling annoyed at his children the day he made his Will and he had just received a nice card from his grandniece, so he left everything to the grandniece and nothing to his children. If there wasn’t a good reason to ignore his children, INAC would probably consider this decision “capricious” and the children could successfully challenge the Will.

9. Legal Process after Death

Administering an estate is quite complicated, and we only go into the first steps in this booklet. There are other books available on how to be an executor. (See Section 15 for where to get more information.)

As long as there is enough money in the estate, the executor can pay for any reasonable help they need. For example, the executor may want to hire an accountant to work out assets and debts, and to prepare paperwork, such as a final tax return. Executors usually hire a lawyer or get legal advice if there is a lot of property in the estate.

If there is not enough money in the estate to pay off all the deceased person's debts, the executor should consult a lawyer.

9.1 Obtain a Death Certificate

If the person did not die in a hospital, then a doctor must be called. Either the hospital or the doctor will issue a Medical Certificate of Death. This certificate usually goes to the funeral home because that is where the body goes. The funeral home then registers the death with the BC Vital Statistics Agency and applies for a Death Certificate. There is a fee. The family can also apply for an original Death Certificate if the funeral home did not get one.

9.2 Find the Will

The family or the executor should look for a Will as soon as possible. The usual places are in the person's home, in a safety deposit box at the bank, or with the person's lawyer. Some band offices may also arrange for the storage of original Wills for their members.

INAC used to accept Wills for safekeeping, but doesn't any more.

A search of the Wills Registry at the BC Vital Statistics Agency should also be done, even if a Will is found, to make sure that no other Will was made later.

9.3 Notify INAC

Once the original Will has been located and the Death Certificate has been received, INAC must be told of the death. The person's Indian Registry number (the number that appears on their status card), the name of their First Nation, a copy of the Death Certificate and the original Will must all be sent to the Estates Unit. (The original Will is returned to the executor after it has been approved.)

9.4 INAC'S Involvement

9.4.1 Confirming Residency

INAC first confirms with the deceased's First Nation that the deceased was both a registered Indian and "ordinarily resident" on reserve.

Ordinarily resident includes people who died while they were away temporarily (such as at college, traveling, or living somewhere else for a short time but intending to return), or who died in hospital or a long-term care home, but their last home before that was on reserve.

INAC also searches the Indian Land Registry to see if the deceased had a registered interest in reserve land. (This search does not include traditional land holdings. Traditional land holdings are not included in an estate. See section 6.8.)

If the deceased was ordinarily resident off-reserve or if they were not a status Indian, then the estate is administered according to the laws of whatever province or state the person lived in.

9.4.2 Getting INAC Approval

If there is a Will and the Will names an executor, INAC asks the executor to apply to administer the estate. In most cases the executor will be appointed and the Will approved. The Will cannot be acted on until INAC has approved it.

The executor is sent a Personal Representative's Package containing information and forms.

If there is no Will, INAC writes to the deceased's family members (see who inherits under the Indian Act in section 1.2, page 4) and asks for someone to step forward to be the administrator of the estate. If nobody volunteers, a staff member at INAC becomes the administrator.

9.4.3 After INAC Approves the Will

INAC does not give legal advice. If the executor needs legal advice they must go to a lawyer. The lawyer can be paid for from the estate.

INAC will get involved if someone challenges the legality of the Will or has a complaint about how the administrator or executor of the estate is doing their job.

INAC will assist an executor in dealing with the transfer of land on reserve.

9.5 Land located off-reserve

As noted in section 6.9, "real property" (which means land) must be transferred

according to the laws of the place where the land is located. This means that land in BC that is off reserve cannot be transferred using estate documents from INAC. If there is land off reserve, the executor needs to contact INAC for an Order to allow the land to be dealt with through the BC Supreme Court (Probate Registry).

9.6 Common Experience Payments

If the deceased person attended a residential school, the executor should find out if they applied for a Common Experience Payment. If they were eligible for a payment and did not receive it, the executor can apply for it as part of the estate.

9.7 Other Responsibilities of the Executor

The executor does the following:

- Makes funeral and burial or cremation arrangements with family.
- Notifies everyone who needs to know about the death, such as employer, landlord, phone company, bank, government agencies, and so on.
- Contacts people named in the Will.
- Makes an inventory of property and debts.
- Pays debts such as funeral expenses, credit cards, loans and back taxes.
- Distributes the assets to people named in the Will.
- Does a final accounting.

10. Example Will - Spouse to Spouse

LAST WILL

This will is made by me, Ellen Josephson, also known as Ellen Joseph. My Membership Number is 01234 and I am of the Eagle Creek Nation. My home address is 6 Gosling Street, Eagle Creek in the Province of British Columbia.

This is my final will. I revoke all former wills and any codicils.

I appoint my spouse, Joseph Josephson, also known as Joe Joseph, who also lives at 6 Gosling Street, Eagle Creek, British Columbia to be the executor and trustee of my estate.

If he does not want to act for any reason or dies before me, then I appoint my sister, Judy Josephson, of Eagle Creek, British Columbia to be executor and trustee of my estate.

Directions to Executor

I want my executor to pay all my debts, funeral expenses and all costs arising from my death. My executor is also to pay any taxes and fees required to be paid to any government office as a result of my death. All these expenses are to be paid from my estate before my estate is divided up and given to my beneficiaries.

I want to be cremated and my ashes scattered at the mouth of Eagle Creek. I would like my executor and family to arrange a traditional memorial ceremony for me.

Gifts of Specific Items

I give my interest in Lot 62, Eagle Creek Reserve ("my land") to my spouse, Joseph Josephson. If he predeceases me or fails to survive me by 30 days, then I give equal shares in my interest in my land to my children who are over the age of 19 and members of the Eagle Creek Band at the time of my death.

If any of my children who are entitled to share in my land predecease me or fail to survive me by 30 days, then that child's share in my land shall be given to any descendant of that child upon their reaching age 19 provided they are members of my band.

If there are no descendants, then that share in my land is to be divided equally among those of my children who survive me and are entitled to a share in my land.

If I leave any descendants who are not entitled to share in my land upon reaching the age of 19, then I give them a share in the remainder of my estate equivalent in value to the share in my land that they would have inherited.

Remainder

I give the remainder of my estate to my spouse, Joseph Josephson and if he fails to survive me, then in equal shares to my four children, Eleanor Josephson, of Eagle Creek, British Columbia, Samuel Josephson, of Eagle Creek, BC, Joseph Wolfman of Salmonberry, BC and William Samuel Wolfman Junior of Vancouver, BC.

If any of my children predecease me, then that share is to be divided equally among that child's children. If there are no descendants, then my deceased child's share is to be divided among the surviving brothers and sisters.

If I leave any descendants who are not entitled to share in that portion of my estate which is CP land upon reaching the age of 19, then I give them a share in the remainder of my estate equivalent in value to the share in my land that they would have inherited.

Signed by the will-maker, Ellen Josephson on _____ at _____, British Columbia in the presence of each of us and all of us together at the same time signing as witnesses to this will.

11. Example Will - Parent to Child

LAST WILL

This will is made by me, Ellen Josephson, also known as Ellen Joseph. My Membership Number is 01234 and I am of the Eagle Creek Nation. My home address is 6 Gosling Street, Eagle Creek in the Province of British Columbia.

This is my final will. I revoke all former wills and any codicils.

I appoint my sister, Judy Josephson who currently lives at 10 Salmon Drive, Eagle Creek, British Columbia to be the executor and trustee of my estate.

If she does not want to act for any reason or dies before me, then I appoint William Wolfman of the Salmonberry Band to be executor and trustee of my estate.

Directions to Executor

I want my executor to pay all my debts, funeral expenses and all costs arising from my death. My executor is also to pay any taxes and fees required to be paid to any government office as a result of my death. All these expenses are to be paid from my estate before my estate is divided up and given to my beneficiaries.

I want to be buried in the Eagle Creek Cemetery. I would like my executor and family to arrange a traditional memorial ceremony for me.

[insert paragraph for Appointment of a Guardian if any children under 19]

Gifts of Specific Items

I distribute my assets as follows:

- To my daughter, Eleanor Josephson, my jewellery;
- To my son, Samuel Josephson, my carving tools; and
- To my sister, Judy Josephson, my car.

All of my children are to have first choice of my household goods and personal items, including my carvings, and anything left is to be given away or sold by my executor;

Remainder

I give the remainder of my estate to my four children, Eleanor Josephson, of Eagle Creek, British Columbia, Samuel Josephson, of Eagle Creek, BC, Joseph Wolfman of Salmonberry, BC and William Samuel Wolfman Junior of Vancouver, BC.

If any of my children predecease me, then that share is to be divided equally among that child's children. If there are no descendants, then my deceased child's share is to be divided among the surviving brothers and sisters.

If I leave any descendants who are not entitled to share in that portion of my estate which is CP land upon reaching the age of 19, then I give them a share in the remainder of my estate equivalent in value to the share in my land that they would have inherited.

Signed by the will-maker, Ellen Josephson on _____ at _____, British Columbia in the presence of each of us and all of us together at the same time signing as witnesses to this will.

12. Example Blank Will with Instructions

To write your own will, use the blank will form on page 29

WILL INSTRUCTIONS

1. Give the name that is on your Indian registration card. That name is your legal name. Also give the name or names that your family and friends use for you. Example: Robert Phillip Josephson (known as "Bob Joe")
2. Name of Band or Nation.
3. If you always go home between jobs or trips, then you have a home address. If you don't have a permanent home and stay with family on your reserve, then just give the name of your nation.
4. People often make new Wills when their lives change, for instance, when they marry or get divorced, their children grow up, or if they buy a home. You can make as many Wills as you want, so long as you make it clear which one is the one you want followed. If you don't "revoke" (which means cancel) any previous Wills, then there can be confusion. If this is your first Will, you can say: "This is my first and only Will."
5. Naming an executor: This is the person you name to take control of your property when you die. They pay your unpaid bills, and deal with all your unfinished business. Your executor carries out ("executes") the instructions you have given in your Will. It is a big job.
6. It is always wise to choose an alternate executor, in case the first person dies, or gets sick or cannot do the job.
7. If you have children under 19 years old, you can appoint somebody you would like to take care of them (a guardian). If there are problems with their other parent being the guardian, you can suggest who should replace you as the person responsible for taking care of the children.

EXAMPLE BLANK WILL

This will is made by me, _____ ①
My Membership Number is _____ and I am of the _____ ②
_____. My home address is _____ ③
_____ in the Province of British Columbia.

This is my final will. I revoke all former wills and any codicils. ④

I appoint _____ ⑤ who currently lives at _____ to be the executor and trustee of my estate.

If he/she does not want to act for any reason or dies before me, or dies within 30 days of my death, then I appoint _____ ⑥ of _____ to be executor and trustee of my estate.

I appoint _____ ⑦ of _____ as Guardian(s) of my minor children.

I want to be _____ and my remains _____ ⑧

I would like my executor and family to arrange a traditional memorial ceremony for me.

Directions to Executor

I want my executor to pay all my debts, funeral expenses and all costs arising from my death. My executor is also to pay any taxes and fees required to be paid to any government office as a result of my death. All these expenses are to be paid from my estate before my estate is divided up and given to my beneficiaries.

8. Directions for funeral/burial/cremation:
Example: "I wish to be cremated and my ashes scattered into the ocean." If there is any disagreement about this after you die, your executor has the final say.

You don't have to include this paragraph in your Will. You can write these instructions separately as a letter to your executor. If you write these instructions separately you can change them at any time without changing your Will.

9. Usually items worth less than a thousand dollars (as second hand goods, not replacement value) are not important enough to list in your Will. You can write a list of small gifts in a letter to your executor. Then if the items change or you change your mind, the letter is easy to change and you do not have to change your Will.

If you want to make gifts of cash, think about whether your property is worth enough after your funeral expenses and other debts are paid. Giving cash amounts is a way to compensate any non-band member relatives who are not able to inherit an interest in land on reserve.

10. This is where you gift all of your property left after payment of debts and specific gifts. If you didn't make any specific gifts, then you can just say "I give all my property to my spouse." or "I give all my property to my children", and then explain what happens if any of them die before you. List your children by name.

11. It is important to write the date on the Will when you sign it, so that it is easy to see that it is the most recent (or "last") Will you made.

12. Place, Province (e.g. Nakusp, British Columbia).

13. The Indian Act does not require that a Will be witnessed, but having two witnesses is a good idea. Witnesses do not read the Will. You must tell them they are witnessing a Will, but they do not need to know what is in it. Witnesses may not receive gifts in your Will. Your executor cannot be a witness.

You must all be together and watch each other signing the Will. The will-maker signs first, then one witness and then the other.

14. If the Will is longer than one page, put your initials in the corner of each page. The witnesses should do this, too.

Gifts of Specific Items

I distribute my assets as follows: 9

To write your own will, use the blank will form on the next page

I give the remainder of my estate as follows: 10

If _____ dies before me, then I give the remainder of my estate to _____.

Signed by the will-maker on _____ at _____ in the presence of each of us and all of us together at the same time signing as witnesses to this will.

Witness Signature

Print Witness Name

Witness Address

Will maker Signature

Print will maker Name

Witness Signature

Print Witness Name

Witness Address

14

It is not a good idea to cross out words or write new words in spaces around what has already been written. If you need to make changes before the Will is signed, then it is much better to rewrite the whole Will. You don't want any confusion, or any questions to be asked about why changes were made.

Once the Will has been printed out and signed, you should not make any more changes. If you do make changes, it may be challenged and it may not be legal. If it's not legal, then it's like you died without a Will.

LAST WILL

This will is made by me, _____ . My Membership
(Full Legal Name)

Number is _____ and I am of the _____ .
(Band Membership Number) (Name of Band or Nation)

My home address is _____
(Address)

in the Province of British Columbia.

This is my final will. I cancel all former wills and any codicils.

Appointment of Executor

I appoint _____ who currently lives at _____
(Full Legal Name)

_____ to be the executor and trustee of my estate.
(Address)

If he/she does not want to act for any reason or dies before me, or dies within 30 days of my

death, then I appoint _____ of _____
(Full Legal Name)

_____ to be executor and trustee of my estate.
(Address)

Appointment of Guardian(s)

I appoint _____ of _____
(Full Legal Name)

_____ as Guardian(s) of my minor children.
(Address)

Funeral Instructions

I want to be _____ and my remains _____
(Buried or Cremated) (Instructions)

_____ .
I would like my executor and family to arrange a traditional memorial ceremony for me.

Directions to Executor

I want my executor to pay all my debts, funeral expenses and all costs arising from my death. My executor is also to pay any taxes and fees required to be paid to any government office as a result of my death. All these expenses are to be paid from my estate before my estate is divided up and given to my beneficiaries.

Gifts of Specific Items

I distribute my assets as follows:

Remainder

I give the remainder of my estate as follows:

If _____ dies before me, then I give the remainder of my estate to _____

Signed by the will-maker on _____ at _____
(Date)
_____ in the presence of each of us
(Location, Province)
and all of us together at the same time signing as witnesses to this will.

Witness Signature

Will maker Signature

Print Witness Name

Print will maker Name

Witness Address

Witness Signature

Print Witness Name

Witness Address

ESTATE PLANNING LIST of FAMILY and PROPERTY

(Use additional sheets of paper if you need more space)

Name: _____

Address: _____

Telephone: _____

Email: _____

Birth date and place of birth: _____

Citizenship: _____

Band Membership Number: _____

Marital Status: ___Married ___Common Law (living together one year or more)
 ___Single ___Widowed ___Divorced ___Separated

Spouse's Name: _____

Spouse's Date of birth: _____

If your spouse has a will, when did they make it? _____

Where is your spouse's will located? _____

Name and address of your previous spouse (married or common law):

PARENTS (biological or step) (if living) Name, address and date of birth:

CHILDREN (identify natural or step or custom-adopted): Names, home address/location, date of birth

Other close family and people named in my will: Names, home address/location

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PERSONAL PROPERTY (only list property worth at least \$1,000)

Address of home or other land in your name on or off reserve: (is it jointly owned? If on reserve, identify Certificate of Possession)

Business or work equipment (e.g. store, fish boat, trap line, mechanic's tools):

Vehicles: _____

Boats: _____

Household goods: _____

Other valuables): _____

Bank accounts (Name of bank, branch location, type of account)

Insurance policies, pension funds, RRSP or other: (location/identifying number)(Is there a named beneficiary? Who?):

DEBTS

Mortgages and Loans: _____

Credit Cards: _____

Other Debts: _____

Location of your important documents (e.g. marriage certificate, bank and tax records, divorce papers, insurance or mortgage)

14. Other documents to prepare at the same time you make a Will

14.1 Planning for Incapacity

When you make your Will, you may also wish to make other legal documents to plan for the future in case you become mentally unable manage your own financial affairs or personal care.

Planning ahead is particularly important if you don't have any close family, or if you don't get along with your family and would prefer to have a friend help you instead.

14.2 What happens if planning is not done

When a person gets very frail or develops Alzheimer's disease and no longer knows what they are doing, family members will

often step in and help out informally. This can work for a while, but if none of the family has the legal right to handle things like banking, there are often problems.

The time to call for help is if a person has become mentally incapable and:

- there's an urgent need to manage financial or legal affairs (for example, they haven't paid their bills and the power is being cut off to their home) and nobody in the family has the legal right to take care of these things; or
- the person is being neglected or abused.

If a person has become incapable and legal documents have not been prepared ahead of time, a legal process must be started to have the person officially declared incapable so that somebody else can be appointed to manage their affairs.

The legal decision about whether someone has become incapable of managing their money or looking after themselves physically is made under BC law. If a First Nations person living on reserve is unable to care of themselves or if there are



concerns about abuse or neglect, friends or family members should contact the BC Public Guardian and Trustee. The BC Public Trustee can take action to protect a vulnerable adult, investigate their living situation, and have their mental capacity evaluated. (See the back of this booklet for contact information for the Public Trustee.)

INAC does not investigate claims of abuse, or decide whether or not a person is mentally capable.

An official legal document will be issued under BC law—either a court order, or a medical ‘Certificate of Incapacity’—saying that a person is incapable of managing their affairs. At that point, under the Indian Act, INAC automatically becomes responsible for that person’s financial and legal decisions (but not personal or health care decisions). If there is a responsible friend or family member willing to manage the incapable person’s financial affairs, INAC may appoint that person to assist.

When the Public Trustee is arranging to have somebody declared incapable, a friend or relative can ask to be included and appointed as the person’s guardian for personal and health care decisions. Personal and health care decisions would include consenting to medical treatment (such as surgery).

Usually, all of this complicated legal process can be avoided if people prepare documents ahead of time, while they are still mentally able. All you need is a Power of Attorney (for financial and legal matters) and a Representation Agreement (for personal and health care). These documents are not difficult or expensive to make.

14.3 Legal Planning Documents

14.3.1 Power of Attorney

People sometimes need to appoint other people to manage their financial and legal affairs, for example, elders who are frail and can no longer get to the bank to sign forms.

A Power of Attorney is a written, signed document in which you appoint another person to be your “attorney”. (In this case, “attorney” does not mean a lawyer, it means a representative.) The attorney is given the power to make financial and legal decisions for you. The document only needs to be witnessed and notarized if you own land off-reserve.

Most people choose their spouse, a responsible adult child or a close friend. It helps if the “attorney” lives nearby and is familiar with your affairs. You can name one person, or more than one person to act together or separately. You can also name an alternate in case the first person can’t act or doesn’t want to. It is a good idea to talk to the person you want to name as your attorney. You want to make sure they are willing to take on this responsibility.

The Power of Attorney can be limited to a few specific powers for a short time. For example, if you are going away on a long trip, you can say “This Power of Attorney is to allow my attorney to pay my bills, do my banking and look after my house while I am away from March 1 to November 30, 2011.”

Or you can give a general Power of Attorney “for all financial and legal purposes”. A general power like that would give the attorney the power to sell your property and use your credit card.

You can put a paragraph in the Power of Attorney saying that it is to continue even if you become mentally incapable. This is called an **“enduring”** Power of Attorney.

For a status Indian living on reserve, the enduring Power of Attorney will then continue unless a legal process declares you incapable (through a court order or a Certificate of Incapacity). This legal process is unlikely to happen unless there is a complaint or abuse or neglect, or your Attorney is unable to act and there is no alternate attorney. If you are declared legally incapable, the Power of Attorney ends and INAC becomes responsible for managing your financial and legal affairs. (See section 14.2 above).

If you have an enduring Power of Attorney and somebody is managing your affairs, it is unlikely that the BC courts or INAC will get involved in your affairs.

A Power of Attorney takes effect the moment you sign it, but you don't have to use it. You can sign the document and put it in a drawer. You can give the document to your attorney later when you need them to act for you. The appointment ends if the maker becomes mentally incapable or dies. Once the maker is dead the Power of Attorney is no longer in effect. The Will comes into effect from the moment of death.

14.3.2 Representation Agreement

A Representation Agreement is a legally binding document in which you appoint someone to speak and act for you when you can't speak for yourself because of illness, accident or disability. This agreement is broader than a Power of Attorney. It can cover personal care and health care as well as financial and legal matters. For instance, it can give a representative the legal right to make personal care decisions for someone who is in a long term care facility. A Representation Agreement cannot be overridden by doctors.

The Representation Agreement gives very broad decision-making power to the representative, who uses their own judgment when different situations arise. You can also appoint another person as a “monitor” to oversee the person you appoint as your representative. It is a good idea to appoint a “monitor”.

For status Indians living on reserve, a Representation Agreement will continue unless you are legally found incapable (through a Certificate of Incapacity or a court declaration). So long as you are not declared legally incapable, your chosen representative can simply start assisting you when you need help. INAC and the BC Public Guardian and Trustee will only get involved if a problem occurs (for example, if someone reports that you are being neglected or abused).

If you are declared legally incapable, the financial powers of a Representation Agreement end automatically, and INAC becomes responsible for managing your financial and legal affairs.

14.3.3 Advance Health Directive

(not yet BC law, but expected in 2010)

This is a written, signed document in which you can give consent in advance (or refuse consent in advance) for specific medical treatments. This document is sometimes called a “living will”, but living wills are not legal in British Columbia.

You must be mentally capable when you write an Advance Health Directive. The instructions will continue to be valid even if you become incapable later. The document does not appoint a representative. It simply says what kind of treatments you want or do not want in case you cannot speak for yourself. An Advance Health Directive can be included in a Representation Agreement.

A very common type of Advance Health Directive is a “do not resuscitate” order. This is often made by people who are terminally ill, who do not want to be revived if their heart stops.

Doctors can sometimes override or ignore an Advance Health Directive. For example, if an unexpected situation occurs that is different than what you intended your directive to cover, or if a new treatment becomes available, they can ignore it.

14.3.4 Cancelling these Legal Documents

You can cancel your Power of Attorney, Advance Health Care Directive or Representation Agreement by tearing up all the copies of it. But it is better, just in case you missed a copy, to write and sign another document saying that you have cancelled the first agreement. Make sure that you give the cancellation document to everyone who received the first document.



15. Where to go for more information or help

Indian and Northern Affairs Canada

The website address given below is for the BC Region Estates Unit. They have useful information sheets and publications about wills, estates, minor children and mental incapability. General information is available online, and other publications specifically for people living on-reserve in BC can be requested by phone or email:

Indian and Northern Affairs Canada
British Columbia Region
1138 Melville Street, Suite 600
Vancouver, BC V6E 4S3

Phone: (local) (604) 775-5100
Phone: (toll-free) 1-888-917-9977
Fax: (604) 775-7149

E-mail: BCestates@inac-ainc.gc.ca
Website: <http://www.ainc-inac.gc.ca/br/es/index-eng.asp>

The People's Law School

Publications (free):

- *Choosing an Executor—Being an Executor*
- *Writing Your Will*

These publications contain information for the general public. You can read them online or print them out from their website: www.publiclegaled.bc.ca.

Or order them from:

The People's Law School
150 – 900 Howe Street
Vancouver, BC V6Z 2M4
Telephone: (604) 331-5400

Self-Counsel Press

Publications:

- *Wills Guide for British Columbia*
- *Probate Guide for British Columbia*

The guides and kits published by Self-Counsel Press contain information intended for people writing a will or administering an estate in British Columbia. They are not intended to apply to registered Indians living on reserve, but may be of assistance if you own off-reserve land in BC (see sections 6.9 and 9.5). You can find these publications at bookstores and stationery stores, or order them online or from their office.

Website: www.self-counsel.com

Self-Counsel Press
1481 Charlotte Road
North Vancouver, BC V7J 1H1

Telephone: (604) 986-3366
Telephone: 1-800-663-3007 (toll free)
Fax: (604) 986-3947

Lawyer Referral Service

Telephone: (604) 687-3221

Telephone: 1-800-663-1919 (toll free)

This service is operated by the BC Branch of the Canadian Bar Association.

When you call, you are given the name of a lawyer in your area of British Columbia. You then call the lawyer to arrange for a half-hour consultation. This half hour meeting costs \$25 plus tax.

Legal Information

A new on-line website, www.clicklaw.bc.ca, is operated by the Courthouse Libraries of BC. When you click on Wills and Estates under the heading "Your Family" or on Aboriginal under "Your Community", you will find all the legal publications and legal information resources available to the general public in BC, including those listed here.

Dial-A-Law

Telephone: 1-800-565-5297

Website: www.dialalaw.org

Free recorded information on a variety of legal topics, including wills and estates, available on the phone or on the Web. This service is operated by the BC branch of the Canadian Bar Association.

Legal Services Society/Legal Aid

Legal aid is not available for people needing help with wills and estates. However, the Legal Services Society does have a publication available on making a will and settling an estate for First Nations people, which you can download free from their website at www.lss.bc.ca.

Guide to Aboriginal Organizations and Services

<http://www.gov.bc.ca/arr/reports/default.html>

The Guide is a list of 800 community-based services and organizations in BC, most of which are Aboriginal controlled and operate on a not-for-profit basis.

The Guide is used by community service organizations, government ministries and agencies to help non-Aboriginal citizens learn about Aboriginal services and organizations.