

How to

Make a Will and Settle an Estate

A guide for First Nations people living on reserve

See page 30 for important updates to the sample will

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Important — Please read

A note about the law explained in this booklet

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

This booklet gives information about Canadian law, not customary or self-governing First Nations law. The information in this booklet is not intended to replace customary or self-governing First Nations law.

This booklet includes the most recent information available from Indian and Northern Affairs Canada. The information is up to date as of May 2006.

When this booklet refers to statutes, regulations, or cases, the citation is given in an endnote on page 27.

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Introduction

Is this booklet for you?

Note: The terms “Aboriginal” and “First Nations” are often used to describe indigenous people in Canada. However, in this booklet we have used the word “Indian” for information that falls under the Indian Act. When the booklet talks about **registered Indians**,* it also means people who are *entitled* to be registered Indians.

This booklet is for you if:

- you want to make a **will**; and
- you are a registered Indian who is **ordinarily resident on reserve** in BC.

OR

- you need to know what to do with the **estate** when a registered Indian has died; and
- the **deceased** was ordinarily resident on reserve in BC.

If you want to make a will, see page 1.
If you want to settle an estate, see page 9.

This booklet is not for you if:

- you are writing a will and you are not a registered Indian who is ordinarily resident on reserve in BC.

OR

- you are settling an estate and the deceased was not a registered Indian who was ordinarily resident on reserve in BC.

*Terms that may be unfamiliar to you are written in bold and explained in the sidebar.

Definitions

registered Indian: a person who is registered in the Indian Register maintained by Indian and Northern Affairs Canada.

will: a written document that describes how you want your property distributed and your debts paid after you die.¹

ordinarily resident on

reserve:² for the purposes of this booklet, this means:

- the deceased has never lived off reserve; or
- the deceased lived off reserve only to work, go to school, or receive medical attention; or
- the deceased lived off reserve for most of his or her life, but returned to the reserve to live and was living on reserve when he or she died.

estate: the property that the deceased owned at the time he or she died (such as a car, house, furniture, money, or residential schools compensation).

deceased: the person who has died.

For example, you might be (or the deceased might have been) a registered Indian living off reserve; an Inuit, Métis, or otherwise unregistered Aboriginal person; a non-Aboriginal person; or a person living outside BC.

If any of these describe your situation, turn to page 23 to find out where to get more information.

About Indian Affairs

This booklet sometimes talks about “Indian Affairs.” This is a short way of saying Indian and Northern Affairs Canada.

The Minister of Indian Affairs has **jurisdiction** over the estates of registered Indians who were ordinarily resident on reserve when they died.³ The minister **delegates** his authority to the employees of Indian Affairs. If you contact Indian Affairs, you will be dealing with Indian Affairs employees called **estates officers**. If you have questions about land on reserve, you will be dealing with Indian Affairs employees called **individual land holding specialists**.

To find out how to contact Indian Affairs, see page 23.

If you move off reserve

If you move off reserve, the will you make using the information in this booklet may not be valid. Read “How to make sure your will is valid (legal)” on page 6 for more information. You can also read one of the publications listed on page 26, see a lawyer (see page 25), or do both.

Definitions

jurisdiction: authority and control.

delegate: to transfer authority and control to someone else.

estates officers: Indian Affairs employees who work on estate matters.

individual land holding specialists: Indian Affairs employees who work on individual land holding matters.



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Making a will

Planning what will happen to your estate after you die

If you are a **registered Indian** who is **ordinarily resident on reserve** and you want to make a **will**, this section will help you. When you make a will, you write down what you want done with your **property (estate)** after you die.

What is a will?

A will is a written document where you describe what should happen to your property after you die. It must follow certain rules to be considered valid (legal).⁴

Under the Indian Act, a will:⁵

- is a written document;
- is signed by the person who made it;
- says what that person wants done with his or her property; and
- takes effect after the person dies.

If you have made a will and the Minister of Indian Affairs approves your will after your death, you will have died **testate**.

If you die without making a will or the Minister of Indian Affairs does not approve your will after your death, you will have died **intestate**. To read more about what

Definitions

registered Indian: a person who is registered in the Indian Register maintained by Indian and Northern Affairs Canada.

ordinarily resident on reserve: for the purposes of this booklet, this means:

- the deceased has never lived off reserve; or
- the deceased lived off reserve only to work, go to school, or receive medical attention; or
- the deceased lived off reserve for most of his or her life, but returned to the reserve to live and was living on reserve when he or she died.

will: a written document that describes how you want your property distributed and your debts paid after you die.

property: things that you own, such as land and personal possessions.

continued on page 2

happens when someone living on reserve dies intestate, see page 13.

Why you should make a will

If you make a will, you will have control over what happens to your property after you die. You can decide who will handle your affairs, and you can make sure that your property, such as residential schools compensation, goes to the people you want to give it to. You can also protect some of the customs and traditions that are important to you. Your will can help your family by naming the person you would like to care for your **minor children**.

If you don't make a will, there are laws that say what will happen to your property. If you are a registered Indian living on reserve, your property will be distributed to your relatives according to the Indian Act.⁶

By making a will, you can avoid confusion and make sure your estate is distributed according to your wishes.

Remember: If you don't have a will, it might create conflict in your family. And it may take them longer to settle your estate after you die.

Videotaped or audiotaped wills

According to the Indian Act, a will must be written by hand or typed, and signed. This means that a videotaped or audiotaped will is not valid (legal).

Definitions

continued from page 1

estate: the property that the deceased owned at the time he or she died (such as a car, house, furniture, money, or residential schools compensation).

testate: when a person dies leaving behind a valid will.

intestate: when a person dies without leaving behind a valid will.

minor children: children under the age of 19.

Making your own will

According to the Indian Act, you must have **testamentary capacity** for your will to be valid. If you move off reserve, the BC Wills Act additionally requires you to be:

- aged 19 or older; or
- married or formerly married; or
- in active service with the Canadian Forces, or enlisted in the navy or air force.

Asking a lawyer to write your will

You can ask *anyone* to write your will, but you must tell the person writing it what you want the will to say. You must also sign it (see page 6).

You may not need to have a lawyer write your will. However, a lawyer can help make sure that your will does what you want it to do, and that it does not leave out anything important.

If you have valuable **assets**, you may want to have a lawyer write your will according to your instructions. A valuable asset is any property that needs special treatment — like a business or a fishing boat. You may also want to hire a lawyer if you want to divide gifts among many **beneficiaries**, especially if any of your beneficiaries are under the age of 19. A notary public can also write a will for you according to your instructions.

Remember: You need to find a lawyer or notary public who is familiar with the Indian Act. For more information on lawyers and notaries public, see page 24.

Definitions

testamentary capacity:

This means:

- you know what you are doing;
- you know the effect of what you are doing; and
- you are of sound mind (mentally capable) when you make your will.

assets: things that you own.

Assets can be things like a certificate of possession to reserve land, livestock, a standing crop, a car or truck, a fishing boat, a licence or lease, insurance, jewellery, money in a bank account, residential schools compensation, an Old Age Security or Canada Pension Plan cheque, wages owed to you, or many other things.

beneficiary: a person who inherits under a will. There can be more than one beneficiary.

What you should put in your will

The checklist on page 28 will help you collect information and make decisions before you start writing your will. You can find a sample will on page 30.

Do the following in your will:

- Say that you are the **testator**;
- Name an **executor**. An executor is the person who will take charge of and settle (**administer**) your estate after you die. Being an executor is an important responsibility, especially if an estate is complicated. To find out more, see “What to do if you are a personal representative” on page 15. (The executor acts as the personal representative of the deceased.)

It is a good idea to check with the person you want to be your executor before you name him or her in your will. Make sure the person is capable and is willing to do the job.

If the executor you choose cannot or will not accept the responsibility after you die, someone else will have to be appointed. For this reason, it is a good idea to name an alternate executor in your will;

- Cancel (revoke) all previous wills and codicils (see page 8);
- Say what you want to have done with your property after you die: how you want your **debts** to be paid and how you want your assets to be distributed;
- Say who the beneficiary is. Give the person’s full legal name (not a nickname) and relationship to you.

Definitions

testator: the person who makes the will (who decides what it should say).

executor: the person who will be responsible for carrying out the instructions in your will after you die. You can name more than one executor. You can also name an alternate executor to take on the responsibility if the executor you choose cannot or will not accept the responsibility.

administer: to take charge of and settle the estate that the deceased has left behind, making sure that the deceased’s property is collected and debts are paid, and that the rest of the property is distributed to the heirs or beneficiaries.

debts: money you owe to someone else. Debts can be things like money owed on a credit card, bank loans, phone bills, utility bills, funeral expenses, money owed to the local store, or many other things.

(If you list more than one beneficiary, say how you want the estate to be divided among them.) If you want certain people to receive certain things, these are called **bequests**. You can choose anyone as your beneficiary. However, your will may be challenged after you die if you do not adequately provide for your spouse or children.

- Say who should get what is left of your estate (the **residue**) after all the specific gifts (bequests) have been given to the beneficiaries. Otherwise, according to the Indian Act, the residue will be given to other people (the same as those listed in “Determining heirs when there is no will” on page 17); and
- Say what should happen if changes occur after you write the will. For example, one of the beneficiaries might die before you do, or you may marry again or have more children. Cover as many possible changes as you can think of. As soon as a change occurs that is not covered in your will, update your will (see page 8). Review your will whenever you or your beneficiaries experience a significant change in your lives, such as a birth, death, marriage, separation, or divorce.

You can also include a clause in your will that appoints a **guardian** for your children who are under the age of 19. This is considered a **persuasive clause** only, however, meaning that it is not legally binding. The person you name in your will must still apply to the provincial court to get legal guardianship.

Ask before naming a person as guardian in your will. Make sure the person is capable and is willing to do the job.

Definitions

bequests: specific gifts that you want to give to specific people.

residue: what is left in the estate after all the bequests have been distributed.

guardian: the person you name in your will to be responsible for taking care of your children under age 19. A court may or may not decide to follow your wishes. You can name more than one guardian.

persuasive clause: a clause that states your wishes, but is not legally binding.

Under the Indian Act, a band member can hold an interest in reserve land through a Certificate of Possession. However, there are bands that do not recognize this form of ownership, and instead have a traditional system of ownership. Some bands even have a blended system that recognizes Certificates of Possession *and* traditional land holdings. To make sure that your interest in land is recognized by your band, get a Certificate of Possession or a Band Council Resolution acknowledging your land holdings. If you have difficulty, consult a lawyer.

How to make sure your will is valid (legal)

- Don't videotape or audiotape your will. According to the Indian Act, a will must be written by hand or typed, and signed, to be considered valid.
- Sign your will using your usual signature, and write the date near your signature.
- You should make your will valid under both the BC Wills Act and the Indian Act in case you are living off reserve at the time of your death. To do this, your will must be in writing, you must say it takes effect after your death, you must sign it in front of two **witnesses**, and the two witnesses must sign it in front of you and in front of each other. The witnesses must not be beneficiaries or married to beneficiaries.
- If you cannot write, make your mark with an "X." It is a good idea to have two witnesses who are not beneficiaries or married to beneficiaries watch you

Definitions

witness: a person who watches you sign your will and who can help answer questions later if there is a problem with your will. The witness also signs your will. Witnesses should not be beneficiaries or married to beneficiaries.



Indian and Northern Affairs Canada

make your “X.” One witness will need to read your will out loud to you, and both witnesses should sign an attestation clause in your will (see page 30).

- It is a good idea for you and your witnesses to initial the bottom right-hand corner of every page of your will, as well as next to any changes you have made to the will.

Note: Special rules limit who can inherit reserve land. For example, under the Indian Act, the deceased cannot leave reserve land to an **heir** or beneficiary who is not a member of the deceased’s band (often referred to as a **non-band member heir**). The act says that this portion of reserve land must be sold, and the money from the sale given to the non-band member heir instead. Consult a lawyer who is familiar with the Indian Act if you own reserve land that you wish to leave to someone (see page 25 for how to find a lawyer).

Where to keep your will

Keep your will safe from floods, fire, theft, and other damage. A safety deposit box at your bank is a safe place.

(**Remember:** Check the bank’s rules about your safety deposit box being opened after you die. Sometimes a court order is needed, which can be expensive and can take time.)

You could also keep your will in:

- a fireproof box or safe at home;
- a safe at your band council office; or
- a safe at your lawyer’s office.

Remember: Tell your executor where you have put your will.

Definitions

heir: a person related to the deceased by blood and entitled to receive property from the deceased’s estate when there is no will. There can be more than one heir.

non-band member heir: an heir or beneficiary who is not a member of the deceased’s band.

Filing a wills notice

You can record the existence and location of your will by filing a **wills notice** with the Vital Statistics Agency in Victoria.

You can get the standard wills notice form by contacting the Vital Statistics Agency (see page 24).

Changing your will later

With a codicil

You can change your will at a later date by making a **codicil**. A codicil is a new document that you add to your will. It can be used to add new sections, explain something in more detail, or cancel your will. Codicils must meet the same requirements as a valid (legal) will under the Indian Act.

With a new will

Another way of changing your will is to make a new one. You can make a new will as many times as you like. After you die, only the most recent one will be carried out.

To avoid confusion, it is a good idea to destroy your old will when you make a new one. Put the date on the new will, and tell your executor that you have made it and destroyed the old one. Tell your executor where you have put your new will. (Make sure that you replace any copies if you change your will later.) It is also a good idea to complete a new wills notice and send it to the Vital Statistics Agency (see page 24).

Definitions

wills notice: a form that you fill out to say that you have written a will and where it is.

codicil: a document that adds to, explains, or cancels a will.



Indian and Northern Affairs Canada

Part 2

Settling the estate of a registered Indian

Getting started

Different laws and a different system for settling (**administering**) **estates** apply to Indians who don't live on reserve and **registered Indians** who are **ordinarily resident on reserve** (see page 1 for definition).⁷ If you are a personal representative, an heir, or a beneficiary, and the **deceased** was a registered Indian ordinarily resident on reserve, this part of the booklet will tell you what happens to the estate of the deceased and what you need to do or know.

If the deceased was not a registered Indian who was ordinarily resident on reserve (for example, a registered Indian who lived off reserve; an Inuit, Métis, or otherwise unregistered Aboriginal person; or a non-Aboriginal person), this information does not apply to you. You can find out where to get information beginning on page 23.

What is an estate?

An estate consists of all the **property** that the deceased owned when he or she died. This could be a car, furniture, a house, land, money, or other possessions.

Definitions

administer: to take charge of and settle the estate that the deceased has left behind, making sure that the deceased's property is collected and debts are paid, and that the rest of the property is distributed to the heirs or beneficiaries.

estate: the property that the deceased owned at the time he or she died (such as a car, house, furniture, money, or residential schools compensation).

registered Indian: a person who is registered in the Indian Register maintained by Indian and Northern Affairs Canada.

deceased: the person who has died.

property: things that you own, such as land and personal possessions.

Notifying Indian Affairs

When a registered Indian living on reserve dies, the band, a family member, or another individual should contact Indian Affairs (see page 23).

After being notified of the death, the **estates officer** first establishes whether Indian Affairs has **jurisdiction** over the estate. If so, the estates officer will open an estate file for the deceased.

If the deceased was not registered or entitled to be registered, or was not ordinarily resident on reserve, then Indian Affairs is not involved in settling the estate. The information in this booklet does not apply to this situation (see page 23 for where to get information).

Transfer of jurisdiction

In some cases, where there are complications such as off-reserve **assets** or a possible lawsuit, Indian Affairs (or the heirs, beneficiaries, or executor) may suggest transferring jurisdiction to the BC Supreme Court.⁸ If the minister of Indian Affairs approves the transfer, the BC Supreme Court will have authority over the estate instead of Indian Affairs, but the estate will still be settled according to the Indian Act. It is a good idea to get legal advice before you decide whether or not to ask for a transfer of jurisdiction to the BC Supreme Court (see page 25).

Protection of vulnerable assets

Before a personal representative is appointed, an estates officer at Indian Affairs may need to take steps to protect the **vulnerable assets** that are part of the

Definitions

estates officers: Indian Affairs employees who work on estate matters.

jurisdiction: authority and control.

assets: things that you own. Assets can be things like a certificate of possession to reserve land, livestock, a standing crop, a car or truck, a fishing boat, a licence or lease, insurance, jewellery, money in a bank account, residential schools compensation, an Old Age Security or Canada Pension Plan cheque, wages owed to you, or many other things.

vulnerable assets: assets that are at risk of being lost, stolen, or damaged before the estate is administered.

deceased's estate. This might include things such as storing jewellery; insuring houses, fishing boats, or vehicles; or having repairs made to a building. The cost of the protection of vulnerable assets is taken out of the estate.

Search for a will

The deceased may have left a **will**. An estates officer will find out if the deceased deposited a will with Indian Affairs. (**Note:** Indian Affairs is no longer accepting wills for storage.) The estates officer may also check with the Vital Statistics Agency to see if there is a **wills notice** on file (see page 24), or check with the family or band office.

You can ask family members and friends of the deceased to look for the will on the reserve and elsewhere. Some places to look include:

- in the **personal effects** of the deceased;
- in a safety deposit box;
- at banks and law offices where the deceased did business; and
- at the deceased's band office.

Look for any papers, written or signed by the deceased, that refer to a will. They could express the intentions of the deceased and could be considered a **codicil** (see page 8).

If you find a will, send it to an estates officer at Indian Affairs, who will see if it can be approved by the minister.

Remember: The will you send to Indian Affairs must be the original will, not a photocopy.

Definitions

will: a written document that describes how you want your property distributed and your debts paid after you die.

wills notice: a form that you fill out to say that you have written a will and where it is.

personal effects: personal belongings such as clothes, jewellery, personal papers, and letters.

codicil: a document that adds to, explains, or cancels a will.

Indian Affairs determines the beneficiaries or heirs

If there is a will, an estates officer will find out who the **executor** and **beneficiaries** are, according to the will.

If there is no will, the estates officer will find out who the **heirs** are, following the rules set out in the Indian Act (see page 17). The estates officer will check the Indian Affairs records and then ask family members or band employees for information about the deceased and his or her heirs.

Indian Affairs appoints a personal representative

If there is a will that names an executor

If a valid will names an executor and that person is willing and able to do the work of administering the estate (as the **personal representative**), Indian Affairs will send that person some forms to fill out and return.

These forms enable Indian Affairs to:

- approve the will, and
- legally appoint that person to act as executor.

OR

- consent to a transfer of jurisdiction to the BC Supreme Court (see “Transfer of jurisdiction” on page 10).

If the executor does not send back any of the forms, Indian Affairs will write to all the beneficiaries named in the will and give them the opportunity to apply to administer the estate.

Definitions

executor: the person who will be responsible for carrying out the instructions in your will after you die. You can name more than one executor. You can also name an alternate executor to take on the responsibility if the executor you choose cannot or will not accept the responsibility.

beneficiary: a person who inherits under a will. There can be more than one beneficiary.

heir: a person related to the deceased by blood and entitled to receive property from the deceased’s estate when there is no will. There can be more than one heir.

personal representative: a person who settles the estate that the deceased has left behind. If the deceased named someone in their will to be their personal representative, that person is called the **executor**. If there was no will, the deceased did not name an executor, or the person named does not act, the person appointed is called the **administrator** (a personal representative can be an executor or an administrator).

If the will names more than one person as executor, Indian Affairs may appoint one or both as co-executors of the will.

If there is a will but no executor

If the will does not name an executor or the named executor cannot or will not do the job, Indian Affairs will write to the beneficiaries and tell them they can apply to administer the estate, nominate someone else, or transfer jurisdiction. Indian Affairs will then select an **administrator** from among the people who apply or are nominated by the beneficiaries.

If there is no will

If there is no will, an estates officer at Indian Affairs will write to the heirs and ask them if they would like to apply to administer the estate, nominate someone else, or transfer jurisdiction. Indian Affairs will then select an administrator from among the people who apply or are nominated by the heirs.

Indian Affairs acts as the “administrator of last resort” if there is no executor or family member available to administer the estate. An estates officer will administer an Indian estate only if no executor is named in the will or no one else is willing and able to do it.

The personal representative administers the estate

After Indian Affairs appoints a personal representative and approves the will (if there is one), they will:

- send the appointment document to the personal representative;

Definitions

administrator: the person who is appointed to act as the personal representative and settle the estate if the deceased did not name an executor.



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- release the assets to the personal representative **in trust** for the estate; and
- close the estate file.

Note: After the personal representative is appointed, estates officers will not advise or interfere with the estate unless:

- there are complaints by the heirs or **creditors** of the estate about the personal representative's administration of the estate; or
- there is a challenge to the will (see below).

Challenges to the will

An heir or beneficiary may object to the will and try to have it declared void (not valid) for one of the following reasons:⁹

- the deceased made or signed the will under **duress** or **undue influence**;
- at the time the will was made, the deceased lacked **testamentary capacity** (see page 3);
- people that the deceased was responsible for would suffer hardship if the terms of the will were carried out;
- the will's instructions about reserve land go against the Indian Act or the band;
- the meaning of the words used in the will is unclear; or
- the terms of the will are against the public interest.

A will must be approved by the minister before it can be challenged. You may want to talk to a lawyer (see page 25) for help with a challenge to a will.

Definitions

in trust: when assets are put in the name and control of the personal representative, who will administer the estate for the benefit of the heirs and beneficiaries.

creditors: people or institutions that the deceased owed money to. They will need to be paid using money from the estate.

duress: a threat or other kind of pressure.

undue influence: influence or persuasion that prevents a person from using their free will.

testamentary capacity:

this means:

- you know what you are doing;
- you know the effect of what you are doing; and
- you are of sound mind (mentally capable) when you make your will.

What to do if you are a personal representative

The personal representative of the deceased settles (deals with) the estate that the deceased has left behind. For example, the personal representative makes sure the deceased's debts are paid, and distributes the rest of the property to the people who are entitled to it. In other words, the personal representative must administer (see page 9) the estate.



Harly Neumann

When you are appointed as the personal representative, you alone are responsible for doing all the tasks and making all the decisions necessary to settle and distribute the estate. Indian Affairs estates officers can give you general information about the process of settling an estate, but they cannot give you legal advice or help you administer the estate in any way.

Note: As the personal representative, you are not responsible for paying the debts of the estate, or paying for a lawyer, accountant, or other estate expenses with your own money. These debts are paid out of the estate.

Do you need a lawyer?

Because administering an estate can be a complicated process and you are legally responsible for what you do, you should

think about whether or not to hire a lawyer to help you.

A lawyer's fees are paid out of the estate. It is a good idea to hire a lawyer if any of the following situations apply:

- Disputes are likely.
- Lawsuits are possible.
- The estate includes property held off reserve.
- Some of the assets require a lot of paperwork to transfer title.
- The deceased had an ongoing business, such as a fishing business.

For information on how to find a lawyer, see page 25.

Whether or not you hire a lawyer to help you administer the estate, you will need information on how to carry out your responsibilities. To find out about some helpful publications, see page 26.

Note: Estates officers cannot give legal advice at any time.

The personal representative's tasks

Because each estate is unique, this booklet cannot give you a complete list of the things you will have to do if you are a personal representative. Here are some of the things you will have to do:

- gather and protect assets;
- determine and pay **debts**, including funeral expenses;
- determine beneficiaries and/or heirs;
- interpret and carry out the terms of the will;
- file income tax returns;

Definitions

debts: money you owe to someone else. Debts can be things like money owed on a credit card, bank loans, phone bills, utility bills, funeral expenses, money owed to the local store, or many other things.

- complete transfers of reserve land and other assets;
- distribute assets; and
- keep track of the debts and assets, and explain to the heirs and beneficiaries everything you have done with the estate.

Some of these tasks are discussed briefly below. Some of the general tasks are described in detail in *Probate Guide for British Columbia* (see page 26). See also “Legal advice” on page 25.

Posting a Notice to Creditors, Heirs, and Other Claimants

As personal representative, you are required to tell creditors, heirs, and other claimants about the death.¹⁰ Contact any creditors you know of, tell them you are the personal representative of the estate, and ask them to send you the deceased’s bills. You will receive a blank Notice to Creditors, Heirs, and Other Claimants form from Indian Affairs when you are appointed. Complete the form and:

- give copies to the deceased’s band and tribal council, to be posted; and
- post copies in meeting places and public places (such as the post office).

After you have posted the notice, anyone who claims to be an heir or claims that the deceased owed money or other assets to him or her has eight weeks to respond and provide proof of the debt. Unless you are certain there is enough money in the estate, do not pay any of the creditors until the eight-week period is over. If this causes a problem, contact



Indian and Northern Affairs Canada

a lawyer (see page 25) or an Indian Affairs estates officer (see page 23).

Determining heirs when there is no will

Unless the estate is very simple, when there is no will it is a good idea to seek legal advice about how to divide up the estate (see page 25). If the estate is simple and disputes seem unlikely, you may be able to determine the heirs and distribute the assets yourself.

Except for the **survivor**, only people who are related to the deceased by blood are considered heirs. However, a person who is legally adopted or adopted according to “Indian custom” (see page 19) is treated in the same way as if they were related by blood to their adoptive relative.

Someone who is not a legal spouse but was in a common-law relationship with the deceased for at least one year immediately before the date of death may also be considered the survivor for inheritance purposes. A **common-law partner** must give evidence of the relationship to be considered the survivor for inheritance purposes. For more information about how to do this, contact an estates officer (see page 23).

To begin, make a list of all the **surviving heirs** by talking to family members or the band council. You may get more names if some heirs respond to your posted Notice to Creditors, Heirs, and Other Claimants (see page 17).

Definitions

survivor: a married spouse or common-law partner (the deceased may have had both a married spouse and a common-law partner).

common-law partner: a person who has lived with an individual in a conjugal (marriage-like) relationship for at least one year.

surviving heirs: heirs who were alive (or conceived but not yet born) on the day the deceased died, including heirs who died after the deceased’s death.

The rules for distributing assets if there is no will are outlined in section 48 of the Indian Act.¹¹ If the **net value** of the estate is:

- less than \$75,000, the survivor gets the entire estate;
- more than \$75,000, the survivor gets the first \$75,000 and the rest is divided between the survivor and the children (if any).

If the deceased had no survivor, children, grandchildren, great-grandchildren and so on at the time of death, the next heirs in line are, in the following order:

- parents,
- sisters and brothers, and
- nieces and nephews.

There are restrictions on who can inherit reserve land when there is no will and the heir or heirs are more distantly related than sisters and brothers.¹² It is a good idea to get legal help in this situation. To find out where to get legal help, see page 25.

If heirs who would inherit are absent or missing, you must take steps to locate and notify them.¹³ Speak to Indian Affairs about this.

Note: The deceased's married but separated spouse *and* common-law partner may both have an inheritance claim to the same estate. It is a good idea for a person to seek legal advice if he or she had a common-law relationship with someone who was also married and not legally divorced.

Definitions

net value: the value of an estate after all debts have been paid.



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Legal and custom adoptions

A person who is adopted according to either Canadian law or Indian custom can inherit from their adoptive relatives in the same way as if they were related by blood.

In the case of custom adoption, there must be a **finding** of custom adoption before the adopted person can inherit. Call the Indian Registration Information Line to find out how to apply for this finding (see page 23 for more information).

Filing income tax returns

As the personal representative, you must file income tax returns for the year of death, as well as any previous tax returns that the deceased did not file before death. Once all of the tax returns have been assessed, you must pay any taxes owing from money in the estate. Once all outstanding taxes have been paid, apply to the Canada Revenue Agency for a clearance certificate. This certificate allows you to distribute the estate. For more information, see page 23.

Selling reserve land if the heir or beneficiary is not a band member

If the deceased leaves reserve land and has heirs or beneficiaries who are not members of the deceased's band, the **non-band member heirs** or beneficiaries cannot inherit an interest in the reserve land. It must be sold by the superintendent, who is employed by Indian Affairs, in accordance with section 50 of the Indian Act. The money from the sale is then paid to the non-band member heirs or beneficiaries.

Definitions

finding: a decision about what the facts are.

non-band member heir: an heir or beneficiary who is not a member of the deceased's band.

If there is a registered lease in place, the non-band member heir or beneficiary's share is paid to the band.¹⁴

If you are the personal representative of a deceased person who has left reserve land to someone who is not a member of his or her band, you cannot legally sell the interest in land that would have gone to the non-band member heir or beneficiary had he or she been a band member. If you have questions about the sale process, contact Indian Affairs (see page 23).

Transferring reserve land

The Minister of Indian Affairs must approve any transfers of reserve land to heirs or beneficiaries.¹⁵ Ask an **individual land holding specialist** at Indian Affairs for the form that you (the personal representative) need to transfer reserve land. (See page 23 to find out how to contact an individual land holding specialist.)

If the deceased had traditional land holdings, you should obtain a Band Council Resolution acknowledging the transfer. If you have difficulty getting this, consult a lawyer.

Note: If the deceased left reserve land but belonged to a band that is now under the First Nations Land Management Act (FNLMA), section 49 of the Indian Act does not apply. In this case, the band (and not the Minister of Indian Affairs) is responsible for approving transfers of reserve land to heirs and beneficiaries. To find out if your band is under the FNLMA, contact Indian Affairs or see the following website:
www.fafnlm.com.

Definitions

individual land holding specialists: Indian Affairs employees who work on individual land holding matters.

If the deceased owned a fishing boat and licence

Contact Fisheries and Oceans Canada and Transport Canada to find out how to deal with these assets (see page 23).

If the deceased owned a trapline

Contact the BC Ministry of Environment to find out how to deal with traplines (see page 24).

Accounting to heirs and beneficiaries

Once all the debts have been paid and the assets have been distributed to the heirs and beneficiaries, you must give a full accounting

of the estate's administration to all of the heirs and beneficiaries.

Write to all of the heirs and beneficiaries, or their legal representatives (in the case of children under the age of 19 or mentally

incompetent people), and provide them with a list of all of the assets in the estate and their value at the date of death. You must also provide details of how the assets were distributed.



Indian and Northern Affairs Canada

Part 3

Where to get more help

General information

Canada Revenue Agency

9755 King George Highway
Surrey, BC V3T 5E6

Telephone: 1-800-959-8281

Website: www.cra-arc.gc.ca

For general tax information.

Fisheries and Oceans Canada

200 – 401 Burrard Street
Vancouver, BC V6C 3S4

Telephone: (604) 666-0566

Fax: (604) 666-5855

Website: www.dfo-mpo.gc.ca

For information about fishing vessels, and recreational and commercial licences.

Human Resources and Social Development (Canada)

Income Security Programs
PO Box 1177

Victoria, BC V8W 2T2

Telephone: 1-800-277-9914
(toll free)

Website: www.hrsdc.gc.ca

For information about the Old Age Security program and the Canada Pension Plan.

Indian and Northern Affairs Canada

For an estates officer, call
1-888-917-9977 (toll free).

Ask to speak to an estates officer who is responsible for your band.

Note: Estates officers cannot give legal advice.

For an individual land holding specialist, call (604) 666-3931.

Ask to speak to the individual land holding specialist who is responsible for your band.

For information about custom adoption findings, call the Indian Registration Information Line at (819) 953-0960.

Insurance Corporation of British Columbia (ICBC)

151 West Esplanade

North Vancouver, BC V7M 3H9

Telephone: (604) 661-2800

Fax: (604) 646-7400

Website: www.icbc.com

To transfer motor vehicle licensing.

Ministry of Environment (BC)

Fish and Wildlife Branch
200 – 10470 152nd Street
Surrey, BC V3R 0Y3
Telephone: (604) 582-5200
Fax: (604) 930-7119
Website: www.env.gov.bc.ca/fw
For information about traplines.

Society of Notaries Public of BC

Telephone: (604) 681-4516
Telephone: 1-800-663-0343
(toll free)
Website: www.notaries.bc.ca
To find a notary public in your area.

Transport Canada

420 – 800 Burrard Street
Vancouver, BC V6Z 2J8
Telephone: (604) 666-3293
Fax: (604) 666-9133
Website: www.tc.gc.ca
For information about ship licensing.

Vital Statistics Agency (BC)

PO Box 9657 Stn Prov Govt
Victoria, BC V8W 9P3
Telephone: (250) 952-2681
Website: www.vs.gov.bc.ca
For birth certificates, death certificates, and will searches.

Legal information

Legal information is general information about the kind of legal problem you are having. Many people are qualified to give you information about some areas of the law, but they cannot tell you how the law will apply in your case.

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.

Electronic Law Library

A website with links to government information, legislation, court decisions, and specific areas of the law: www.bcpl.gov.bc.ca/ell — “Law by Subject” — “Death” and “Wills”

LawLINE

LawLINE is a toll-free telephone service that provides general legal information and, in some cases, advice about legal issues. It is a service for people who cannot afford a lawyer but do not qualify for legal representation. LawLINE is staffed by lawyers and paralegals. They can arrange

immediate access to telephone interpreters as needed.

Telephone: (604) 408-2172
(Lower Mainland)

Telephone: 1-866-577-2525
(toll free outside the Lower Mainland)

After dialing the telephone number, press “7” to connect to LawLINE.

Monday, Tuesday,
Thursday, and Friday:
9:00 a.m. to 4:00 p.m.
Wednesday:
9:00 a.m. to 2:30 p.m.

LawLINK

A website with links to self-help resources and information on legal topics:

Website: www.lawlink.bc.ca
— “Aboriginal” and “Wills and Trusts”

PovNet

If you’re looking for an advocate in your community, go to
Website: www.povnet.org and click on the “Find an Advocate” link.

Legal advice

Legal advice applies to your specific legal problem. Only a lawyer is qualified to give you legal advice. To talk to a lawyer who knows about estate law for Aboriginal people or registered Indians, try the following sources.

The Law Centre

1221 Broad Street
Victoria, BC V8W 2A4
Telephone: (250) 385-1221
Website: www.thelawcentre.ca

An in-person service provided by University of Victoria law students in downtown Victoria.

LawLINE

LawLINE is a toll-free telephone service that provides general legal information and, in some cases, advice about legal issues. Please see page 24 for more information on LawLINE.

Lawyer Referral Service

Telephone: (604) 687-3221
Telephone: 1-800-663-1919
(toll free)

This service is operated by the Canadian Bar Association. When you call, you are given the name of a lawyer in your area. You then call the lawyer to arrange for a half-hour consultation in which you will discuss your legal options. The meeting costs \$25 plus tax.

UBC First Nations Legal Clinic

50 Powell Street
Vancouver, BC V6A 1E7
Telephone: (604) 687-0285
Telephone: 1-877-771-9444
(toll free)

An in-person service provided by UBC law students in downtown Vancouver.

UBC Law Students' Legal Advice Program

Telephone: (604) 822-5791
Website: www.lslap.bc.ca

An in-person service provided by UBC law students at clinics located throughout the Greater Vancouver Regional District (GVRD).

Yellow pages

Look in the yellow pages to find a lawyer or notary public who specializes in Aboriginal law.

Useful publications

Settling a Family Member's Estate (free)

Why Make a Will? (free)

Indian and Northern Affairs Canada
To order, contact Indian Affairs at:
Suite 600 – 1138 Melville Street
Vancouver, BC V6E 4S3
Telephone: (604) 666-3931
Telephone: 1-800-665-9320
(toll free)

Fax: (604) 775-7149
E-mail: BCinfo@inac-ainc.gc.ca

Choosing an Executor— Being an Executor (free)

Writing Your Will (free)

People's Law School

These publications contain information that applies to the general public. You can read them online or print them out from 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
Fax: (604) 331-5401

Wills Guide for British Columbia

Probate Guide for British Columbia

Self-Counsel Press

These and other guides and kits published by Self-Counsel Press contain information that applies to the general public.

You can find these publications at bookstores and stationery stores, order them online at www.self-counsel.com, or order them from:

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

A Guide to Aboriginal Organizations and Services in BC (free)

Government of BC

A list of community-based services and organizations that can be found in PDF form on the Ministry of Aboriginal Relations and Reconciliation website, at www.prov.gov.bc.ca/arr.

Order hard copies from:

Telephone: (250) 387-2199

Fax: (250) 356-9467

First Nations Profiles (free)

Indian and Northern Affairs
Canada

A website providing current First Nation community profiles that include general information about the First Nation, the First Nation's government, tribal councils, and reserves:

Website: <http://sdiprod2.inac.gc.ca/FNProfiles>.

For more information, call Indian Affairs toll free at 1-800-665-9320.

Endnotes

1. *Indian Act*, R.S.C. 1985, c.1 – 5, s.45.
2. *Indian Act*, s.4(3). *Canada (Attorney General) v. Canard* (1975), [1976] 1 S.C.R. 170, 52 D.L.R. (3d) 548, 4 N.R. 91, [1975] 3 W.W.R. 1, 8 C.N.L.C. 120 (S.C.C.).
3. *Indian Act*, ss.2(1), 4(3), and 42.
4. *Indian Act*, s.45.
5. *Indian Act*, s.45.
6. *Indian Act*, s.48.
7. *Indian Act*, ss.2, 3, 4, and 42 – 50; *Indian Estates Regulations*, C.R.C. 1978, c.954; *Wills Act*, R.S.B.C. 1979, c.434; *Estate Administration Act*, R.S.B.C. 1979, c.114.
8. *Indian Act*, s.44.
9. *Indian Act*, s.46.
10. *Indian Estates Regulations*, s.8.
11. *Indian Act*, s.48.
12. *Chief Dan Wilson v. Bonneau et al.*, 2002, BCSC 748.
13. *Indian Estates Regulations*, s.13.
14. *Songhees First Nation v. Attorney General for Canada*.
15. *Indian Act*, s.49.

Checklist for making a will

Executor

- Executor: name, address
- Alternate executor: name, address

Spouse

- Married spouse: full legal name, band membership and number, year the relationship started and ended, if applicable
- Common-law spouse: full legal name, band membership and number, year the relationship started and ended, if applicable

Children

- Children: full legal name, band membership and number, date of birth (including year)
- Children adopted through custom adoption: full legal name, band membership and number, date of birth (including year)
- Guardian for children under age 19: name, address, relationship to you
- Alternate guardian for children under age 19: name, address, relationship to you

Property

- Property on reserve (vehicle, trapline, boat, jewellery, money in a bank account, etc.): description, location
- Property off reserve (vehicle, trapline, boat, jewellery, money in a bank account, etc.): description, location
- Insurance policies, pension plans, etc.: description, name of beneficiary
- Debts: description and amount
- Land holding: reserve, lot number, type of possession (certificate of possession, traditional, or other)

- Land holding off reserve: legal description, street address
- House: description, reserve, type of interest (joint tenant, tenant in common, sole ownership)
- Person/people you want to give your land to: description of land, person's full legal name, relationship to you, band membership and number
- Person/people you want to give a specific piece of property to: description of property, person's full legal name, relationship to you, band membership and number
- Person/people you want to give the residue of the estate to: full legal name, relationship to you, band membership and number

Other

- Other instructions
- Specific funeral wishes

Sample will

This sample will meets the formal requirements of the BC Wills Act and the Indian Act. Since this is a sample will, you can use it as a guide, but yours will be different depending on your situation.

This is the last will of me, *[name]*, of *[address]*, British Columbia.

1. I revoke all of my former wills and codicils.
2. I appoint my *[relationship]*, *[name]*, currently living at *[address]*, British Columbia, to be my Executor and Trustee (in my will, I refer to this person as my "Trustee"). If *[Trustee's name]* is unwilling or unable to act or continue to act as my Trustee, I appoint my *[relationship]*, *[name]*, currently of *[address]*, British Columbia, to be my Trustee.
3. I give all my property, wherever it is located, to my Trustee on the following trusts:
 - a) subject to this will, to use his or her discretion in settling my estate;
 - b) to pay my just debts, funeral and testamentary expenses, and outstanding taxes;
 - c) to give *[description of property]* to *[name]*;
 - d) to give the residue of my estate to *[name]* if *[he/she]* survives me for 30 days, provided that if *[same name]* does not survive me for 30 days, then to give the residue of my estate in equal shares to such of my *[relationship]*, *[names]*, as survive me for 30 days.

OR

Important information update

to give the residue of my estate to my spouse, *[name]*, if *[he/she]* survives me for 30 days, provided that if my spouse does not survive me for 30 days, then to give the residue of my estate in equal shares to such of my children, *[names]*, as survive me for 30 days, provided that if a child of mine does not survive me for 30 days, but dies leaving children of his or her own who survive me for 30 days, then to give the share that would have been given to that deceased child of mine in equal shares to such of his or her children as survive me for 30 days. If a child of mine does not survive me for 30 days, and does not leave children of his or her own who survive me for 30 days, then the share of my estate that would have been given to that deceased child of mine shall be given in equal shares to such of my children as survive me for 30 days.

4. In administering my estate, my Trustee may make prudent investments, and is not limited to those authorized by law for Trustees.
5. If a person under 19 years of age becomes entitled to any part of my estate, I direct my Trustee to hold that part in trust and pay as much of the income and capital as my Trustee feels is reasonable for that person's benefit until that person reaches 19 years of age, and then to pay the remaining income and capital to that person.
6. My Trustee may make any payment for the benefit of a person under 19 years of age to that person's parent or guardian. Having done so, my Trustee's obligations with respect to that payment are completed.
7. Upon my death, I direct my Trustee to: *[list funeral wishes]*
8. I appoint my *[relationship]*, *[name]*, as guardian of any children under the age of 19 of whom I am sole guardian at the time of my death.

I, *[name of testator]*, have signed this will on *[month, day, year]*.

We, the witnesses, were both) *[Signature of Testator]*
 present at the request of the) _____
 testator, *[name of testator]*, when) *[Full name of Testator]*
[he/she] signed this will. We then)
 signed as witnesses in *[his/her]*)
 presence and in the presence of)
 each other.)

OR, IF THE TESTATOR IS)
 VISUALLY IMPAIRED)
 OR CANNOT READ:)

We, the witnesses, were both)
 present at the request of the)
 testator, *[name of testator]*, when)
 this will was read to *[him/her]*.)
[Name of testator] appeared)
 to thoroughly understand it)
 and approve its contents. We)
 remained present while *[he/*
she] signed this will *[with his/*
her mark]. We then signed as)

continued on next page

continued from previous page)
)
witnesses in *[his/her]* presence)
and in the presence of each)
other.)
)
)
)
_____)
Signature of witness)
)
_____)
Name)
)
_____)
Address)
)
)
_____)
Signature of witness)
)
_____)
Name)
)
_____)
Address)