Estate Planning Guidebook

Last Wills & Testaments
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Introduction

This document is meant as an introduction and a basic guide for residents of Newfoundland and Labrador who are thinking about making a Last Will and Testament or who are taking other steps to establish or update their estate plan.

While it is perfectly legal and possible to prepare your own Last Will or other estate planning documents, this guide is not meant to be a do-it-yourself kit for writing and finalizing your own estate plan. In the absence of a solicitor-client relationship with the writer (which is not created by simply obtaining a copy of this guide), it is also not meant as legal advice. Rather, this guide is meant to provide **general information on estate planning**, to cause you to ask questions or turn your mind to issues you may not have considered, and to equip you to be able to ask your estate planning advisors the right questions and give them clear instructions. If you are a client or prospective client of our firm, please feel free to also ask for a copy of our **Estate Planning Worksheet** to help you collect and record some of the basic information and details that your estate planning advisor will likely need in order to assist you.

Personal Information

First and foremost your identity is a key thing that you will need to establish in your estate planning documents. Your solicitor will be required by their professional regulator to confirm client identity and to collect and maintain client ID details in their file, and will likely want information about yourself, your family, and about your personal circumstances, in order to help you make a plan for your estate.

Spouse or Partner

If you are married, engaged to be married, or are co-habiting or involved in a long-term relationship with a common law partner, then your solicitor will want to know about that person, regardless of your intentions in relation to their role in your estate plan.

Family Information

Last Wills by their nature are made for the benefit of others, often dependants, family members, or those close to you. As well, these people often play a role in administering your estate. It is important to give an estate planning professional details about members of your family, whether or not you intend to name or include any or all of them in your Last Will or other instruments in any role. Obvious people to consider listing in addition to a spouse or partner are children and grandchildren, but also stepchildren, as well as parents, siblings, and nieces or nephews as necessary. You may also wish to list very close friends or other persons you have a special relationship with, as well as people who have passed away who otherwise might have been heirs.

For persons with second marriages, blended families, or common law partnerships, being clear on family relationships is very important, especially if there are children or grandchildren who are not biological relatives or were legally adopted, but whom are “step” family members.

Last Wills & Testaments

In life you have the right (within the bounds of the law) to do as you wish with your property, whether that property is land or interests in land, or is personal property such as money, investments, business assets, vehicles, intellectual property, or household goods and personal effects.

A Last Will & Testament is meant to be the last expression of a person's intentions for the use or disposition of their property when they pass away.

Executors

In order for a person's instructions in their Last Will to be carried out (*i.e.* executed), someone living needs to take action to do what is required to give effect to the testator's wishes (*e.g.* to sell their house, transfer registrations, liquidate or transfer investments, carry on or wind up business affairs, or to just have the recyclables cleared out of the basement and the family heirlooms taken down from the attic).

Selecting an **executor** or executors is an important decision, and one that is often neglected when people prepare homemade wills. Executors have a duty of good faith towards the creditors and beneficiaries of an estate, and most people would agree that the person or persons chosen to act should be (1) someone whom you trust and who is trustworthy, and (2) someone who is also practically capable of managing the wind-up of your affairs. If selecting someone appropriate is a challenge, consider that a person's honest and trustworthy character will generally be more important than their capabilities, so long as they have the good sense to get a competent advisor to assist them. For example, your family member with a high school diploma who works as an unskilled labourer but who also has a reputation for being hard-working and scrupulous may likely be a safer or better choice than your family member with an advanced degree and who runs their own business but who also has fraud convictions.

It is wise to name at least one **substitute executor** in case your named executor predeceases you or is too ill or otherwise unable to take on the role of executor when the time comes.

It is also possible to appoint one or more executors to act together as **co-executors**, either jointly or jointly and severally, or for all or a part of your estate.

Finally, it is possible in some cases to appoint a **corporate executor** or trust company to act as an executor or co-executor, although this usually requires signing a contract with the trust company in advance.

Be sure to carefully discuss your choice of executor with your estate planning advisor.

Beneficiaries

Your beneficiaries are the persons who will receive a gift or benefit under your Last Will. They may be any of your immediate or extended family members, or they may be friends, or they may also be charitable trusts or organizations.

It is important that you **clearly identify** which persons (or classes of persons) are intended to receive a benefit under your Last Will.

Contingent Beneficiaries

Contingent beneficiaries are persons who may not be the first in line to inherit under the terms of your Last Will, but who may be listed in the event that one or more of your first-named beneficiaries predecease you. For example, if a person is predeceased by all of their children and grandchildren, they may choose to name nieces or nephews, or charitable organizations, as contingent or **back-up beneficiaries**, as a way to avoid an intestacy.

Guardians for Children

While Last Wills primarily deal with the disposition of property, it is also possible in many jurisdictions for a testator with **minor children** to appoint one or more people to have custody of their child or children. In the province this is possible pursuant to the provisions of the *Children's Law Act*, RSNL 1990, c C-13. These appointments are not immune to challenge, but on application a Court of competent jurisdiction in the province will generally defer to these appointments unless it clearly was not in the best interests of the child. Named guardians do not have to be the same as named executors or trustees, although they can be. Even if guardians are intended to be the same persons as a testator's appointed executors or trustees, **guardianship is a separate appointment** and needs to be separately indicated.

Surviving Spouse

If you are married or have a long-term partner, you may or may not be making couples' estate plans with your spouse or partner as "mirrors" of each other. Or, if you are not married, you be planning to get married. It is critical to explain your intentions here to your estate planning advisor, since (1) a future marriage can operate to automatically revoke a will, and (2) your plans for your estate may be different depending on whether your partner survives you or predeceases you. As well, if you are legally married some of your property may be joint or matrimonial assets, which may also affect your plans for your estate.

If you are married or plan to marry, or if you are in a long-term relationship, and if your spouse or partner survives you, you should be clear on whether your intention is to leave your spouse or partner all of your estate, or just some part of it.

This question is simple for some people, but for people with children from a prior relationship, for example, the question can become more complicated.

Personal Effects

There are three main types of gifts a person might commonly make in a Will, namely, "specific bequests", "general legacies", and "residual legacies".

That said, it is not uncommon for testators to deal with their **personal effects** in a more perfunctory manner. For our purposes, "personal effects" broadly means items of personal or household use or ornament (*e.g.* clothing, jewelry or personal accessories, books, household decorations or artworks, or small furnishings or appliances). For example, a testator may simply leave it to their executor to divide or dispose of these items according to an exercise of the executor's discretion. Other testators might choose to prepare a **precatory memorandum** in addition to the main body of the Will, listing certain personal effects and what they would like done with them.

It should be noted that items of moveable property that have significant monetary value (*e.g.* expensive jewelry or valuable artworks) are best not dealt with as mere personal effects, but, *e.g.*, as specific gifts or as part of a residual legacy.

Specific Gifts

Specific bequest or gifts are exactly what they sound like, namely, **a gift of a specific thing**. A specific gift could be something with significant market value (*e.g.* "my cottage property at Bonne Bay"), or something that has sentimental value or is a family heirloom (*e.g.* "my gold wedding ring"; or "my grandfather's .303 British bolt-action hunting rifle, serial no. F1234"). If it's important to you that a particular item be left to a particular person, then it's a good idea to include it in your Will as a clear specific gift.

If you do choose to make gifts of specific items in your will, then **it is also best to describe them as clearly as possible** so that they can be easily identified and to limit the possibility for any disagreements. So, instead of, *e.g.*, "I give my antique car to my son John", it's better to write something like "I give my 1956 Chevrolet Bel Air, serial no. V8CL5678 to my son John."

General Legacies

A general legacy is typically **a gift of money to a person or charity**. These gifts are taken from the general proceeds of an estate, after the payment of the deceased's debts and expenses, and are distributed BEFORE residual legacies. For example, "My Trustee shall pay the sum of $5,000 to my niece, Jane, if she is alive on the date of my death, but if my niece has predeceased me then the gift shall remain as part of the residue of my estate."

It is important to **consider the impact of general legacies on the amount left for residual beneficiaries**, should the value of the estate be less than anticipated by the testator at the time of their death.

It is worth noting here that another type of legacy gift that is like a general legacy, albeit somewhat different, is called a "**demonstrative legacy**", the difference being that these gifts are made from a particular fund or asset, rather than from the general estate. If that is your intention you should discuss it with your estate planning advisor, especially if you are also leaving general or residual legacies.

Residual Legacies

The "**residue**" of an estate (sometimes written as "all the rest and residue"), is what is remaining after all debts and expenses of the deceased have been paid, all specific gifts and general legacies have been distributed, and any claims are settled. It would be a mistake, though, to think of the residue as just the leftovers. It's almost always wise to include a residue clause in a Last Will, to avoid the possibility of a partial intestacy. As well, **many testators leave the bulk of their estate to be distributed according to the terms of a carefully written residue clause**. For example, if your general plan for your estate is to leave everything to your two children (*e.g.* "I direct my Trustee to divide all the rest and residue of my estate equally among my children who are alive at my death . . .").

There are a number of ways to write residue clauses depending on your intentions, ranging from very simple to very complex. A simple question, for example, if you want to leave the residue of your estate to several persons, is whether you want it left in equal or in unequal proportions. A further question is how, if something happens to a residual beneficiary before you pass away, to handle what otherwise would have been their inheritance.

Contingent Gifts

As discussed above, something that many testators don't consider before speaking to an estate planning advisor is what they would want to have happen to a gift if one of their intended beneficiaries predeceased them (*e.g.* what if you were travelling with a beneficiary and there was a common accident?).

For example, if you have no spouse or partner living, and have three children, and perhaps some grandchildren, AND you plan to leave your estate in three equal parts to your three children, what happens if one of them predeceases you? Many testators do not consider this scenario, but everyone should. A few minutes of planning and thoughtful consideration of this question could save a lot of trouble and uncertainty for family in the future.

In the case of the untimely death of a child, some people might wish to leave a gift instead to another child, or to a grandchild or great-grandchild, or to a sibling, niece, or nephew or some other family member, or, for many testators, to a charitable organization that is important to them.

Conditional Gifts

It is possible to place **conditions on a gift** given in a Will. Placing condition on gifts needs to be done with care to avoid unintended consequences, vesting issues, or disputes. Some types of conditions are not valid, either because of rules of construction or for reasons of public policy, while others are perfectly acceptable. Generally, **conditions subsequent** are unenforceable (*e.g.* ". . . my house and land to my son John as long as he never gets married . . ."), while **conditions precedent**, properly worded, can be enforced and validly achieve a testator's objective (*e.g.* ". . . my house and land to my daughter, Jane, if she completes her undergraduate degree . . .").

If you want to place conditions on a gift in a Will, it is best to discuss with your estate planning advisor and make sure what you want to do can actually be done, and that the bequest is properly worded.

Long Term Trusts

The residue of an estate being held by an executor for the benefit of the testator's beneficiaries is already a form of trust, with the executor being in law a type of trustee. The executor holds the estate assets in trust after having done the work of administering the estate. The trust is terminated when the estate assets are all distributed and the executor is discharged from their duty.

But **sometimes a testator may wish to direct that some property or funds be held longer term** for the benefit of one or more beneficiaries. This could be for many reasons. For example, a testator may wish to provide for beneficiaries who are minors, or who are disabled, or who may

be vulnerable to creditors or easily taken advantage of by other less-than-well-intentioned family members or acquaintances (*e.g.* the grasping friend or love interest).

In that case you should discuss your concerns with your estate planning advisor, as you may wish to include in your Last Will a "**testamentary trust**" (sometimes called a "will trust").

Drafting trust provisions can seem deceptively simple, but even experienced lawyers must be careful when drafting trusts in order to avoid any number of unintended consequences, and if you plan to use a trust it's important to consider and discuss your intentions in detail.

Simple Trusts

If it is possible that **a person who is a minor** could inherit under the terms of your will, it might be prudent to direct that their **inheritance be held in a simple trust** for them at least until they reach the age of majority, if not for longer. This can be done in such a way that the trustee still has discretion to apply funds held in trust if there is an earlier need to do so (*e.g.* for education or for uninsured medical expenses).

Testamentary Family Trusts and Tax-Planned Wills

Trusts are a very old form of structure which evolved gradually out of the Court of Chancery and conveyancing practices in the Middle Ages. For that reason, trusts are both somewhat arcane, but also very flexible vehicles which can be used creatively to set property aside for the benefit of a person or for classes of persons without giving the property to them outright.

A testamentary trust, being a trust settled in the text of a person's Last Will and Testament on their death, might, for example, put funds aside not only for minor children, but also for adult children and THEIR children on a long term basis (a testamentary family trust), or for a spouse or partner (a spouse trust), for a disabled beneficiary for their care (a "Henson" trust), or for a charity (a charitable purpose trust).

These types of testamentary trusts require professional drafting and under no circumstances should be attempted by a layperson.

If you would like establish a form of testamentary trust other than a simple trust for minors, you should be clear on your intentions with your estate planning advisors.

Inter Vivos Trusts

In contrast to a testamentary trust, which is set out in the terms of a testator's Last Will and Testament and springs into existence only after their death, an *inter vivos* trust is one that you settle while you are still living. As at the time of writing, income in *inter vivos* trusts in Canada is taxed at the highest marginal rate and not at graduated rates, and the application of *inter vivos* trusts is limited in estate planning measures to special situations. One of the most common forms of *inter vivos* trust used in estate planning is the **alter ego trust**, which is available to persons over the age of 65. *Inter vivos* trusts are best discussed with input both from your solicitor as well as from your tax advisor.

Business Assets

If you have an operating business then there are a number of special considerations that need to be considered in making a comprehensive estate plan that balances priorities in relation to the continued operation of the business or business succession, inter-related businesses, surviving business partners and shareholders, business financing matters, directorships, insurance, winding-up, and tax efficiency.

If you have an ownership interest in an operating business or businesses, this fact should also be discussed in connection with making a complete estate plan.

Funerary Instructions

An optional inclusion in a Last Will and Testament is an indication of a testator's wishes in relation to their own funeral or memorial. Some people are ambivalent about this, while others have very strong feelings about it. Some testators have already made prearrangements for a funeral, while many have not. Some testators care deeply about how their bodily remains are treated, where their funerary or memorial service is held, or where their remains are interred or placed. Many testators find the question difficult to consider. That said, including these directions in a Will can give helpful guidance to a testator's family and friends at a difficult time.

Administrative Clauses

Most professionally drafted wills, even short-form wills, will have some clauses that are administrative in nature and intended to broaden or constrain the executor's authority, or otherwise give them further direction to assist in the administration of the estate.

The type and wording of the administrative clauses that would be prudent to include in a person's last will depends entirely on their circumstances and on their intentions, and care needs to be taken in including or excluding "standard" administrative clauses from a precedent form of Will.

Some issues to consider include:

- Residence of executor;
- Executor vacancies;
- Addition of other executors or trustees;
- Executor delegation or sub-delegation;
- Decision-making rules for multiple co-executors;
- Removal of executors;
- Executors' liability;
- Power to sell, convert, or postpone conversion of assets;
- Administering charitable bequests;
- Powers to invest and types of investments;
- Distribution in kind;
- Power to deal with real estate;
- Power to deal with digital assets;

- Tax elections;
- Lending and borrowing;
- Accounting;
- Executor compensation;
- Disinheritance / anti-challenge provisions;
- Governing law, forum selection and alternative dispute resolution provisions.

Signing a Will

Once a draft form of Last Will has been finalized it needs to be properly signed in order for it to have legal effect. The *Wills Act* requires that a Last Will, other than one entirely in the handwriting of the testator, be signed in the presence of **two witnesses**, at the **same time**.

While signing a Last Will seems simple, it is remarkable how often it is done incorrectly. While any competent adult who is not a beneficiary or who otherwise stands to benefit from an estate can be a witness to a Will (*e.g.* a person's next-door neighbours could act as witnesses to their Will), it is ideal to have it done in the presence of a solicitor or their staff not only to ensures that the Will is signed correctly but also to make it harder to challenge and easier to probate.

Once signed, the original instrument needs to be carefully stored. In the absence of an ongoing relationship with a solicitor who is instructed to take custody of the original Will, the executors should also be alerted to its existence in case they are called on to act and need to be able to produce the Will for inspection.

Enduring Powers of Attorney

A Last Will and Testament is just one part of a complete plan for an estate. While a Will benefits others, it has no effect until the testator passes away.

An Enduring Power of Attorney, in contrast, is meant to be effective while the person who creates it is living, and primarily in the event that they are no longer able to manage their own property and financial affairs, for example because of some illness or accident that results in incapacity.

While you make a Will for someone else, you make an Enduring Power of Attorney to **protect yourself**.

A Power of Attorney is authority given to one person (the **agent** or "attorney"), to act on behalf of another (the **principal** or "donor") to handle their affairs. An Enduring Power of Attorney, made while a person has capacity, can remain in effect if the donor later loses their legal capacity, and in fact may be set up to be triggered precisely by that event.

The key issues to address in setting up an Enduring Power of Attorney are (1) who is to be named as the donor's attorney, (2) when it is to be effective, and (3) what limits should be placed on the attorney's authority.

Choice of Attorneys

As with the executors for a Will, it is wise to name at least one **substitute** attorney, in case your first choice (*e.g.* a spouse or partner) predeceases you or is too ill or otherwise unable to take on the role.

It is also possible to appoint one or more attorneys to act together as **co-attorneys**, either jointly or jointly and severally.

Finally, as with executors, it is possible in some cases to appoint a **trust company** to act as an attorney or co-attorney, although this usually requires signing a contract with the trust company in advance.

Be sure to carefully discuss your choice of attorney with your estate planning advisor.

Date of Effectiveness

In relation to the time when an Enduring Power of Attorney comes into legal effect, for most people it is reasonable that the attorney's agency is not triggered until the time when the donor loses their legal capacity. However, other options include making the Enduring Power of Attorney come into effect on a specified future date, or immediately on signing, which may be appropriate if the donor already heavily relies on their intended attorney or attorneys for assistance with their affairs (*e.g.* because of mobility issues).

Administrative Clauses

Finally, like Wills, Enduring Powers of Attorney frequently include further administrative language clarifying the extent of the grant of authority given to the attorney by the donor, and sometimes setting limits on the grant of authority.

Issues to consider include:

- Prior / multiple powers of attorney;
- Foreign property, if any;
- Compensation for the attorney for acting, if any;
- Threshold for personal liability;
- Duty to account to certain persons;
- Extent of power to make gifts, if any;
- Access to information;
- Access to donor's Last Will;
- Digital assets;
- Remaining at home or moving to a personal care facility.

When the form of Enduring Power of Attorney is settled then, like a Will, it is vital that it be properly signed.

While it is not required for validity that an Enduring Power of Attorney be signed in the presence of a person who is able to administer oaths or affirmations, in order for the instrument to have practical effect, especially if it to be used in connection with any future real estate

transaction, it should be signed in the presence of a barrister, notary public, or commissioner for oaths.

Advance Health Care Directives

An Advance Health Care Directive is very similar in many respects to an Enduring Power of Attorney, except that instead of property and financial affairs, it addresses **medical decision-making**.

An attorney appointed under an Enduring Power of Attorney does NOT have authority to make medical decisions for the donor, unless they are a person's "next of kin" or have also been explicitly given authority under the provisions of the *Advance Health Care Directives Act*.

This makes sense when you consider that some persons may have friends or family with different strengths and abilities, and where one person may be best suited to manage an incapacitated person's finances, another may be better suited to speak to and instruct their doctors (*e.g.* my son, the bookkeeper, will have my power of attorney, while my daughter, the radiologist, will be my medical substitute decision-maker).

Advance Health Care Directives have **two main legal functions**, namely, appointing a substitute decision-maker for medical decisions, and, if a person desires, setting out advance directions for end-of-life care in the event of a terminal illness (sometimes called a 'DNR' direction).

If a person does not have an Advance Health Care Directive in place, then a member of their family CAN apply to Court for "Letters of Guardianship of the Person" for an order giving them authority to make decisions. The problem with this is that the process takes time and costs money, and also that the patient has no control over which family member applies for the order.

Choice of Substitute Decision Maker

As with executors for a Will and attorneys under an Enduring Power of Attorney, it is wise to name at least one **alternative substitute decision-maker**, in case your first choice (*e.g.* a spouse or partner) predeceases you or is too ill or otherwise unable to take on the role.

Date of Effectiveness

In relation to when an Advance Health Care Directive comes into effect, as with Enduring Powers of Attorney, for most people it is reasonable that the power to act or instruct is not triggered until the time when the patient loses their legal capacity.

End of Life Care

An Advance Health Care Directive does NOT have to include provisions for end-of-life care. That is, it is possible simply to appoint substitute decision-makers and leave it at that. However, if a person has strong feelings about whether they want extraordinary measures taken to keep them alive in the event of a terminal disease with no medical hope of recovery, then they can indicate their preference beforehand. This is a sensitive question for most people involving questions of mortality and conscience and is a deeply personal choice.

As with a Last Will and with an Enduring Power of Attorney, an Advance Health Care Directive needs to be **properly signed** to be valid and effective. Like a typed Will, it needs two independent witnesses. In addition, your named substitute decision-makers also need to sign in order to indicate their consent to appointment.

As well, in order for an Advance Health Care Directive to have practical effect, the original instrument or a true copy needs to be provided to your local health authority to be placed on your medical chart (it is not as helpful as it could be if hidden away in a filing cabinet at home).

Other issues?

Is there anything else that has not been covered in this Guidebook that is important to you or that you want to discuss with a solicitor? If so feel free to make some notes to discuss later:

Glossary of Key Terms

The following terms are frequently used by lawyers in the context of estate planning.

Beneficiary	In this context, the person for whose benefit a trust is created, or the person named in a Last Will to receive property under the terms of the Will.
Donor	In this context, a person who gives (or "donates") a power of attorney.
Enduring Power of Attorney	At common law, a Power of Attorney ceased to be effective if the Donor became incapacitated (*e.g.* because of an accident or illness). An Enduring Power of Attorney is a special form of Power of Attorney permitted by statute which can "endure" beyond the subsequent incapacity of the donor.
Estate	Originally a term that referred to the nature and extent of a person's interest in land (*i.e.* real estate), it has come more generally to mean the aggregate of a person's property, both real and personal.
Executor	The person to whom the execution (*i.e.* carrying out the provisions) of a Will is entrusted.
Guardian	In relation to minors, a person who has charge of and is responsible for the care and management of the person and/or property of the child. In relation to mentally disabled persons, the person to whom the custody and management of the estate of a mentally disabled person are committed.
Heir	A term sometimes conflated with but not the same as "beneficiary"; it is sometimes loosely used to refer to a person who inherits real or personal property under a Will, although this usage is technically incorrect. Strictly speaking a person's heirs at law are those entitled to receive a person's property under intestacy rules.[1] The term is also used in a number of different configurations of terms of art in conveyancing (*e.g.* "heirs and assigns"). The short story is that care should be taken in using this term.
Letters of Probate	In Newfoundland and Labrador, if a Court is satisfied that a testamentary instrument submitted to the Court is in fact the valid Last Will and Testament of a deceased person, and that the person making the application is the lawful named executor in the Will, then the Court will issue "Letters of Probate" to the executor to be used in connection with the administration of the deceased's estate, which is a document giving proof of the executor's authority to act under the terms of the Will and having the force of a Court order.

[1] *E.g.*, see *O'Donnell Estate v Walsh*, 1991 CanLII 7446, 92 Nfld & PEIR 66 (NL SC)

Living Will	A term in many U.S. states referring to a type of instrument akin to an Advance Health Care Directive. The term is not properly used in Newfoundland and Labrador.
Per stirpes	In a distribution of an estate or part of an estate, *per stirpes* means that each distributee inherits in a representative capacity and stands in the place of a deceased ancestor. That is, each beneficiary receives a share in the property to be distributed, not necessarily equal, but the proper fraction of the fraction to which the person through whom he or she claims from the ancestor would have been entitled.
Per capita	In this context, defined by the heads or polls according to the number of individuals, share and share alike. Anything figured *per capita* is calculated by the number of individuals involved and is divided equally among all. In will drafting, a *per capita* distribution is sometimes used as opposed to a *per stirpes* distribution.
Power of Attorney	A power of attorney is legal authority that a person (known as the donor, grantor, or principal) delegates to another person or entity (known as the agent, donee, attorney-in-fact, or simply as the "attorney"), by way of a written instrument. Once properly executed and delivered by the donor, an attorney has the legal authority to take all of the actions specified in the written instrument on behalf of the donor, subject to certain limited exceptions.
Probate	The word "probate" is an old legal term of art, has several overlapping meanings, and can be used both as a noun or a verb. For that reason it can cause some confusion. For our purposes it means the process of establishing or "proving" that a testamentary document is a person's valid Last Will before of a court of competent jurisdiction.
Residue	The property and/or funds that remain in a deceased person's estate after the payment of their debts and the distribution of any other gifts or legacies.
Settlor	A person who creates (or "settles") a trust by giving property over to another (a trustee) to hold for the benefit of someone else (a beneficiary). A testator may settle a trust pursuant to the terms of their Last Will.
Substitute decision-maker	A person with authority to make medical decisions on behalf of another under the provisions of an Advance Health Care Directive.
Testator	A person who makes a Last Will and Testament. When they make their Last Will they are said to be "testate". A person who passes away with no valid Last Will in place is "intestate".
Trust	A right of property created by the separation in law of legal and equitable title, such that a trustee, given property by a settlor (or by a

	testator under a will trust) holds legal title to property on behalf and for the benefit of a beneficiary, who is said in turn to have equitable, or "beneficial" title.
Trustee	A person holding property under the terms of a Trust.
Will	Used interchangeably with "Last Will" or "Last Will and Testament" (although they do have slightly different technical meanings), a Will is a person's written wishes for the disposition of their estate on their death. It is a final expression of intent in relation to their property.

Legislation

There are several provincial and federal statutes that impact and commonly come up in discussion in estate planning. A few are listed here for ease of reference.

Advance Health Care Directives Act, SNL 1995, c A-4.1

This statute enables the creation of and establishes the basic rules for the creation of Advance Health Care Directives in the province.

Enduring Powers of Attorney Act, RSNL 1990, c E-11

This statute enables the creation of and establishes the basic rules for the creation of Enduring Powers of Attorney in the province.

Family Relief Act, RSNL 1990, c F-3

This statute allows a Court to vary the disposition of a deceased's estate if adequate provision is not made for dependants in a Last Will or under the default intestacy rules.

Income Tax Act, RSC 1985, c 1 (5th Supp)

This federal statute is the primary statute governing taxation in Canada, including the taxation of estates and trusts.

Intestate Succession Act, RSNL 1990, c I-2

This statute codifies certain common law rules and governs the disposition of estates in the province for persons who pass away without a valid Last Will.

Judicature Act, RSNL 1990, c J-4

This statute establishes the structure and rules of the Courts of inherent jurisdiction in the province and also governs to the probate and administration of estates.

Mentally Disabled Persons' Estates Act, RSNL 1990, c M-10

This statute empowers a Court to appoint a guardian for the custody and management of the estate of a mentally disabled person in the province.

Trustee Act, RSNL 1990, c T-10

This statute sets out certain legal obligations for trusts and trustees in the province, including those acting as executors, administrators, or under powers of attorney.

Wills Act, RSNL 1990, c W-10

This statute modifies certain aspects of the common law relating to Wills and codifies the basic formal requirements for valid Last Wills in the Province.

Important Cases

Over hundreds of years a large body of case law has developed which applies to the law of estates, wills, and trusts, including a good many cases from this province. This Guidebook is not meant to be a textbook. But a few important cases are very commonly cited in the body of wills themselves, or are useful for solicitors in advising clients, a few of which are listed here simply by way of brief explanation.

Brown v Martin et al., 2007 NLTD 115, 270 Nfld & PEIR 167

This is a Newfoundland and Labrador case which considered the question of executor compensation, having a view to the provisions of the *Trustee Act* and the *Judicature Act*, and earlier case law.

Howe v Lord Dartmouth (1803), 7. Ves 137

A leading case in English trusts law. It laid down the rule of equity in relation to the duties of a trustee in relation to a trust fund where there are successive interests in relation to the trust fund, and seeks to strike a fair balance between the rights of the life tenant and the remainderman. It is one of a number of highly technical common law rules (*e.g.* as in *Re Earl of Chesterfield's Trusts* (1883), 24 Ch D 643, and *Allhusen v Whittell* (1867), LR 4 Eq 295) which can lead to confusion or disputes where wills and trusts have not been professionally prepared. In inherited common law jurisdictions where the rule in the case still applies and has not been modified by statute or subsequent decision the duty to apportion is, in practice, nearly always excluded in any professionally drafted will.

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