

Estate Planning

+ WILLS

+ ENDURING POWERS
OF ATTORNEY

+ REPRESENTATION
AGREEMENTS



Nisga'a Lisims Government

Sayt-K'ilim-Çoot
one heart, one path, one nation

A Will is an important part of planning for your family's future. A Will is a legal document that says what you would like to happen with everything you own when you pass away. A Will also appoints the person to look after your minor children.

IF YOU DON'T HAVE A WILL

- + The British Columbia law sets out who will inherit everything you own.
- + Until a family member or someone else applies to the British Columbia Supreme Court for permission to handle your estate, no one can deal with your assets, like your home or vehicle.
- + If you have minor children, their share of your estate will be held in trust by the Public Guardian and Trustee of British Columbia until they turn 19.
- + If your minor child has no surviving parent with custody of them, the Public Guardian and Trustee will become responsible for the child's financial and legal affairs, and the Nisga'a Child & Family Services will become responsible for the child's living arrangements, health and education.
- + A surviving parent without custody of your minor child or a family member can apply to the Court to become the guardian of your minor child; however, this is typically a time consuming and costly process compared to the simple process of appointing someone to look after your minor child in your Will.

WHO CAN MAKE A WILL?

To make a Will, the Will-maker must be:

- + Age 16 or over.
- + Mentally capable of making a Will
- + If it's proven in Court that you were not mentally capable when you made your Will, the Will is invalid. You are mentally capable if you can understand: what a Will is and does, what you own, how you own it, what will pass through and outside of your Will, who your next-of-kin are, who may have a claim if you exclude them from your will.
- + Free from any pressure to make a Will and agree with what your Will says when you sign it. If it's proven in Court that someone pressured you to sign the Will or pressured you to include certain things in your Will, the Will is invalid.

WHEN SHOULD YOU MAKE A WILL?

You can make a Will at any time

- + It's a good idea to make a Will even if you don't have children or assets like a home, are not married or are not in a common-law relationship.
- + If you have children under 19 years of age, it is very important to make a Will as you may also use your Will to appoint a guardian to make sure your children are looked after by someone you trust.
- + If you would like to leave special items to specific people in your life, a Will can document these gifts.
- + It is important to make a Will while you still are mentally capable of giving instructions. If you leave it too late, you may not have the mental capacity to make a Will.
- + You can change your Will during your lifetime as your Will should evolve with your family. The Will you need when you have minor children is very different from the Will you need when you are in your 80's.

WHAT IS IN A WILL?

Appointing your Executor and Backup Executor

- + In your Will, you appoint an executor and should appoint a backup executor. The executor is the person responsible for carrying out your instructions in your Will. Their job is to locate all of your assets and liabilities, pay all funeral costs, file and pay all taxes and once all liabilities are paid, distribute your assets as the Will specifies.
- + The executor is typically also the trustee of any trusts created in the Will. If you have minor children, their share of your estate has to be held in trust until they turn 19, so you need to trust that your executor will act in the best interests of your minor children.
- + Talk to the person you wish to name as your executor before you name them to ensure they are willing to accept this role. If you own assets of significant value or registered assets like vehicles, bank accounts or homes in your name alone, your executor will typically have to apply for a Representation Grant of your Will, which is the process of applying to the Court to confirm your Will is valid.
- + If you are married or in a common-law relationship, your executor is typically your spouse, and you will both need to discuss who the backup executor should be.

Appointing a Guardian & Backup Guardian

- + If you have minor children, you name a guardian and possibly a backup guardian who will look after your minor children until they turn 19.
- + Talk to the person you wish to name as the guardian and backup guardian for your minor children to see if they would be a good choice. Explain how you would like your minor children to be raised and see if they are willing to take on this role.

Gifts in your Will

- + You can make gifts to specific people, like a family heirloom or an item of sentimental value.
- + You don't need to gift everything you own in your Will, as what you own today may be very different even five years from now.

Distributing the Residue of your Estate

- + You can distribute everything else to the people you choose. We call this the residue as we never know when we will pass away, so this could be similar to what we own today, or we could live for many years, and what we own then may be very different. Because of this, we don't put a value on the residue, and it is given to the beneficiaries of our Will, which is often our spouse, children, extended family, friends, charities or whomever you choose.
- + However, if you don't adequately provide for your spouse or children, they could challenge your Will in Court.
- + If you have minor children that are beneficiaries in your Will, you have to create a trust in your Will to hold their share until they turn 19, or older if you wish. The trustee of these trusts can be your executor, or you can choose someone else like the guardian to be the trustee.
- + Your Will has to be specific so that your wishes can be understood.

Funeral Wishes in your Will

- + You can include your wishes regarding burial, cremation and funeral service. You should discuss any wishes with your executor as your preference for cremation or burial in your Will is binding on your executor.

WHAT A WILL DOES NOT INCLUDE

- + A Will does not cover property that you own as a joint tenants with someone else, like your home or a jointly held bank account.
- + For example, any property you own with your spouse as a joint tenant becomes the property of your spouse as the surviving joint tenant. This property isn't included in your estate and "passes outside the Will" to your spouse.
- + A Will does not cover assets that have designated beneficiaries, like life insurance policies, retirement benefit plans or tax-free savings accounts. When you pass away, the life insurance company or bank directly transfers the asset or pays it out to the person named as your designated beneficiary.

An Enduring Power of Attorney is a legal document that allows you to appoint someone to make legal and financial decisions on your behalf if you are not capable and cannot make your own decisions or need help with decision making.

No one can predict the future and know if or when they may be in an accident or be diagnosed with an illness that affects their cognitive abilities or an age-related cognitive decline. If this happens, not even your spouse has the right to manage your financial and legal affairs.

WHO CAN MAKE AN ENDURING POWER OF ATTORNEY?

- + Anyone 19 years of age or older.
- + Anyone capable of understanding the nature and consequences of an Enduring Power of Attorney. If you don't have the mental capacity to make an Enduring Power of Attorney, you may be able to make a section 7 Representation Agreement.

WHAT DOES AN ENDURING POWER OF ATTORNEY COVER?

- + An Enduring Power of Attorney can only deal with your legal and financial affairs. Financial affairs means paying your bills, doing your banking, managing your investments, managing your pension, selling your assets and paying your taxes. Legal affairs means obtaining legal advice, services and instructing a lawyer.
- + An Enduring Power of Attorney does not cover decisions about your personal care and health care; a Representation Agreement must be used if you want to choose someone to make your personal care and health care decisions.



WHEN DOES AN ENDURING POWER OF ATTORNEY START?

- + An Enduring Power of Attorney is effective as soon as it is signed by you and your primary attorney.
- + An Enduring Power of Attorney will continue or 'endure' even if you become mentally incapable of making decisions.

CAN YOU STILL MAKE DECISIONS ABOUT YOUR LEGAL & FINANCIAL AFFAIRS ONCE YOU MAKE AN ENDURING POWER OF ATTORNEY?

- + Yes, you are presumed to be capable and you can make decisions until you are incapable of making those decisions.
- + Your attorney can not override decisions made by you when you are mentally capable.

WHEN DOES AN ENDURING POWER OF ATTORNEY END?

- + An Enduring Power of Attorney will continue until you cancel it or you pass away.
- + When your attorney and any alternate attorneys have predeceased you, or are incapable of managing their own affairs, they cannot manage your affairs.
- + When your marriage or common-law relationship ends and your attorney is your spouse.
- + A court order ends your Enduring Power of Attorney.
- + The Public Guardian and Trustee is appointed Committee of your Estate under a Certificate of Incapability pursuant to the *Patients Property Act*.
- + Your attorney declares bankruptcy.
- + Your attorney is convicted of a crime in which you are the victim.

WHAT IF I WANT TO CHANGE MY ENDURING POWER OF ATTORNEY OR CANCEL IT?

- + You can change or cancel your Enduring Power of Attorney at any time if you are capable.
- + If you wish to cancel your Enduring Power of Attorney, you will need to follow the revocation rules (cancelling rules).

CHOOSING YOUR ATTORNEY FOR YOUR ENDURING POWER OF ATTORNEY

The person you name is called your attorney, and you may also select a backup attorney. Your attorney is not a lawyer; your attorney is your decision-maker.

- + Your attorney must be 19 or older and able to understand the responsibilities required.
- + You can name anyone you trust 100% to be your attorney.
- + You may choose your spouse, a family member or a close friend.
- + You cannot name someone who is paid to provide personal or health care services to you; there is an exception if this is your spouse, child or parent.
- + Talk to the person you wish to name as your attorney to see if they are willing to accept this role and understand the responsibilities before naming your attorney. Also consider if your attorney has the time, knowledge and skills to take on this role.
- + We advise you to choose an alternate attorney just in case your attorney predeceases you or is incapable of managing their own affairs.

FIDUCIARY & LEGAL DUTIES OF AN ATTORNEY

Your attorney is a fiduciary, which means that they are someone in a position of trust towards you. As a fiduciary, your attorney has duties and responsibilities that they must follow as set out in the *Enduring Power of Attorney Act*:

1. An attorney must act honestly and in good faith.
2. An attorney must exercise the care, skill and diligence of a reasonably prudent person.
3. An attorney must act within the authority given in the Enduring Power of Attorney and under any enactment.
4. An attorney must keep prescribed records and produce the prescribed records for inspection and copying at your request.
5. An attorney must act in the adult's (your) best interests when managing and making decisions about the adult's financial affairs.
6. An attorney must, to the extent reasonable, give priority to meeting the personal care and health care needs of you when managing your financial affairs.

7. An attorney must invest your property only in accordance with the *Trustee Act* unless the Enduring Power of Attorney states otherwise.
8. An attorney must, to the extent reasonable, foster the independence of you and encourage your involvement in any decision-making that affects the adult.
9. An attorney must not dispose of property that the attorney knows is gifted in your Will, unless necessary to comply with the attorney's duties.
10. An attorney must, to the extent reasonable, keep your personal effects at the disposal of you.
11. An attorney must keep your property separate from the attorney's own property.

WHAT IF MY ATTORNEY MISUSES THE POWER GRANTED UNDER MY ENDURING POWER OF ATTORNEY?

- + Any person may make a report to the Public Guardian and Trustee (a provincial government agency) regarding an attorney's abuse, neglect, incapable acting or failing to comply with their duties and the Public Guardian and Trustee has powers to investigate and resolve the matter or apply to the Court for any order necessary.
- + An attorney may be liable under provincial law, federal law and the Criminal Code of Canada.
- + However, your attorney is not liable for any loss or damage to your financial affairs if your attorney complies with the duties of an attorney in the *Enduring Power of Attorney Act*, any direction of the Court and any other duty that may be imposed by law.



A Representation Agreement is a legal document that allows you to appoint someone to make or help make health and personal care decisions on your behalf if you are not capable and cannot make your own decisions or need help with decision making.

In British Columbia, there are two kinds of Representation Agreements, the standard representation agreement, referred to as a Section 7 Representation Agreement and an enhanced representation agreement, referred to as a Section 9 Representation Agreement.

The best time to make a Section 9 Representation Agreement is before any health issues occur; however, if you have not planned and have diminished capability, you may be able to make a Section 7 Representation Agreement.

WHO CAN MAKE A SECTION 7 REPRESENTATION AGREEMENT?

- + Anyone 19 years of age or older.
- + A Section 7 Representation Agreement is helpful for adults with intellectual disabilities, adults with a brain injury, and adults in the early stages of cognitive decline who don't have the capability to make an Enduring Power of Attorney and a Section 9 Representation Agreement.
- + A person can make a Section 7 Representation Agreement even if they are not capable of managing their financial affairs, personal care, health care, or legal matters like making a contract as there is a lower threshold of capability.

- + If someone with intellectual disabilities or cognitive decline does not have any planning documents in place, no one has the authority to make legal, financial or personal care decisions for them if they are incapable of making those decisions themselves. Sometimes a family member may need to apply to the Court to be appointed the committee of this adult's estate (decisions about financial and legal matters) and/or person (decisions about health and personal matters), but this is a time consuming and costly process compared to the process of appointing a representative in Section 7 Representative Agreement.

WHAT DOES A SECTION 7 REPRESENTATION AGREEMENT COVER?

- + A Section 7 Representation can cover health care, personal care, legal matters and financial affairs, but the representative has limited powers regarding legal matters and financial affairs and can only help with routine management of financial affairs.
- + Routine management of finances means decisions about bills, pensions, bank accounts, insurance, taxes, paying off a loan/mortgage, but it does not include using or renewing credit cards, obtaining a loan/mortgage, purchasing or selling real property.
- + Legal matters means decisions about obtaining legal advice, services and instructing a lawyer.
- + Health care means decisions about therapeutic, preventive, palliative, diagnostic, cosmetic or other purposes related to health and includes minor and major health care as defined in the *Health Care (Consent) and Care Facility (Admission) Act*. For example, routine tests, medication, diagnostic tests, dental work, eye care, surgery and chemotherapy.
- + Personal care means decisions about where you live, what you eat, how you dress, your social activities, your career, spiritual matters, contact with other people and licenses needed to do something.

WHO CAN MAKE AN ENHANCED SECTION 9 REPRESENTATION AGREEMENT?

- + Anyone 19 years of age or older.
- + Anyone capable of understanding the nature and consequences of a Section 9 Representation Agreement.

WHAT DOES A SECTION 9 REPRESENTATION AGREEMENT COVER?

- + A Section 9 Representation Agreement can only deal with your health care and personal care.
- + Health care means decisions about therapeutic, preventive, palliative, diagnostic, cosmetic or other purposes related to health and includes minor and major health care as defined in the *Health Care (Consent) and Care Facility (Admission) Act*. For example, routine tests, medication, diagnostic tests, dental work, eye care, surgery and chemotherapy.
- + Personal care means decisions about where you live, what you eat, how you dress, your social activities, your career, spiritual matters, contact with other people and licenses needed to do something.
- + Your representative can make decisions about your health care in addition to the enhanced powers of giving, refusing or withdrawing consent to life-supporting health care and consent to health care necessary to preserve your life even if you are refusing to give consent at the time it's needed.
- + Your representative can make decisions about your personal care in addition to the enhanced powers of physically restraining or moving you, authorizing someone to do this if necessary to provide personal care to you even if you object. As well as providing consent on your behalf to admission to certain care facilities.

WHEN DOES A REPRESENTATION AGREEMENT START?

- + A Representation Agreement is typically effective as soon as it is signed by you and your primary representative and the monitor if required in a Section 7 Representation Agreement.

WHEN DOES A REPRESENTATION AGREEMENT END?

- + A Representation Agreement will continue until you revoke it or pass away.
- + When your representative and any alternate representative have predeceased you or are incapable of managing their own affairs, they cannot manage your affairs.
- + When your marriage or common-law relationship ends and your representative is your spouse.
- + A committee of person is appointed by the Court to make health and personal decisions for you.

WHAT IF I WANT TO CHANGE MY REPRESENTATION AGREEMENT OR CANCEL IT?

- + You can change or cancel your Representation Agreement if you are capable.
- + If you wish to cancel your Representation Agreement, you will need to follow the revocation rules (cancelling rules).

CHOOSING YOUR REPRESENTATIVE FOR YOUR REPRESENTATION AGREEMENT

The person you name is called your representative, and this is your decision-maker.


- + Your representative must be 19 or older and able to understand the responsibilities required.
- + You can name anyone you trust 100% to be your representative.
- + You may choose your spouse, a family member or a close friend.
- + You cannot name someone who is paid to provide personal or health care services to you; there is an exception if this is your spouse, child or parent.
- + Talk to the person you wish to name as your representative to see if they are willing to accept this role and understand the responsibilities before naming your representative.
- + You cannot name someone who is an employee of a facility in which you reside and through which you receive personal or health care; there is an exception if this is your spouse, child or parent.

- + Also, consider if your representative has the time, knowledge and skills to take on this role, will understand the medical options and will put your needs and wishes first. Your representative may need to make difficult decisions that will impact your well-being and quality of life.
- + We advise you to choose an alternate representative just in case your representative predeceases you or is incapable of managing their own affairs.

IF YOU DON'T HAVE A REPRESENTATION AGREEMENT & ARE NOT CAPABLE OF MAKING HEALTH CARE DECISIONS, WHO CAN GIVE CONSENT ON YOUR BEHALF?

- + The British Columbia law sets out a hierarchy of authority that the health care provider must follow if a decision needs to be made.
- + This hierarchy is called your temporary substitute decision-maker and starts with your spouse, adult children, parent, sibling, grandparent, grandchild, another relative by birth or adoption, a close friend or someone related by marriage.
- + If there is no one available from the temporary substitute decision-maker, or there is disagreement about who should make this decision, then someone authorized by the Public Guardian and Trustee will be chosen and may be an employee of the Public Guardian and Trustee.





THE INFORMATION IN THIS BOOKLET PROVIDES GENERAL INFORMATION ONLY. IT IS NOT MEANT TO BE USED AS LEGAL ADVICE FOR SPECIFIC LEGAL PROBLEMS. IF YOU NEED HELP WITH MAKING A WILL, ENDURING POWER OF ATTORNEY OR REPRESENTATION AGREEMENT, CONTACT THE NISGA'ALISIMS GOVERNMENT WILLS & ESTATES CLINIC OR A LAWYER. THE INFORMATION IN THIS BOOKLET APPLIES ONLY TO BRITISH COLUMBIA, CANADA. INFORMATION ABOUT THE LAW IN THIS BOOKLET WAS CHECKED FOR LEGAL ACCURACY AT THE TIME IT WAS PUBLISHED BUT MAY BECOME OUTDATED AS LAWS OR POLICIES CHANGE.