# Wills

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## Learning Outcomes

After completing this chapter, you should be able to:

- List the formal requirements of a will.
- List the legal requirements relating to a testator.
- Identify the characteristics of a split will and other less common wills.
- Explain the two methods for amending a will.
- Describe the processes for revoking or reviving a will.
- Describe the best practices for storage of a client's will.



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# Introduction

**will**
document that sets out a person's wishes and directions with respect to the disposal of his property after death

**testator**
person who makes a will (traditionally the male term; now used for all genders)

**testatrix**
the traditional term for a female person who makes a will

Estate planning is what people do to ensure that their bills are paid and their assets preserved and ultimately given to other people following their death. The most common form of estate planning is the creation of a will. A **will** is a document that sets out a person's wishes and directions with respect to the disposal of her property after her death. The person making the will was traditionally called the **testator** (male) or the **testatrix** (female). More recently, the term "testator" is used for all gender identities. When the person signs the will, the testator is said to execute it.

Figure 1.1 is an example of a will. There are many different ways to create a will, and no two wills are exactly alike. Notwithstanding the uniqueness of every will, all wills share some characteristics. This is, in part, because to be valid, all wills must be created and executed according to certain formal requirements. If a will is not valid, the wishes of the testator expressed in it will not be followed (unless those wishes correspond with the laws that come into play when a person dies without a will). It is the lawyer's and the law clerk's job to ensure that a client's will has been created and executed properly in accordance with the legal requirements. This is the case whether that will is created and executed under the direction and guidance of the lawyer and law clerk or whether the client seeks the lawyer's opinion as to the validity of an existing will.

As an introduction to wills, this chapter discusses the basic legal requirements for creating and executing wills. It also explains some of the more common and less common ways in which wills are created, executed, and amended. Finally, the chapter deals with some practical issues facing a lawyer and a law clerk regarding the drafting and safekeeping of wills.

**FIGURE 1.1 Will**

THIS IS THE LAST WILL AND TESTAMENT of me, **Jahan Maryam**, whose current residence address is 99 Anywhere Street, Hamilton, Ontario, Q9Q 9Q9, retired bank manager.

### 1. REVOCATION

I revoke all previous wills.

### 2. INTERPRETATION

Where used in this document,

(a) "executor" shall be interchangeable with the term "estate trustee with a will," shall be deemed to include "trustee" if a trust fund has been established, to be pluralized if more than one executor has been named, and to include all genders as the context in each case requires;

(b) the singular, masculine, feminine, or personal pronoun shall be construed as meaning the plural, gender, or body corporate as the context in each case requires;

(c) paragraph headings are for reference purposes only and shall not define, limit, extend, or otherwise affect the meaning of any term or provision;



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(d) “pay” shall be deemed to include “transfer” and “deliver” as the context in each case requires;

(e) “child” or “children” shall be deemed to include only my daughter, Vida Maryam, and my sons, Hamid Maryam and Jahan Maryam Jr.

## 3. PAYMENT OF DEBTS AND TAXES

I direct my executor or executors to pay as soon as convenient after my death all debts, funeral and testamentary expenses, and taxes that my estate is legally bound to pay, or to commute, prepay, or defer payment of such debts or taxes as my executor or executors may in his, her, or their sole and absolute discretion consider advisable, and I hereby empower my executor or executors to make any election, determination, or designation pursuant to the *Income Tax Act* or any other taxing statute or any regulation pursuant thereto.

## 4. APPOINTMENT OF EXECUTOR

I appoint my spouse, DALARA MARYAM, to be the sole executor of my estate. If my executor first named has not survived me by thirty days or is unable or unwilling to act, then I appoint as my executor my daughter, VIDA MARYAM. If my said daughter is unable or unwilling to act as my executor then I appoint as my executors my son, HAMID MARYAM and my friend, YUSEF KALEI, acting jointly.

## 5. DISPOSITION

I give all the residue of my property, both real and personal, and including any property over which I may have a general power of appointment, to the executor or executors UPON THE FOLLOWING TRUSTS, namely:

(a) to divide all articles of a personal, domestic, or household use or ornament or works of art in accordance with a List or Memorandum signed by me, which I may leave among my personal papers or attached to a copy of this my Last Will;

(b) to give the entire residue of my estate to my spouse, DALARA MARYAM, provided she survives me by thirty days;

(c) if my said spouse has failed to survive me by thirty days, to distribute my estate as follows:

(A) provided that she survives me by thirty days, to give to my daughter, VIDA MARYAM, the following:

(i) any real property that I may own at the time of my death, including houses and their respective contents;

(ii) any automobiles that I may own at the time of my death;

(B) to divide the residue of my estate equally between the following who survive me, share and share alike, subject to clauses 6 and 7, below;

(i) my son, JAHAN MARYAM JR, provided he survives me by thirty days;

(ii) my son, HAMID MARYAM, provided he survives me by thirty days.

## 6. LINEAL DESCENDANT OR DESCENDANTS OF DECEASED CHILD

If any child of mine who has been given a benefit herein dies before final distribution of my estate, leaving one or more lineal descendant or descendants then alive, such deceased child shall be considered alive for purposes of distribution hereunder and my executor or executors shall make the gift or distribution to which such deceased child would have been entitled, if he or she had not so died, to such lineal descendant or descendants by representation.

*(Continued on next page.)*



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## 7. AGE OR OTHER DISABILITY

If any person who becomes entitled to any share in my estate is under the age of majority or incapable of executing a release or under any other legal disability, my executor or executors shall hold and keep invested the share of such person and use the income and capital, or so much of either, as my executor or executors may in his, her, or their absolute discretion consider advisable for the maintenance, education, or benefit of such person until he or she is no longer incapable or under such age or disability and shall then distribute such share or the balance thereof remaining to such person, but in the meantime I authorize my executor or executors to make any payment for or on behalf of any such person that my executor or executors in his, her, or their sole discretion consider it advisable as a payment for the benefit, education, or general welfare of such person, and the receipt of any payee in those circumstances is a sufficient discharge to my executor or executors.

## 8. POWER TO INVEST

I authorize my executor or executors to make investments and otherwise deal with my estate (including property held for persons below a stipulated age or under any other legal disability) and to exercise any rights, powers, and privileges that may at any time exist with respect thereto to the same extent and as fully as I could if I were the living sole owner thereof as he, she, or they in his, her, or their absolute discretion consider to be in the best interests of my estate and the beneficiaries thereof.

## 9. POWER OF SALE

I authorize my executor or executors to use his, her, or their discretion in the realization of my estate with power to sell, call in, and convert into money any part of my estate not consisting of money at such time or times, in such manner and upon such terms and either for cash or credit or for part cash or part credit as he, she, or they may in his, her, or their uncontrolled discretion decide upon, or to postpone such conversion of my estate or any part or parts thereof for such length of time as he, she, or they may think best or to retain any portion of my estate in the form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which executors are authorized to invest trust funds and whether or not there is a liability attached to any such portion of my estate) for such length of time as my executor or executors shall in his, her, or their complete discretion deem advisable, and my executor or executors shall not be held personally responsible for any loss that may occur to my estate by reason of his, her, or their so doing.

## 10. DISCRETION TO PAY OR DIVIDE

Except as herein expressly stated to the contrary, my executor or executors may make any division of my estate or set aside or pay any share or interest wholly or in part in the assets forming part of my estate at the time of my death or at the time of such division, setting aside, or payment, and I declare that where there may be some question of the value of any part of my estate my executor or executors may in his, her, or their absolute discretion fix the value of my estate or any part or parts thereof for the purpose of making any such division, setting aside, or payment, and his, her, or their decision shall be final and binding upon all persons concerned.



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## 11. AUTHORITY BINDING

Any exercise by my executor or executors of the authority or discretion conferred on him, her, or them shall be binding on all beneficiaries of my estate whether or not such exercise would have the effect of conferring an advantage on any one or more of them at the expense of any other or could otherwise be considered but for the foregoing as not being an impartial exercise by my executor or executors of his, her, or their duties, powers, and discretions or as not maintaining an even hand among the beneficiaries.

## 12. EXCLUSION OF BENEFITS FROM COMMUNITY OF PROPERTY

All income from property given by me to any beneficiary who is, at my death, a spouse within the meaning of the *Family Law Act* or any similar legislation of another jurisdiction shall be excluded from the net family property of such beneficiary.

## 13. CUSTODY OF CHILDREN

If I die before all of my children are over the age of eighteen years and if my spouse has predeceased me or failed to survive me by thirty days, or if she has survived me but is deemed not competent to provide proper care and support for any of my surviving children under the *Mental Health Act* of Ontario, or any similar statute or law, I give custody of my surviving children to my sister, Anahita Maryam, and if my said sister is unable or unwilling to act as custodian of my said surviving children, I give custody of my surviving children to my friend, Ruth Smith. I wish it to be known that the custodians appointed above were chosen after a thorough and careful examination of all alternatives.

IN TESTIMONY WHEREOF I have to this my last will and testament written upon this and three preceding pages of paper hereunto subscribed my name this 1st day of January 2022.

SIGNED, PUBLISHED AND DECLARED )
by **JAHAN MARYAM** )
as and for his last will and )
testament, in the presence of )
us, both present at the same )
time, who at his request, in )
his presence, and in the )
presence of each other, have )
hereunto subscribed our )
names as witnesses: )

) *Jahan Maryam*
) Jahan Maryam

*Mary Breshney* )
Mary Breshney )

*Seung Ji-Hun* )
Seung Ji-Hun )



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# Formal Requirements of Wills

## In Writing

The first requirement for a valid will is that it be in writing. An audio or a video recorded "will" is not valid. An emailed or texted "will" that exists only on a computer or other digital device—or only in cyberspace—does in fact satisfy the writing requirement, but, as discussed in this chapter, other requirements make such a document invalid as a will.

## Signed by the Testator

To be valid, a will must be signed by the testator. A hand-stamped signature does not satisfy this requirement, nor does a computer cut-and-paste version of the testator's signature. It is for this reason that a cyberspace "will" cannot be considered valid.

In the author's opinion, the lawyer should instruct the client to sign the will with his usual signature—that is, the way he would normally sign a cheque. If a client normally signs her cheques with her middle name rather than her first name, or with her first initial rather than her first name, that is the most appropriate way to sign the will. As discussed later in this text, even though it is good practice for a lawyer or law clerk to generate an affidavit by one of the witnesses proving the genuineness of the testator's signature immediately upon the will's being signed, it may become necessary after the testator is deceased to prove that the testator in fact signed the will. In such a case, an authorized bank employee, or any other person who has knowledge or documentation of the testator's usual signature, could be called on to give her opinion as to the authenticity of the signature appearing on the will. Signing with the usual signature simply makes identification of the signature easier. Notwithstanding the above, signing with the usual signature is not a legal requirement.

It may happen that a hurried will has to be executed in circumstances that prevent the testator from using his usual signature. A testator, for example, may be in a hospital and may have suffered a stroke that prevents him from using his writing hand. A will of a right-handed testator signed with his left hand nevertheless satisfies the requirement of a signature.

It may be that the testator's signature is simply some form of mark or insignia as opposed to letters forming the testator's name, as, for example, in the case of a testator who does not know how to sign his name owing to illiteracy. In such a case, that mark or insignia would suffice as the testator's signature on the will. One common mark used in place of a written name is an "X." A will signed with an "X" is valid provided that the witnesses to the will are able to verify that the testator himself actually drew the "X." A will may also be signed by a person other than the testator in cases where the testator is physically prevented from signing his full signature because of weakness, blindness, or some other cause. In such cases, the person signing must do so on the instructions of the testator and in the presence of the testator and witnesses. As in all cases, it is essential that the testator be fully aware of what is contained in the will before it is signed.

One final requirement is that the signature must be at the foot or the end of the will. If the signature appears in the middle, the will is not invalidated, but all gifts and directions that appear after or below the signature are not considered part of the will.



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The *Succession Law Reform Act*[1] does not indicate where the witnesses should sign the will (see below under "Witnessed"), but good practice dictates that they sign opposite or immediately below the signature of the testator.

While it is not a legal requirement, it is good practice to direct the testator and the witnesses to initial each page of the will except the last page, where the signatures appear. This provides some substantiation that one or more pages of the will were not altered or substituted after the will was executed. Although such a practice is advisable, it must be done carefully in case one page is missed, thus creating a presumption of mischief that would not otherwise have existed.

### Exception to Signature Requirement

The *Succession Law Reform Act* allows for a situation in which, as indicated above, the testator does not sign her own will but instead has another person sign for her in her presence. In such a case, the testator must acknowledge, in the presence of the two witnesses (see the next section), that the other person has signed for her. It should be noted that under section 12(3) of the Act, a gift in the will to a person who signs on behalf of the testator, or to that person's spouse, is considered void unless the Superior Court of Justice is satisfied that neither the person signing nor his spouse exercised any improper or undue influence on the testator. If the court is not so satisfied, the will is not invalidated but is interpreted as if the gift to the person had not been made.

## Witnessed

A will must be witnessed by two witnesses, neither of whom should be a beneficiary named in the will (see below) or the spouse of such beneficiary. Both witnesses must be present while the testator signs, and they must themselves sign the will in the presence of the testator and should sign in the presence of each other as well.

The *Succession Law Reform Act* states that a will is not invalidated owing to the mental incompetence of the witnesses, but good practice dictates that witnesses be competent. At some later date, the witnesses may be asked to sign affidavits verifying that they witnessed the will. If a witness is mentally incompetent to swear such an affidavit, alternative means are available to prove the proper execution of the will (see Part II, Estate Administration), but it is much simpler to complete the affidavit.

Some lawyers ask the witnesses to sign such affidavits immediately after the will itself is signed. This is done so that the lawyer acting for the estate trustee will not have to track down the witnesses at some future date, perhaps many years later.

As in the case of a person signing on behalf of the testator, under section 12(3) of the *Succession Law Reform Act*, a gift to a witness of the will, or to the spouse of a witness, is considered void unless the Superior Court of Justice is satisfied that neither the witness nor the witness's spouse exercised any improper or undue influence on the testator. Again, if the court is not so satisfied, the will is not invalidated but is interpreted as if the gift to the person had not been made.

In cases where the testator signs with a mark such as an "X," the witnesses must complete a special affidavit that affirms that the mark is that of the testator. In cases where the testator is blind, the will must be read to her in the presence of the

1 RSO 1990, c S.26 [SLRA].



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witnesses, and, again, the witnesses must complete a special affidavit affirming the testator's blindness and the fact that the will was read aloud in their presence.

### Exceptions to Witnessing Requirement

**holograph wills** handwritten wills

A will does not have to be witnessed if it is entirely in the handwriting of the testator and signed by him at the end or foot of the will. Such handwritten wills are called **holograph wills**. As a general rule, it may be professionally risky for lawyers or law clerks to advise clients to create holograph wills, in part because the requirements are unyieldingly strict. (If any one of the requirements discussed below is not met, the document will not be considered a will.) Holograph wills have to be dealt with, however—for example, in an emergency situation, it may be necessary for a lawyer or law clerk to instruct a client on how to create such a document. A lawyer may also be acting for an estate in which the deceased has left only a holograph will. Sometimes in cases involving documents alleged to be holograph wills, the document in question does not state that it is a will. It is important to examine the contents of the document to determine whether it is a will. If the writer clearly wrote the document in contemplation of his death, and it clearly expresses a disposing intention as to the writer's assets, it is likely to be considered a will, assuming the handwriting and signature requirements are met. On the other hand, if the document simply describes the writer's hopes and wishes regarding his assets or does not specifically mention his death, it is less likely to be considered a will. Ultimately, when a handwritten and signed document is unclear or ambiguous as to the writer's intention, the question of whether it is a will or not must be determined by a court.

Another exception to the witnessing requirement is the case of a member of the Canadian Forces placed on active service under the *National Defence Act*;[2] a member of any other naval, land, or air force while on active service; or a sailor when at sea or in the course of a voyage. In such situations, a person can create a valid will even if it is not wholly in her handwriting and/or witnessed. Provision is made in the *Succession Law Reform Act* for proving the proper execution of such wills through a certificate of active service signed by or on behalf of an officer who has custody of the records pertaining to the status of the testator as an active member of the forces. In a case where a certificate of active service is unavailable, the testator is deemed to be on active service after she has taken steps under the orders of a superior officer in preparation for serving with, being attached to, or being seconded to a component of the force she is serving under.

Finally, it should be noted that during the 2020 COVID-19 pandemic, an emergency temporary amendment to the *Succession Law Reform Act* was enacted that allowed for wills to be witnessed remotely via audiovisual communication technology, provided one of the witnesses was a lawyer or a licensed law clerk or paralegal.

## Disposing Intention

Perhaps the most important requirement of a valid will is that it have a disposing intention—that is, that the testator intends to give away her property by virtue of what is written in her will. As alluded to above, this issue can sometimes arise in the case of an alleged holograph will that could be interpreted as a mere letter. If it can be

2 RSC 1985, c N-5.



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proved, on the basis of the facts of the particular situation, that there was no intention to create a will on the part of the "testator," the "will" is not considered a valid will or even a will at all.

# Legal Requirements Relating to the Testator

## Age of Testator

To make a valid will, a testator must be at least 18 years of age, subject to the exceptions specified in the *Succession Law Reform Act*.

### Exceptions to the Age Requirement

A will signed by a testator who is not 18 years of age can be considered valid in certain circumstances.

If the testator is a member of the Canadian Forces either as part of a regular force under the *National Defence Act* or while placed on active service under that Act (that is, presumably whether part of a "regular force" or not), or is a sailor and at sea or in the course of a voyage, she may be under the age of 18 and nevertheless make a valid will. Note that the provisions of the *Succession Law Reform Act* dealing with these exceptions to the age requirement are similar to the exceptions dealing with the witnessing requirement. Despite the similarity, the exception to the age requirement is more liberal in that it does not require that the testator be on active service if she is a member of a regular force in the Canadian Forces.

Another exception to the age requirement occurs when the testator is married or has been previously married. In such cases, the testator may make a valid will even though he is under 18. Again, if an underage person is contemplating marriage, he may make a valid will provided that the will states that it is being made in contemplation of marriage to a named person. In such a case, the will becomes valid only upon the testator's marriage to that named person.

## Testamentary Capacity and Knowledge and Approval of Contents of the Will

A testator must have testamentary capacity and must know and approve the contents of the will. Otherwise, the will can be set aside by a court after the testator's death. The concepts of testamentary capacity and knowledge and approval by the testator (as well as the related topics of fraud and undue influence) are dealt with in Part III, Estate Litigation, Chapter 15, Challenging the Validity of the Will.

Testamentary capacity is related to the soundness of the testator's mind. In brief, a person lacks testamentary capacity if he lacks any one of the following four elements at the time of giving instructions for the will and at the time of signing the will:

1. an understanding of what it means to make a will,
2. an understanding of the extent of his own property,
3. an understanding of the relationships he has with those persons who might be expected to receive a portion of his estate, and
4. an understanding of the claims of the persons whom he is leaving out of his will.



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While it may be difficult to prove a lack of the first three elements, the concepts are fairly straightforward. The fourth area of necessary understanding or knowledge (sometimes called "the testator's knowledge of the natural objects of his bounty") can be difficult to grasp. It may seem to imply that a testator is obliged by law to make gifts of his estate to those relatives who are closest to him. With the exception of a legal spouse or dependants (dealt with in Part III, Chapter 16, Statutory Forms of Estate Litigation), however, there is no obligation in law to leave one's estate to those who are closely related by blood or marriage. That is, a will cannot be set aside merely because it does not provide for gifts to close relatives. Nevertheless, if a testator has close relatives and there is no apparent reason for leaving them out of the will, a court may consider the fact that they do not appear in the will in deciding whether it should be presumed that the testator lacked testamentary capacity. As will be seen in Chapter 16, this presumption may be rebutted with other evidence tending to show that the testator did indeed have testamentary capacity.

The test of "knowledge and approval" generally relates to the question of whether the testator was fully aware of the contents of the will, particularly the disposition section. Thus, for example, if a testator did not understand that certain gifts were going to certain persons, she would likely fail the test of knowledge and approval. An issue can arise in this context if the testator is not fluent in the language in which the will is written, particularly if the circumstances suggest that the will was not discussed with a lawyer or law clerk before it was signed.

Clearly, there can be many cases where the questions of testamentary capacity and knowledge and approval are interdependent or related to each other. Nevertheless, the question of whether the testator had testamentary capacity and whether he knew and approved of the contents of the will are dealt with in the law as separate inquiries. Again, as will be seen in Chapter 15, the questions of fraud and undue influence are also closely related to testamentary capacity and knowledge and approval but are a distinct category in the law.

## Appointment of Estate Trustee with a Will

**estate trustee with a will**
person chosen by testator to oversee the administration of her estate

The **estate trustee with a will**, formerly known as the executor or executrix (see Chapter 2, Will Clauses), is a person who is chosen by the testator to oversee the administration of her estate. The estate trustee's job is to protect or secure and gather together the assets of the deceased, determine and pay the creditors of the estate, and, ultimately, pay the beneficiaries their respective shares of the estate in accordance with the will.

A clause appointing an estate trustee is not a necessity for a valid will but is a practical requirement. Leaving it out creates unnecessary delay, expense, and uncertainty in the administration of the estate. An estate trustee must be at least 18 years old and must not be an undischarged bankrupt. These are the only legal qualifications, but for practical reasons estate trustees should be individuals who are fairly sophisticated in dealing with money and other valuable property. Whether the will appoints someone or not, the court will always have the final say as to who is given the role of estate trustee. This topic is dealt with in more detail in Chapter 9, Applying for a Certificate of Appointment of Estate Trustee.



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# Less Common Wills

## Joint Wills

The **joint will** is a rare form of will that is recognized as legal in most jurisdictions. Such a will is signed by two persons, usually a married couple, with respect to the disposal of their property after death. Joint wills used to be created with the intention of saving the time and expense involved in creating two separate wills. Most lawyers practising today, however, avoid creating joint wills because of the awkwardness and difficulties that can arise in interpreting their terms. Furthermore, word processing has eliminated most of the perceived benefit of creating a joint will.

**joint will**
rare form of will that is signed by two persons regarding the disposal of their property after death

## Multiple Wills or Split Wills

Normally, a subsequent will revokes any previous will so that a testator has at any one time only one valid will. Occasionally, however, a testator has two or more wills that are intended to govern the estate concurrently. Such wills are called **multiple** or **split wills**. Split wills are fairly common in the case of testators who have property in two or more countries or jurisdictions (although see the section below on international wills), with each will dealing with property within a specific jurisdiction. Following the 1998 decision in the case of *Granovsky Estate v Ontario*,[3] however, lawyers in Ontario now routinely advise certain clients to create split wills even though all of their property is in Ontario. The rationale for this is explained in more detail in Part II, Chapter 8, Preliminary Steps in Applying for a Certificate of Appointment of Estate Trustee, but basically split wills are intended to save estate administration tax and are often used by testators whose estates are likely to include privately held corporate shares with significant value. The decision in *Granovsky Estate v Ontario* allows such testators to avoid the estate administration tax that would otherwise be payable on the value of the corporate shares by having the corporate shares distributed by a separate will. Split wills must contain the necessary language to identify themselves as split wills (that is, wills intended to coexist with each other) so that one will not be misinterpreted as revoking the other.

**multiple or split wills**
two or more wills that are intended to govern an estate concurrently

## Mutual Wills

**Mutual wills** are wills that are executed by two persons, usually spouses, who gift their estates to each other in the first instance and to the same alternate beneficiaries in the second instance, along with an agreement not to change the wills by the survivor of the two. Without the agreement, the wills would be called "mirror wills," which is simply a way to describe the fact that they are worded identically, although with the beneficiaries in the first instance reversed. For a mirror will to be enforced as a mutual will, the party seeking to enforce the agreement will need to have extraneous convincing evidence of the agreement.

**mutual wills**
two mirrored wills that are accompanied by an agreement between the two testators that the survivor of the two will not change the gifts in his or her will

## International Wills

If a testator signs a will that is valid under Ontario law and purports to deal with the testator's entire estate, as far as Ontario law is concerned, that will is sufficient to deal with

3 1998 CanLII 14913, 156 DLR (4th) 557 (Ont Sup Ct J).



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the testator's entire estate wherever it is situated—that is, even if some of the testator's assets are outside Canada. Nevertheless, a foreign jurisdiction may have its own laws related to estates that are inconsistent with Ontario law and may require a different form of will. Where the Ontario will is not valid under the foreign country's laws, the estate trustee may not be able to deal with the assets situated in that foreign country using only the Ontario will. This problem was addressed by an international treaty in which the signatory countries agreed to enact legislation that recognizes a certain standardized form of will. Canada is one of the signatories, and, accordingly, section 42 of the *Succession Law Reform Act* sets out the requirements of an international will.

### Wills Made Pursuant to the Indian Act

Special provisions in the federal *Indian Act*,[4] sections 45 to 50.1, relate to the wills and estates of Indigenous peoples. Essentially, the *Indian Act* allows the minister of Indigenous services to allow any written document signed by an Indigenous person to be construed as a valid will and provides powers and guidelines for the interpretation of such wills and for the distribution of such estates. This book does not cover such wills and estates because they fall under a unique set of rules that differ from the laws of Ontario.

## Amending Wills

Instead of revoking a will and executing a new one, people sometimes choose to amend their existing will. There are two ways to amend a will: by making the changes on the face of the will itself and by making a formal amending document called a codicil. Both are discussed below.

### Making Changes on the Face of the Will

Making changes on the face of the will is a fairly simple process if the changes are made before the will is executed and if each change is initialled by the testator and both of the witnesses. The amended will as signed is no different conceptually from a will that was not altered. If there are no initials beside the changes, the question may be raised in the future whether the will was signed with or without the alterations. As will be seen in Chapter 9, the proper execution of a will has to be proven by way of an affidavit of execution. If there are uninitialled changes on the face of the will, a special form of affidavit of execution is required, in which the witness states under oath that the will was in the changed state before it was signed.

If, on the other hand, the will has already been signed before the alterations are made, making a valid amendment requires both the testator and two witnesses to sign the will "in the margin or in some other part of the will opposite or near the alteration."[5] The witnesses to the alteration do not have to be the same as the witnesses to the original will. Alternatively, the testator and the two witnesses may sign at the end of or opposite "a memorandum referring to the alteration and written in some part of the will."[6] Note that signatures of witnesses are not technically required for

4 RSC 1985, c I-5.

5 SLRA, s 18(2)(a).

6 SLRA, s 18(2)(b).



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alterations to a holograph will or a will of a member of the Canadian Forces placed on active service; a member of any other naval, land, or air force while on active service; or a sailor at sea or in the course of a voyage. Again, however, in practical terms, a question may arise as to whether the testator made the alterations in question.

If an amendment to a will does not satisfy the requirements discussed above, it is invalid. One exception to this rule occurs where the amendment on the face of the will renders part of the will "no longer apparent."[7] In such a case, the part of the will that is rendered no longer apparent is invalidated. Depending on the circumstances, however, a court may consider extrinsic evidence, such as a photocopy of the unamended will, to uphold the provision that would otherwise be invalidated.

## Amending a Will Formally by Way of Codicil

A will can also be amended by a **codicil**, a formal document that is created and executed after the will has been executed and that refers to the will that it is amending. Figure 1.2 is an example of a codicil. For a codicil to be valid, it must be created in accordance with all of the legal requirements for a valid will. All rules and exceptions pertaining to a will also pertain to a codicil. As shown in the example, a codicil must be signed by the testator and witnessed by two witnesses, who do not have to be the same as the witnesses to the original will. If it is proven that the testator does not have knowledge and approval of the contents of the codicil, the codicil will not be valid.

**codicil**
formal document that amends a will

The only difference between a will and a codicil is that a codicil cannot stand on its own. It must be interpreted alongside the will to which it refers.

As can be seen from Figure 1.2, a codicil generally looks like a will, except that it refers to a specific will that is being amended and contains instructions for the amendments. If a will is not referred to in a codicil, the risk may arise that what is intended to be a codicil could instead end up being interpreted as a will. In that case, the codicil may revoke the previous will rather than amend it.

### FIGURE 1.2 Codicil

THIS IS A FIRST CODICIL to the Last Will of me, **Jahan Maryam**, whose current residence address is 99 Anywhere Street, Hamilton, Ontario, Q9Q 9Q9, retired bank manager, my said Last Will having been executed on the 1st day of January 2022.

1. I hereby delete subclause 5(c)(A)(ii) and substitute following therefor the following:
   "(ii) any automobiles and any watercraft that I may own at the time of my death;"
2. In all other respects I confirm my said Last Will.

IN TESTIMONY WHEREOF I have to this Codicil written upon this and one single preceding page of paper hereunto subscribed my name this 1st day of May 2022.

*(Continued on next page.)*

7 SLRA, s 18(1).



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| | | |
|---|---|---|
| SIGNED, PUBLISHED AND DECLARED<br>by **JAHAN MARYAM**<br>as and for his last will and<br>testament, in the presence of<br>us, both present at the same<br>time, who at his request, in<br>his presence, and in the<br>presence of each other, have<br>hereunto subscribed our<br>names as witnesses: | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | *Jahan Maryam*<br>____________________<br>Jahan Maryam |
| *Anne Torrie*<br>____________________<br>Anne Torrie | )<br>)<br>)<br>) | |
| *Talon Chatelain*<br>____________________<br>Talon Chatelain | )<br>)<br>) | |

A codicil can be written in holograph form—that is, wholly in the handwriting of the testator and signed—and a holograph codicil can amend a non-holograph will. Similarly, a non-holograph codicil can amend a holograph will.

While a codicil can amend a previous codicil, many lawyers consider reading a will with successive codicils awkward and confusing. In this day of computers that can easily store, open, and amend drafts of clients' wills, some lawyers avoid using codicils altogether.

## Revoking and Reviving Wills

As stated, except in the case of international wills and split wills, a subsequent will revokes a previous will, provided that the subsequent will is intended to deal with all of the property of the deceased. There is no rule preventing a holograph will from revoking a standard will, and vice versa. A will can also be revoked by physically destroying it—by tearing, burning, or other means of destruction—provided that two conditions are satisfied: the will must be physically destroyed by the testator or someone under his direction and in his presence, and the act of destroying the will is intended by the testator to revoke the will.

A will or part of a will that has been revoked can be revived by a valid will or codicil indicating the intention to revive the previously revoked will or the part of the will previously revoked. Such a will need not set out the gifts in the previous will but need only indicate the intention that the previous gifts be reinstated. While there may be occasions when using such a procedure is unavoidable, for practical purposes it is not advisable in normal circumstances owing to the inherent logistical complications



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of proving the gifts. The previous will intended to be revived, for example, may have been destroyed.

Note too that under section 19(2) of the *Succession Law Reform Act*, unless a contrary intention is shown, if a will has been partly revoked, then afterward wholly revoked, and then revived, the revival does not extend to the part of the will that was originally revoked. In other words, only the last revocation is cancelled.

Finally, as will be discussed in Chapter 3, Interpretation of Wills, revocations of wills and parts of wills can occur by operation of law, for example, in the case of marriage or divorce of the testator.

## Safekeeping of Wills

After a will that is prepared by a lawyer or law clerk is signed, the question may arise as to what should be done with the original. While some lawyers hand the original will to the client with instructions to keep it safe, many lawyers consider that this practice is not in the best interests of the client. Often clients lose important documents, and losing an original will can lead to many complications in the future. Another potential problem is the possibility that a client may, on his own, attempt to make changes to his will on the face of the original itself and, in the process, inadvertently alter the disposition clauses in a way not intended. Accordingly, many lawyers make it a practice to keep the original signed will in a fireproof vault for safekeeping and give the client a photocopy.

Lawyers who keep clients' original wills incur two ongoing obligations with respect to their safekeeping. First, the lawyer has the duty of confidentiality (reflected in s 3.3 of the Law Society of Ontario's *Rules of Professional Conduct*,[8] reproduced in Figure 1.3). Second, the lawyer must keep the will safe from physical harm or loss (s 3.5, also reproduced in Figure 1.3). These duties of course extend to the lawyer's entire staff.

Although the rule of confidentiality is probably the most often quoted rule of professional conduct for lawyers, it is an important rule that is worth discussing. The duty extends indefinitely, whether the lawyer continues to act for the client or not. It also extends beyond the death of the client, although at that point the lawyer may be obligated to deal with the deceased client's estate trustee. Before the client dies, however, the lawyer may find herself in a quandary if the client's attorney under a power of attorney for property (discussed in Chapter 5, Powers of Attorney) asks to see the client's will, especially if the client himself instructs or has instructed the lawyer not to disclose the will. While the lawyer must follow the instructions of the client, the client may no longer be of sound mind when instructing the lawyer not to deal with the client's attorney. In addition, the client, when of sound mind, may have included a clause in the power of attorney for property authorizing and directing the attorney to review the client's will. Such situations have no easy resolution, and when they do arise, it is usually best for the lawyer to consult with the Law Society of Ontario or a senior lawyer in good standing with experience in such matters. Issues of legal capacity of clients are dealt with in more detail in Chapter 5.

8 (1 November 2000; amendments current to 24 October 2019), online: <https://www.lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>.



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**FIGURE 1.3 Rules of Professional Conduct Relevant to the Safekeeping of Wills, Law Society of Ontario**

## SECTION 3.3 CONFIDENTIALITY

3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless

(a) expressly or impliedly authorized by the client;
(b) required by law or by order of a tribunal of competent jurisdiction to do so;
(c) required to provide the information to the Law Society; or
(d) otherwise permitted by rules 3.3-2 to 3.3-6.

### *Commentary*

… A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

… [I]t is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to administrative staff and to others whose services are used by the lawyer. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, and students and other licensees engaged under contract with the lawyer or with the firm of the lawyer the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

## SECTION 3.5 PRESERVATION OF CLIENT'S PROPERTY

3.5-2 A lawyer shall care of a client's property as a careful and prudent owner would when dealing with like property and shall observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

### *Commentary*

… The lawyer should keep the client's papers and other property out of sight as well as out of reach of those not entitled to see them and should, subject to any rights of lien, promptly return them to the client upon request or at the conclusion of the lawyer's retainer.

3.5-4 A lawyer shall clearly label and identify the client's property and place it in safekeeping distinguishable from the lawyer's own property.

3.5-5 A lawyer shall maintain such records as necessary to identify a client's property that is in the lawyer's custody.

3.5-6 A lawyer shall account promptly for a client's property that is in the lawyer's custody and upon request shall deliver it to the order of the client or, if appropriate, at the conclusion of the retainer.

3.5-7 If a lawyer is unsure of the proper person to receive a client's property, the lawyer shall apply to a tribunal of competent jurisdiction for direction.

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Note that where an estate trustee requests the will of a deceased testator or even requests to read it, proof of death of the testator must be obtained by the lawyer or law clerk before that request can be honoured. In addition, if an attorney under a power of attorney for property or an estate trustee of the deceased testator requests that the lawyer holding the original will hand the will over, it is essential that the lawyer or law clerk first determine whether the attorney or estate trustee is named solely as such in the power of attorney or will and that the attorney or estate trustee is the first in line to act in such capacity. If he or she is not solely named, the lawyer must insist that all named attorneys or estate trustees request the document, preferably in writing. If the attorney or estate trustee is not the first in line, the lawyer must insist that the circumstances necessary for the next in line to take over as attorney or estate trustee be verified—for example, by a death certificate of the first-named person. In addition, the lawyer or law clerk receiving such instructions should insist on seeing and preserving appropriate identification of the attorney(s) or estate trustee(s) making the request.

When a lawyer or law clerk prepares a subsequent will for a client, it is usually considered good practice not to destroy the previous (now revoked) will because there is always a possibility that, despite all the best efforts of the lawyer, the testator may later be found not to have had the required legal capacity to sign the subsequent will. In that case, the previous will may still be the last valid will of that testator. The foregoing is, of course, subject to the instructions of the client.

Finally, it should be noted that pursuant to section 2 of the *Estates Act*,[9] the office of the local registrar of the Superior Court of Justice (that is, the local court office) is an available depository for the safekeeping of wills. The rules pertaining to the depositing, inspecting, and safekeeping of wills on such premises are set out in rule 74.02 of the *Rules of Civil Procedure*.[10]

## Will Kits

Lawyers and law clerks are often asked to discuss will kits or to review wills created with the help of will kits. A valid will can be created with a will kit provided that the instructions are correct and are followed. A review of a will created with the use of a will kit requires more than a cursory review of the clauses to see that "everything looks all right." In such a situation, the lawyer would likely be held professionally negligent if there were any misunderstanding on the part of the testator regarding a material provision in the will following the review by the lawyer or clerk, whether that provision was discussed or not. If such a review is undertaken, therefore, it is essential that it be done conscientiously and that each clause be discussed in detail. This clearly takes time and energy on the part of the lawyer or law clerk; consequently, unless the review is performed on a pro bono basis, any money saved by the client in using the will kit will likely be eliminated.

## "Living Wills"

Lawyers and law clerks are often asked about so-called living wills. What these usually refer to are health care directives to a treating doctor or personal representative of the client directing the doctor not to keep the client alive by artificial means in the event

9 RSO 1990, c E.21.

10 RRO 1990, Reg 194.



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that the client is under an extreme mental or physical disability with no reasonable hope of recovery.

Living wills are not wills as such. Furthermore, a will is not the most appropriate place in which to put a "living will" clause. As in the case of the donation of organs or other living tissue, the intent of the clause will be thwarted if, as is often the case, the will is not consulted until perhaps days after the testator's death. Living wills are discussed in Chapter 5, because it is generally accepted in Ontario that the most appropriate place for a living will is within the body of a power of attorney for personal care.

## Client Copy of Will

As indicated above, the lawyer usually keeps the original will and gives the client testator a photocopy. The testator can then review his will periodically without having to contact the lawyer. Whether the copy is kept in a safety deposit box or other safe place, it is a good practice to keep a list of assets (including any digital assets and possibly usernames or passwords necessary to access them) and ongoing liabilities, and their particulars, with the copy of the will. These particulars include bank account information—the addresses of the banks where the testator has accounts and the account numbers. The lawyer often asks for this information from the client when preparing the will, but the list is merely a snapshot of the person's assets at that point in time. As will be seen in later chapters, the practice of keeping an up-to-date list of assets and liabilities can be very helpful to an estate trustee after the death of the testator.

Other papers that can be kept with the copy of the will include copies of any powers of attorney the client has made and the contact information of the lawyer who has possession of the original will and powers of attorney.



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## KEY TERMS

codicil, 15
estate trustee with a will, 12
holograph wills, 10
joint will, 13
multiple or split wills, 13
mutual wills, 13
testator, 4
testatrix, 4
will, 4

## REVIEW QUESTIONS

1. What does it mean to administer an estate?
2. Define the following terms or concepts:
   a. will;
   b. holograph will;
   c. joint will;
   d. multiple/split wills;
   e. international will;
   f. living will;
   g. codicil;
   h. testator/testatrix;
   i. executor/executrix; and
   j. estate trustee with a will
3. What are the formal requirements of a valid will?
4. What form of signature is advisable for a will?
5. Where does the signature have to be?
6. When can someone else sign a will for a testator?
7. Who can witness a will, and how many witnesses should there be?
8. When are witnesses not required?
9. What are the legal requirements of a testator?
10. What is meant by the term "testamentary capacity"?
11. How does someone become an estate trustee with a will?
12. What is the difference between "mirror wills" and "mutual wills"?
13. In what two ways can a testator amend a will?
14. Name three ways that a person can revoke her will.
15. How can a will be revived?
16. What are the lawyer's two main duties in the safekeeping of wills for clients?
17. What should be done with a will that has been revoked?
18. What government official will accept deposit of a will for safekeeping?
19. Are wills that are created with kits valid? Explain.
20. What should a client do with the original will and with a copy?



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