TD Wealth

Estate Planning for First Nations People in Canada

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As a proud supporter of AFOA Canada, its members and Aboriginal communities across the country, TD Bank Group is pleased to deliver this third article in a series of three articles that focus on planning for Aboriginal people both on and off reserve. This article will discuss estate planning considerations for First Nations people.

Studies have shown that more than half of adult Canadians do not have a valid Will in place[1]. Some assume that upon death everything will go to their spouse and/or children. Whatever the case, having a Will and establishing a plan for how you distribute your assets, what sort of legacy you would like to leave, and planning how your dependents will be looked after is one of the most important things you can do for those that you care about. Even if you feel that you don't have much money or property, it's still a good idea to have a Will so you can name an executor, and make it clear who you want making decisions after you die.

In Canada, will-making is administered federally for First Nations individuals who live on reserves by the Indian Act. If the individual lives off-reserve, then the laws of the province in which that individual lives will be applicable. This article provides a general overview of the estate planning rules that may apply to First Nations people who live both on and off reserve in Canada.

What is a Will and How do I Make One?

A Will is a document that leaves instructions about what you want done with your property (estate) after you die. There are two main purposes for making a Will:

1. To document your intentions as to the choice of beneficiaries or recipients of your assets; and
2. To appoint the executor.

Making a Will ensures that your wishes are carried out and your loved ones are considered. If you have dependants, personal belongings, real property, securities or cash assets, you should have a Will.

[1] For example, see the following study performed by the Lawyers' Professional Indemnity Company (LawPRO) https://www.lawpro.ca/news/pdf/Wills-POAsurvey.pdf

The requirements for making a valid Will depend on whether or not you are "ordinarily resident"[2] on a reserve.

Requirements for Making a Valid Will for First Nations People Living on Reserve

In general, if a First Nations person is ordinarily resident on a reserve or on Crown land, his or her Will is governed by the *Indian Act*.

Under the *Indian Act*, the usual formalities required for valid Wills, such as two witnesses present to sign after the will-maker ("testator"), in the testator's presence, do not need to be followed. However, the formalities should still be met whenever possible.

For First Nations people that live on-reserve, a valid Will must:

- be in writing (you can write your own or use Will forms available from various sources);
- be signed by you;
- state your wishes with respect to disposing of your assets; and
- state that it takes effect after your death.

Your Will should generally provide instructions for the distribution of all your land and other property (i.e., money,securities, jewelry, etc.). Although it is not required, it is preferable to date your Will and to have someone witness the signing of your Will. Your witness(es) should be an adult(s) who is not mentioned in the Will. The spouse of someone mentioned in your Will should also not be a witness.

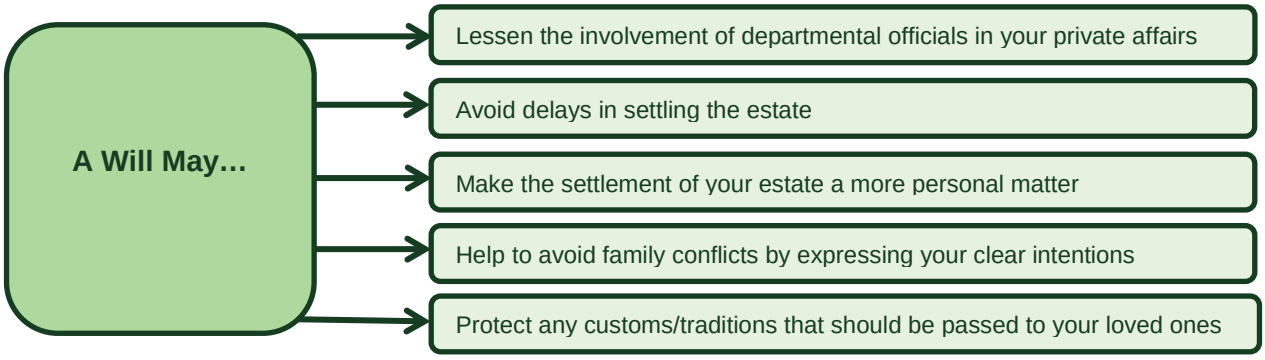
Under the *Indian Act*, the Minister of Indigenous and Northern Affairs Canada (INAC) has the authority to declare a Will void in whole or in part in some circumstances, such as when the Minister is satisfied that the Will was executed under duress, or the Will would cause hardship on persons for whom the testator had a responsibility to provide.

Requirements for Making a Valid Will for First Nations People Living off Reserve

If a First Nations person is not “ordinarily resident” on a reserve or on Crown land, the laws of the province in which he or she lives at the time of death will generally apply. In most provinces, a Will must be in writing and be signed by the testator at the end of the document. In general, two witnesses, both of whom must be at least 18 years of age, must witness the testator's signature and must be competent at the time of witnessing. In addition, a witness cannot generally be a beneficiary under the Will or the spouse of a beneficiary. The cost of making a Will depends on where you live in Canada, but can be as much as $500 or more.

[2] Whether a person is "ordinarily resident" on reserve is a question of fact that is determined on a case by case basis. All of the material circumstances will be examined, including the customary mode of life of the deceased and the presence and intention of the deceased to remain in residence on reserve.

Benefits of Making a Will



What Happens If I Die Without a Will (Intestate)?

Although everyone has good intentions, many people die “intestate”, meaning, without having made a valid Will.

First Nations People Living On Reserve

If you die intestate, the *Indian Act* applies and sets out how your assets will be distributed rather than you or your family deciding. The people entitled to receive on an intestacy are described in section 48 of the *Indian Act*.

In general, if the net value of the estate is

- less than $75,000, the surviving spouse or common law partner gets the entire estate;
- more than $75,000, the surviving spouse or common law partner gets the first $75,000;
    - if there is one child[3], the surviving spouse or common law partner receives half the remainder, with the remaining portion going to that child;
    - if there is more than one child, the surviving spouse or common law partner receives one-third of the remainder, with the remaining portion being divided equally among the children; and
    - if a child has predeceased the deceased and has children or grandchildren ("issue"), the issue will receive the child’s share.

The rules above may be altered at the Minister of INAC's discretion.

If the deceased had no spouse, children, or grandchildren at the time of death, the next heirs in line are: parents; sisters and brothers, or their issue in their place; and next of kin of equal blood relation.

Finally, with respect to reserve land, if there is no surviving relative that is closer than a brother or sister, then reserve land appears to vest in Her Majesty for the benefit of the band.

[3] The definition of “child” includes children born out of wedlock.

First Nations People Living Off Reserve

If you die intestate and are not ordinarily resident on a reserve, your estate will be distributed according to the intestacy laws in your province/territory. All provinces/territories have specific rules on how an estate is to be divided among the living heirs of the deceased. Under the laws in most provinces and territories, your nearest relatives are the people who will share in your estate if you die without making a Will. The end result may be quite different from what you would have wanted, particularly where there is a spouse and children involved.

The absence of a Will can also delay the administration of your estate, resulting in inconvenience or financial difficulty for your beneficiaries. In addition, your estate may incur unnecessary administration costs and could be subject to tax liabilities, which could otherwise have been mitigated in a properly prepared Will.

Depending on how complicated your estate is, your relatives may need to hire a lawyer and go to court to deal with your estate. Sometimes, a government agency will get involved to make sure that your estate is dealt with properly.

Special Considerations for Reserve Land

Due to the special nature of reserve land, there are limits on the distribution of interests in reserve land to your beneficiaries or heirs. To inherit an interest in land on reserve, your heir must be entitled (have the right) to live on the reserve where your land is located at the date of death. Your heir is generally entitled to live on reserve if he or she is a band member.

This means that in general, to inherit an interest in land on reserve, your heir must be a member of the same band with which the particular reserve land is associated at the time of your death.

If, at the date of distribution of the estate, your heir is not entitled to inherit the reserve land, then his or her share must be sold and the sale proceeds paid to him or her in accordance with the *Indian Act*. The sale of the reserve land must also be approved by the Minister of INAC. If your heir chooses to either give up that interest in favour of the remaining heirs or release and assign the share to a member of the band, then a sale is unnecessary.

Summary: Significant Differences Between Wills Governed by Indian Act and Wills Governed by Provincial Legislation

	Will Governed by Indian Act (First Nations Living On Reserve/ Crown Land)	**Wills Governed by Provincial Legislation** (First Nations Living Off Reserve/ Crown Land)
Formalities	▪ The formal requirements for Will-making are less strict under the Indian Act than they are under provincial legislation regarding Wills. ▪ To be valid, a Will must (i) be in writing, (ii) be signed by you, (iii) state your wishes with respect to disposing of your assets, and (iv) state that it takes effect after your death. ▪ The Minister of INAC has to approve the Will in order to give it force and effect.	▪ Formalities vary according to provincial legislation. ▪ Typical formalities for Will-making generally include the requirement that the Will-maker be a specific age (i.e., the age of majority), that the Will-maker signs the Will, and that two witnesses are present and sign the Will after the Will-maker in the Will-maker's presence.
Intestacy Provisions	▪ Section 48 of the *Indian Act* sets out the intestacy provisions in detail. ▪ In general, if the net value of the estate is less than $75,000, the surviving spouse or common law partner gets the entire estate. ▪ If the net value of the estate is more than $75,000, the surviving spouse or common law partner gets the first $75,000, the deceased child(ren) or their issue may be entitled to a portion of the amount over $75,000. ▪ If there is no Will or no one is named in the Will and no one applies to administer the estate, INAC may assist by appointing a departmental administrator for the estate.	▪ Under the law in most provinces and territories, your nearest relatives are the people who will share in your estate if you die without making a Will. ▪ Depending how complicated your estate is, your relatives may need to hire a lawyer and go to court to deal with your estate. Sometimes, a government agency will get involved to make sure that your estate is dealt with properly.
Reserve Land	▪ Under the Indian Act, people who are “not entitled to reside on a reserve” may not acquire title to land on a reserve under a Will or on an intestacy. ▪ An individual must be a member of the band with which the reserve land is associated in order to be eligible to inherit the right to possession. ▪ If heir is not entitled to reside on a reserve, his/her share must be sold and the sale proceeds paid to him/her, unless he/she chooses to relinquish their interest in favour of remaining heirs or release or assign share to member of band.	N/A

How Do I Get Started?

Whether you live on or off reserve, the following are some practical steps that you can take to begin the process of addressing your estate planning needs.

Collect Items That You May Need to Prepare a Will

Some of the items that may assist you in preparing a Will are:

- A list of the full names and addresses of your beneficiaries;
- A list of all your assets, real or personal property (these assets may include a commercial licence, crops, animals);
- A list of all your debts and the location of your bank accounts and other assets;
- Directions on the distribution of your assets and a list of special items you wish to give to specific people; and
- The name of someone that you want to be your executor.

Prepare an Inventory of Significant Documents and Identify Where They Are Located

Your inventory may include:

- Birth certificates;
- Marriage certificates and marriage contracts;
- Real estate deeds;
- Insurance policies;
- Location of safety deposit boxes; and
- Existing Wills and Powers of Attorney.

Draft a Will

A Will is essential to any well-developed estate plan. Consequently, if you do not have a Will then you should consider having one drafted and executed. If you have a Will, ensure that it is reviewed periodically to determine if it still reflects your personal and financial objectives.

Appoint a Power of Attorney (POA)

A complete estate plan includes planning for possible illness, accident, or other disability that may leave you unable to manage your financial affairs or your personal medical care. A POA for property is a legal document that empowers another person to manage your financial affairs during your lifetime. In some provinces and territories, it is now also possible to name a POA for personal care, which allows you to name someone to make decisions on your behalf concerning nutrition, shelter, clothing, and consent for medical treatment or withholding treatment should you become incapable of doing so. In all cases, POA arrangements terminate upon your death, at which time your Will takes effect.

Appoint an Executor

An executor is one or more individuals, or an estate professional (i.e. trust company), appointed in your Will to administer your estate after your death. An executor is also responsible for carrying out other important duties, such as making funeral arrangements, applying to the court for probate, preparing final tax return(s), paying any outstanding taxes, and obtaining tax clearances from the Canada Revenue Agency. You should select an executor with the right qualifications to carry out your wishes under your Will.

Regularly Review Your Will

It is important that you review your estate plan on a regular basis and make sure it addresses your needs and wishes. You may wish to consider changing your Will if, for example, there is a birth of a child, divorce, change of residence, death of someone mentioned in your Will, or if you have acquired new valuable property. If you are governed by the *Indian Act* and are making the changes without the assistance of a lawyer, you should always initial the changes or additions and have them witnessed.

Store Important Documents in a Secure Location

If you choose to keep your original Will, put it in a safe place such as your safety deposit box, a fireproof box, a home safe or a safe at the band council office. You should tell a family member, your executor or someone you trust where your Will is kept so that your final wishes can be carried out.

Taking these steps and knowing that your affairs are in order can help ensure peace of mind to all concerned.

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