

Sample 1 Will with Alternate Distribution Clause

THIS IS THE LAST WILL of me, *George Q. Willmaker, of Anytown, Anyprovince, Canada*

PART I — INITIAL MATTERS

A. REVOCATION

I revoke all former Wills and Codicils.

→ *People usually assume that by signing a new will, they are automatically cancelling any old ones, and this clause eliminates any doubt.*

B. EXECUTORS AND TRUSTEES

I revoke all former Wills and Codicils.

1. I APPOINT my spouse, *Josephine Willmaker, of Anytown, Any province* as the Executor and Trustee of my Will.

2. If she —

a. does not survive me; or

b. is unable or unwilling to act when I die or at any later time; or

c. ceases to be a resident of Canada within the meaning of the Income Tax Act (Canada), then I appoint my brother, *Herbert Willmaker, of Anytown, Anyprovince* as Executor and Trustee of my Will

3. I shall refer to the Executor and Trustee of my Will as “my Trustees.”

→ *This clause appoints the executor and alternate, and says when the alternate is to take over. It also allows you to avoid repetition of the phrase “my executors and trustees” in the rest of the will by just saying “my trustees.”*

4. My Trustees may pay themselves a reasonable fee for the work they do, in addition to any gift or benefit that I leave them in this Will, provided that the amounts are —

- a. approved by the Surrogate Court; or
- b. approved by all of the beneficiaries of my estate.

C. SURVIVORSHIP

Any beneficiary who is not alive thirty (30) clear days after my death is considered not to have survived me.

D. DISPOSITION OF BODY

I direct that my body be disposed of as my Trustees see fit.

→ *This reminds executors that they can't take their fees until the fees are approved. Trust companies usually ask for a clause allowing them to "pre-take" fees, meaning they don't have to wait until the estate is finalized.*

→ *If a couple with mirror wills dies in a common accident, like a plane crash, where it is physically impossible to determine who died first, there can be confusion over who gets what. The general rule for this situation is to assume the oldest died first. That means all the estate of the older automatically goes to the younger before going to the younger's beneficiaries. With this clause, the two estates are administered together, so the wishes of both are followed.*

→ *You may not know that your executor has the legal right to decide on the disposition of your body, no matter what you say. However, most executors are relieved to find that you left specific instructions about that and are happy to follow them. It is a good idea to put those instructions in a separate document and deliver it to your executor sooner rather than later. If the will isn't opened until after the funeral, it's too late.*

PART II — DISPOSITION OF ESTATE

I give all my property, including any property over which I have a general power of appointment, to my Trustees on the following trusts:

A. PAYMENT OF DEBTS

To pay:

1. All my legally enforceable debts;
2. My funeral expenses;
3. The expenses incurred in administering my estate.

B. RESIDUE TO SPOUSE

To transfer the residue of my estate to my spouse,
Josephine Willmaker

I am aware of the provisions of the Dependants' Relief Act of my province. I leave everything to my spouse knowing that she will adequately care for our children.

→ A general power of appointment is a power given to an executor to decide who gets a certain asset. This clause allows for the possibility that our will maker might have such a power as executor of someone else's will, but dies before he carries it out. I never saw such a power in my practice, but lawyers routinely include this clause nevertheless.

→ A reminder to the executor to pay all debts and expenses before distributing the estate. Don't forget that "debts" includes "income tax."

→ This gives all of the estate to the spouse. If she survives the will maker, then the gifts that follow are ignored.

→ We discussed the purpose of the dependants' relief act in the chapter "Frequently Asked Will Questions." This covers the situation in which the will maker has children who will continue to live with their mother, and she will use the estate assets to raise them, just as both parents did when the will maker was alive. Under those circumstances, the public trustee does not have to use the dependants' relief act to have assets set aside in trust for the children.

C. ALTERNATE DISTRIBUTION

If my spouse does not survive me:

→ If the spouse is not alive, these gifts come into effect and the alternate executor takes over. This sets up trusts for children.

1. Children

- a. To divide the residue of my estate equally among those of my children, Sally Willmaker, Susie Willmaker, and Sammy Willmaker, who survive me;
- b. If a child of mine is younger than the age of twenty-one (21) years, to set aside the share of that child in trust as follows:
 - (i) To keep that share invested;
 - (ii) To pay the income or capital of that share or as much of either or both as my Trustees consider advisable for the maintenance, education, advancement, or benefit of that child; and
 - (iii) To pay or transfer the capital of that share or the amount thereof remaining to that child when he or she reaches the age of twenty-one (21) years;
- c. If a child of mine dies before becoming entitled to receive the entire principal of his or her share:
 - (i) To divide the share as constituted at that child's death among my other children then alive in equal shares; and,
 - (ii) If any person becomes entitled under this or any other clause to any interest in addition to a share being held in trust for that person under this Will, to add that interest to and mingle it with that share and to administer it as if it had been an original part of that share.

→ This is a typical trust for children. Note that it also says what happens if a child dies before reaching the age of distribution.

→ There are many possibilities for this part of the will. It is impossible to present one clause for everybody. Please remember that this is a sample will that may work in one common situation. Do not assume it is perfect for you. Make sure that your own will does what you want it to do.

2. Grandchildren

- a. If a child of mine does not survive me, leaving any surviving children (referred to as my “grandchildren” or “grandchild”), they are to receive in equal shares the share that my deceased child would have received if my child had survived;
- b. If a grandchild of mine is younger than the age of twenty-one (21) years, to set aside the share of that child in trust as follows:
 - (i) To keep that share invested;
 - (ii) To pay the income or capital of that share or as much of either or both as my Trustees consider advisable for the maintenance, education, advancement, or benefit of that child; and
 - (iii) To pay or transfer the capital of that share or the amount thereof remaining to that child when he or she reaches the age of twenty-one (21) years;
- c. If a grandchild of mine dies before becoming entitled to receive the entire principal of his or her share, to divide the share remaining at that grandchild’s death among his or her siblings then alive in equal shares.

→ *This clause assumes that the will maker wants to pass assets to his grandchildren if a child of his is not alive. In that case, the trustee is to hold the shares of any grandchildren in trust until they reach the stipulated age. This may or may not be what you want for your estate.*

3. Family Demise

If neither my spouse nor any of my children or grandchildren survive me, or if all of them die before they become entitled to receive the entire principal of their shares of my estate, then to divide the residue of my estate, or the amount then remaining, as follows:

- a. to pay or transfer FIFTY (50%) PERCENT to my wife's sister, Sherry Smith, if she is then alive; but if she is not then alive to pay or transfer this share to the Canadian Cancer Society for use as their board of directors sees fit.
- b. to divide the balance of the residue of my estate equally among those of my siblings, Syd Willmaker, Marty Willmaker, and Shareen Willmaker who are then alive.

→ This is called the “ultimate disposition clause” or the “wipe-out clause.” There is an infinite number of possibilities. This is a typical example. Make sure your will reflects your particular needs and wishes.

PART III — POWER TO ADMINISTER MY ESTATE

To carry out the terms of my Will I give my Trustees the following powers:

→ This is the executor's tool box, which we discussed in the chapter “Planning for Death: Choosing an Executor for Your Will.” The powers below are the most common ones found in wills. Even though some of them relax the strict requirements that bind executors, your executor must always act honestly, reasonably, and fairly.

A. EXERCISE OF PROPERTY RIGHTS

My Trustees may exercise any rights that arise from ownership of any property of my estate. This includes the right to conduct any legal actions necessary with respect to the property of my estate.

→ *This confirms that the executor takes over management and control of the will maker's assets, and gives him or her the right to deal with law suits, if necessary. For example, as discussed in Part 1, this gives the executor power to deal with tenants of rental properties owned by the estate.*

B. REALIZATION AND SALE

To realize and sell my estate assets on terms my Trustees think advisable. They may delay conversion until it is advantageous. They can hold assets in the form that they are in at my death even if the assets are not approved for Trustees. They will not be responsible for any loss which may occur from a properly considered decision to leave investments in the form that they were in when I died.

→ *The executor must gather the estate assets and turn them into cash. This is called "realizing" or "converting" the estate. The cash is then invested until the executor is able to distribute it. As discussed in Part 1, this power allows the executor some discretion about timing the sale of assets, and lets him or her hold onto assets of the deceased that are not otherwise approved for estates.*

C. PAYMENTS TO BENEFICIARY

To make any payment for a person younger than the age of majority to his or her parent or guardian. The receipt of that parent or guardian will be a sufficient discharge to my Trustees.

→ *A minor cannot give a legal receipt for payments or assets received from an estate. This clause lets the parents or guardian do that.*

D. DISTRIBUTION IN KIND

To transfer the assets of my estate to my beneficiaries without converting them into cash when that is reasonable. For this purpose my Trustees will determine the value of the assets involved and their valuation will be binding.

→ *As discussed in Part 1, this allows the executor to distribute assets of equal value without having to sell them.*

E. TAX ELECTIONS

My Trustees, using absolute discretion, may make any elections, allocations, designations, and distributions permitted by the Income Tax Act (Canada) or any other taxing statute.

→ As discussed in Part 1, this lets the executor take whatever steps he or she can to minimize the amount of tax payable as a result of the will maker's death.

F. EMPLOYMENT OF AGENTS

To employ any agent to carry out the administration of my estate and its trusts.

→ As discussed in Part 1, this lets the executor hire an agent such as a trust company, lawyer, or accountant to help with the administration of the estate. The executor should remember that these agents are only advisors. Ultimate responsibility for all decisions rests on the executor's shoulders

G. APPORTIONMENT OF RECEIPTS

To decide whether receipts are income or capital in his or her absolute discretion.

→ There may be times when the executor, on the advice of accountants or other financial advisors, can decide if money earned or received by the estate is income or capital, which may make a difference for tax purposes. This clause makes the choice possible.

H. ENCROACHMENT POWER

Except as otherwise provided in this Will, if my Trustees hold any share of my estate in trust they shall have the power to spend as much of the income or capital or both as my Trustees in their sole and absolute discretion consider advisable for the maintenance, education, advancement, or benefit of the beneficiary of that trust.

→ This is for situations that aren't already covered in the trust for the children or grandchildren. For example, if a grandchild dies before receiving his or her share, this share is then split between his or her children. They would likely be minors, and their portions would be held in trust under this clause. Otherwise, this clause won't likely be needed.

I. RESOLUTION OF DISPUTES

My Trustees, in their sole and absolute discretion, and without the consent of any persons interested in my estate, may compromise, settle, or waive any debts, liabilities, and claims of or made by or against my estate.

→ As discussed in Part 1, this gives the executor some options if a dispute breaks out after the will maker's death.

J. BORROWING

To borrow money for the estate with or without security

→ This clause and the three that follow are usually required only if the will maker owns a business. They allow the executor to operate the business until it can be sold or closed down in an orderly fashion.

K. REAL PROPERTY

To manage, sell, or lease any real property in my estate on such terms as they choose and to spend such amounts as may be necessary to maintain and repair it.

L. CORPORATE AND BUSINESS ASSETS

To represent my estate as a shareholder in any corporations in which it holds shares and to participate in any corporate decisions required.

To carry on any business I was engaged in as if I were still alive.

To incorporate a company to carry on any business or hold any assets of my estate.

M. RENEWAL OF GUARANTEES

To renew any Guarantees or Securities I may have given to secure the debt of another person and to renew them only for the purpose of an orderly liquidation.

PART IV — GUARDIANSHIP OF CHILDREN

A. APPOINT GUARDIAN

If my spouse, *Josephine Willmaker*, fails to survive me, I appoint my wife's sister, *Sherry Smith*, of *Anytown, Anyprovince*, as Guardian of my minor children.

B. FINANCIAL ASSISTANCE TO GUARDIAN

I wish that the resources of my estate be used to prevent any financial burden on my Guardians as a result of their agreement to care for my minor children. I give my Trustees discretion to use the encroachment powers to make such payments as may be reasonable to provide adequate housing and household help and to pay the cost of feeding, clothing, and educating my minor children.



I, George Q. Willmaker, have subscribed my name to this my Will on the 1st day of *Anymonth*, A.D. *Anyyear*, at the *City of Anytown*, in the Province of *Anyprovince*.

George Q. Willmaker

George Q. Willmaker

SIGNED BY George Q. Willmaker as his Will,)
in our presence and attested by us in his)
presence and in the presence of each other)

WITNESSES:

I.M. Witness

Name: I.M.

Witness Address: (Witness 1)

U.R. Witness

Name: U.R.

Witness Address: (Witness 2)