

What makes a Will valid?

by: Michelle Pearson, Associate
published November 4, 2024

Wills are legal documents that have formal requirements to be considered valid – and rightly so when the important purpose of a Will is to govern someone’s estate after their death. In Manitoba, *The Wills Act* governs who can make a Will, how the court may interpret Wills, and most importantly, what makes a Will valid.

Must be in writing

The first requirement of a formal Will in Manitoba is that it must be in writing. This may go without saying for most, and our legislation sets this out quite plainly to avoid any confusion about verbal testamentary wishes.

Must be over 18

Someone making a Will must be over 18 years of age. Again, this seems self-explanatory, however it is important to note that the legislation provides for three exceptions to this rule: someone who is or has been married, or someone who is a member of the military or is any member under the *National Defence Act* of Canada are able to make Wills even if they are under 18 years old.

Must have two witnesses in your presence

A Will must be signed at the end of the document by the Will-maker themselves, and it must be signed in the presence of two witnesses. The two witnesses must then also sign at the end of the document, in the Will-maker’s presence and each other’s presence, signifying that they witnessed the Will-maker sign the document. If you have made a Will before, you know that practically this looks like yourself and two witnesses in one room, each taking turns to sign the document.

The legislation provides for variations on this rule for practical reasons. First, if the Will-maker is unable to write, they can direct another person to sign the Will on their behalf. Second, there is a possibility to witness Wills remotely or virtually, meaning the witnesses and Will-maker need not be in the same room. This remote witnessing of Wills always requires additional wording and evidence following the Will being signed. The other avenues provided for are for military members in active service,

and in the case of holograph Wills (for more details on holograph Wills, see our article “Is a handwritten Will legal?”).

Must have Testamentary Capacity

Finally, a Will-maker must have “testamentary capacity”. Testamentary capacity is the legal term used to encompass understanding and knowledge that an individual must have in order to make a Will and is different than capacity as determined by a doctor or psychiatrist. Put another way, the Will-maker must be considered to be of “sound mind”.

This means a few things. First, the Will-maker must have understanding and knowledge of their estate, being their assets and liabilities, and must understand the consequences and effect that their Will shall have on their estate.

Second, the Will-maker must be capable of considering and appreciating who may have a claim against their estate, meaning their family members, spouses, and common-law partners.

Finally, the Will-maker must be free of any illness that may directly affect their mental capacity for making a Will. The most obvious examples are dementia or Alzheimer’s, as these are illnesses that would diminish one’s ability to understand and know their current state of affairs and be able to understand the effect on their estate and their relatives that their Will would have.

If a lawyer finds someone to be without testamentary capacity, it is likely that they will be required to decline drafting and signing a Will with that individual. Without testamentary capacity, one should not be making or signing a Will as it will have crucial and significant impacts on their estate that they may not understand.

DISCLAIMER: *This article is written for informational purposes only and does not constitute legal advice. The views expressed are solely the author’s and should not be attributed to any other party, including Meighen Haddad LLP. If you want to seek legal advice, please contact the author directly or call our office at (204) 727-8461.*

The Author:

MICHELLE PEARSON
Associate
mpearson@mhlaw.ca
204.725.8774