



# Mi'kmaw Wills & Estates:

**A Guide For Nova Scotia Mi'kmaq**  
Book One: How to Write a Will

Revised January 2017



## IMPORTANT

This guide contains general information and educational material for Nova Scotia Mi'kmaq who want to write their own Will. This publication is a general, plain-language guide to rules, documents and processes for writing a Will if you are a Status Indian and you live on reserve or Crown lands in Nova Scotia. While every effort has been made to ensure accuracy, this guide is neither a complete technical description nor an official interpretation of the subjects it discusses. This publication does not provide legal advice; if you have specific legal questions you should contact a lawyer.

The Legal Information Society of Nova Scotia offers a Lawyer Referral Service. This service provides an individual with an initial consultation of up to 30 minutes for a fee of \$20 plus tax. Please note that the lawyer will not do legal work for you during the initial 30-minute consultation. The lawyer is there to review your legal questions and talk about the options you may have, and how much it may cost to have the legal work done.

For more information about hiring a lawyer, please see Part Seven: *Hiring a Lawyer to Write Your Will* on page 18 of this guide.

**Lawyer Referral Service:** (800) 665-9779 (toll free) or (902) 455-3135 (Halifax area).

# **Mi'kmaw Wills & Estates:**

## **A Guide for Nova Scotia Mi'kmaq**

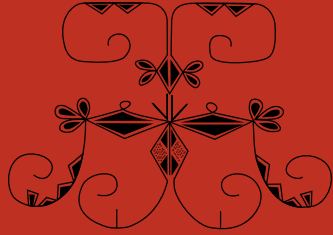
Book One: How to Write a Will  
Revised January 2017

# Table of Contents

- INTRODUCTION** ..... 1
  
- PART ONE - IS THIS GUIDE FOR YOU?**..... 2
  - WHAT IS A WILL? ..... 3
  - DO YOU NEED A WILL? ..... 4
  - WHAT HAPPENS IF YOU DO NOT HAVE A WILL? ..... 4
  
- PART TWO - WRITING A WILL** ..... 5
  - HOW TO START WRITING A WILL ..... 5
  - CHOOSING AN EXECUTOR AND THEIR RESPONSIBILITIES ..... 7
  
- PART THREE - GIVING AWAY YOUR PROPERTY** ..... 8
  - WHAT ARE ASSETS?..... 8
  - ORGANIZING ASSETS IN A WILL ..... 12
  
- PART FOUR - PROVIDING FOR YOUR CHILDREN** ..... 13
  - WHO WILL CARE FOR YOUR CHILDREN?..... 13
  - MEETING THE FINANCIAL NEEDS OF YOUR CHILD ..... 13
  - PROVIDING FOR ADULT DEPENDANTS ..... 14
  
- PART FIVE - NOW THAT YOUR WILL IS COMPLETE**..... 15
  - CAN A WILL BE CHALLENGED? ..... 15
  - WHERE SHOULD A WILL BE STORED? ..... 16
  - CHANGING A WILL..... 16
  
- PART SIX - OTHER ESTATE PLANNING TOOLS** ..... 17
  - BURIAL INSTRUCTIONS..... 17
  
- PART SEVEN - HIRING A LAWYER TO WRITE YOUR WILL**..... 18
  
- FOR MORE INFORMATION** ..... 19
  
- APPENDIX** ..... 20
  - APPENDIX A: LAST WILL AND TESTAMENT ..... 20
  
- ABOUT THE AUTHORS**..... 22
  
- ENDNOTES** ..... 24

## List of Acronyms

BCR	Band Council Resolution
CP	Certificate of Possession
<i>FHRMIRA</i>	<i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i>
PFR	Provisional Federal Rules
INAC	Indigenous and Northern Affairs Canada
MRP	Matrimonial Real Property
RRSP	Registered Retirement Savings Plans
NSSC	Nova Scotia Supreme Court
TFSA	Tax Free Savings Accounts
VA	Veteran's Allotment
WWII	The Second World War



## Introduction

As Mi'kmaq we have our own customs, laws and spiritual beliefs regarding death and worldly possessions. Historically, when a person was returned to the spirit world the family would bury the person with all of their possessions. It was believed the possessions would follow their owner into the next world. As a result, only a few worldly possessions passed to the next living generation.

Today we do not bury our loved ones with all of their possessions. Many of us have things we wish to pass on to family and friends. Writing a **Will** is the best way to ensure your final wishes are followed. The *Indian Act*<sup>1</sup> sets out the rules for making a Will that apply to all **Status Indians** who are **Ordinarily a Resident on Reserve**.\*

In addition to the *Indian Act*, the *Family Homes on Reserves and Matrimonial Interests or Rights Act (FHRMIRA)*<sup>2</sup> can affect your Will. The Provisional Federal Rules (PFR), as set out in sections 12 to 52 of *FHRMIRA* contain provisions that may affect your Will and have been highlighted throughout this guide in the yellow text boxes. The PFR under *FHRMIRA* will only affect you if your band does not have Matrimonial Real Property (MRP) laws.

A First Nation can write MRP laws at any time. Once a First Nation has passed a MRP law, the Band's law and not FHRMIRA will apply to the matrimonial property located on the reserve. A band can legislate different provisions for the division of MRP on reserve lands.

It is important to know if your band has MRP laws. Indigenous and Northern Affairs Canada (INAC) maintains a list of bands that have MRP laws online at: <http://www.aadnc-aandc.gc.ca/eng/1408981855429/1408981949311>

**Will:** A signed written or typed document stating how a person wants his or her property to be distributed and debts paid after they die. The Will also names an Executor, who will be responsible for carrying out the deceased's final wishes.

**Status Indian:** A person who is registered as an Indian, in accordance with the Indian Act (Canada).

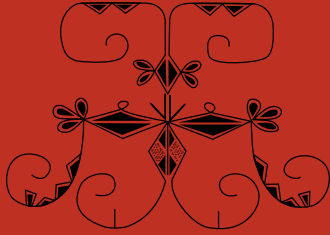
**Ordinarily a Resident on Reserve:** Is when a person habitually makes the reserve their home. A person who must spend time in a hospital or prison; or leaves the reserve in order to attend school, work, to go hunting or to serve in the military; or lived off-reserve for most of their life, but moved to the reserve and was living on the reserve at the time of death may still be "Ordinarily a Resident on Reserve".



\* This guide also applies if you are a Status Indian living on Crown lands or reside on a traditional land holding.

## Part One

# Is This Guide for You?



This guide provides information on how to write a Will for Status Indians who Ordinarily Reside on Reserve.

You may USE this guide to help prepare your Will if:

- ✓ You are a Status Indian;
- ✓ You live on-reserve or crown lands;
- ✓ You are 19 years of age or older;
- ✓ You have **Testamentary Capacity**; and
- ✓ You do not own **Property** off reserve.

However, you should talk to a lawyer before writing your Will if:

- You care for Adult Dependants or Developmentally Delayed Children.
- You are divorced or are in the process of a divorce. A divorce does not cancel a Will. If you want to remove your former spouse from your Will, you must change the Will. If you do not change your Will, your ex-spouse may have a right to claim part of your **Estate**.
- You are planning to get married. Marriage revokes a prior Will, unless the Will states it was made in “contemplation of marriage.”
- You start a business.
- You own property located off reserve.
- You own a great deal of Property, such as, land holdings, bank accounts with large sums of money, investments, etc.

Do NOT use this guide if you are:

- 1) A Status Indian living off reserve; or
- 2) A non-Status Indian living on reserve.

In these situations the *Wills Act*<sup>3</sup> may apply.

**Testamentary Capacity:** The legal requirement that a person making a Will must be of sound mind and memory, knows the extent of their property, and understands the effects of the Will.

**Property:** Land, possessions and other items a person has legal ownership of. There are two forms of property: Real Property and Personal Property.

**Estate:** Any property the deceased owned at the time of death (that may include your home, car, bank accounts, household goods, investments).



## What is a Will?

A Will is a written or typed document that explains how a person would like their Property given out after they pass away. The person who writes a Will is known as a **Testator**.

For a Will to be valid it must be:

### A. *Written*

A Will cannot be audio or video recorded. The Indian Act states that any written or typed document, signed by you, that gives away your possessions, may be accepted as a Will.<sup>4</sup>

### B. *Signed and Dated*

Signing and dating a Will is important. By signing and dating the Will, you are agreeing that the contents of the Will reflect your wishes. It is good practice to sign your initials at the bottom of every page of your Will. This makes it difficult for anyone to change your Will.

If you have difficulty reading or writing, you can sign your Will by placing an “X” in the space next to your name. If you must sign your Will by placing an “X”, you must have two people (who are not **Beneficiaries**) present and read the Will aloud to you. After the Will has been read, the witnesses must observe you make your “X” mark.

### C. *Witnessed*

A Will for a Status Indian living on reserve does not need to be witnessed.<sup>5</sup> However, in order to avoid disputes, two people should witness your Will, especially if you own Property off reserve.

Each witness must be at least 19 years old and be present when you and the other witness sign and date the Will. Witnesses do not need to know the contents of the Will; they only need to know that it is your Will and that it states your wishes. To avoid conflicts you should not use family members or **Beneficiaries** as witnesses.

### D. *Give away your Property*

The Will must give away or dispose of your Property or **Assets** to specific people or organizations upon your death.

**Testator:** A person who makes a Will. Testatrix is sometimes used to describe a woman who makes a Will. Throughout this guide Testator will also include the feminine.

**Beneficiary:** A person or organization named in a Will, in an insurance policy or at provincial law to receive a gift or money after a person dies. There can be more than one beneficiary in the Will or policy.

**Assets:** Everything a person owns, including Real and Personal Property (such as land, vehicles, bank accounts, pensions, jewelry, art, crafts, household goods).





## Do You Need a Will?

Making a Will is a personal decision. A Will can give you control over what happens to your Property after you pass away. A Will can enable you to:

- Choose your **Executor**;
- Choose your Beneficiaries;
- Choose who will care for your **Child(ren)**;
- Prevent family conflicts;
- Lessen the involvement of INAC;
- Settle your Estate quickly; and
- Protect your history, culture and traditions.

### Custom Adoption

Some First Nation people raise children who are not their own by birth and who have not been formally adopted under provincial laws (for example, your niece or nephew). If you have children who are not biologically yours, and you want to be sure they are legally treated the same as your biological children in your Will, be sure to mention these custom-adopted children by name, instead of just saying "I leave everything to my children".

## What happens if you do not have a Will?

If you do not have a Will at the time of your death, the law will declare that you have died **Intestate**. When a Status Indian who lives on reserve dies Intestate, the **Minister** may appoint an Executor to the Estate.<sup>6</sup> Section 48 of the *Indian Act*, provides that an Estate worth less than \$75,000.00 will be given entirely to the **Surviving Spouse**.<sup>7</sup> If an Estate is worth more than \$75,000.00 the Surviving Spouse will receive the first \$75,000.00. Anything left, is then divided amongst the Surviving Spouse and any children of the deceased.<sup>8</sup>

Since the coming into force of *FHRMIRA* on December 16, 2014, a Surviving Spouse or **Common Law Partner** can file an application with the Nova Scotia Supreme Court (NSSC) to access a number of rights and interests under *FHRMIRA*.<sup>9</sup>

**Executor:** The person or corporation named in a Will to carry out the instructions in the Will or to administer the Estate. More than one Executor can be named in a Will. Executrix is sometimes used to describe a female Executor. Throughout this guide Executor will also include the feminine.

**Child:** Includes a legally adopted child and a child adopted in accordance with Mi'kmaq custom.

**Intestate:** Means a person has died without making a Will or has made a Will that is not valid.

**Minister:** Means the Minister of INAC.

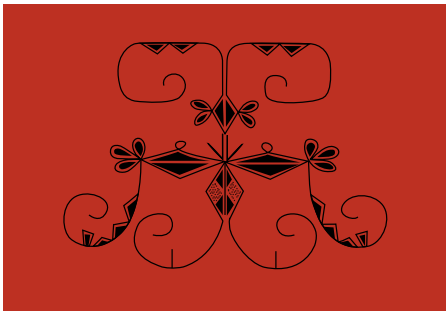
**Surviving Spouse:** The person the deceased was married to at the time of death (husband or wife).

**Common Law Partner:** A person who has been living with an individual in a conjugal relationship for a period of at least one year. Common law spouses are not considered legally married.

### Survivors Choice under *FHRMIRA*

- *FHRMIRA* only applies to the family home and other matrimonial interests. A Surviving Spouse or Common Law Partner can choose to divide MRP under *FHRMIRA*, as well as inherit other assets, such as personal items, from a Will or under the Indian Act. (*FHRMIRA*, s 37)
- A Surviving Spouse or Common Law Partner (including non-band members) has an automatic right to occupy the family home for up to 180 days. (*FHRMIRA*, s 14)
- The Surviving Spouse or Common Law Partner (including non-band members) may apply to receive half the value of the deceased's interest in the family home and other matrimonial interests and rights on reserve lands. (*FHRMIRA*, s 34)

**NOTE:** *FHRMIRA* only applies to Bands that have not passed MRPLaws.



## Part Two

# Writing Your Will

### How to Start Writing a Will

When writing a Will you should be as specific and as clear as possible. When you are writing your Will, you must make sure others will be able to easily understand your instructions (see Appendix A). If your instructions cannot be understood the Minister has the authority to declare a Will **Void**, in whole or in part.<sup>10</sup>

Generally, when writing a Will you should consider the following:

1. State you are writing your Last Will & Testament; insert your legal name, address and in brackets any nicknames you are known by.
2. Insert a statement that you cancel or revoke all previous Wills and **Codicils**.

#### **Example**

This is the Last Will and Testament of me, [YOUR LEGAL NAME] (NICKNAME), of [ADDRESS].

3. State the name of the person you want to act as your Executor. Then, name an alternate, in case the first named Executor is not able or willing to act.

#### **Example**

I appoint [LEGAL NAME OF PERSON], of [ADDRESS], as Executor of my Will. If he or she is unable or unwilling to act, I appoint [LEGAL NAME OF PERSON], of [ADDRESS], as Executor of my Will.

4. State that you want your Executor to pay all of your debts, funeral and **Testamentary Expenses** out of the Assets of the Estate.
5. Identify all your Property, including your Assets and name the specific person or organization you wish to gift the item to. It is important to name an alternate Beneficiary for each gift, just in case the person named in the first instance passes away before you.

**Void:** Not valid or legally binding.

**Codicil:** A legal document that amends a Will. A codicil becomes part of the Will and must be signed, witnessed and dated in the same manner as a Will.

**Testamentary Expenses:** The expenses your Executor will have to pay to carry out the instructions in your Will.



When identifying your Property, Assets and Beneficiaries in your Will, you should consider the following:

1. Write a clear description of each item you want to give away. If you have a collection of baskets, describe particular features of the item that set it apart, and clearly identify who you want to receive the gift.

**Example**

I give to my daughter, [LEGAL NAME] of [ADDRESS], my Mi'kmaq sweetgrass basket with the turtle design on the top of the cover.

2. Sometimes it is better if you are not too specific about items in your Will. For example, when identifying a vehicle being too specific can lead to a gift not being given away. If, at the time of death, the only vehicle you owned is a "Honda Civic" and your Will only identifies a "Ford F-150", the "Honda Civic" will not be given to anyone. The "Honda Civic" will fall into the **Residue** of your Estate and the Beneficiary gifted the "Ford F-150" will not receive anything.

**Example**

I give the primary vehicle I drive, at the time of my death, to my son, [LEGAL NAME] of [ADDRESS].

3. Specific gifts can also include cash gifts.

**Example**

I give \$1,000.00 to my son, [LEGAL NAME], of [ADDRESS].

**Residue:** Is everything in a Testator's Estate that has not been given to a specific person or organization; and includes any gifts that fail to be given away or are void.



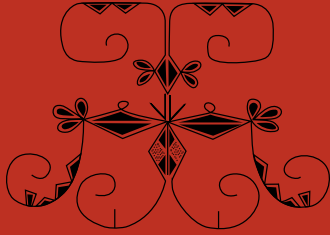
## Choosing an Executor and their Responsibilities

Anyone can be named as an Executor in your Will. The person you name as the Executor should be someone who can handle responsibility at a difficult time, is in good health and presence of mind to settle your affairs. Be sure to ask the people you are naming as Executor if they are able and willing to act as your Executor.

The Executor must file your final Income Tax Return, pay your remaining debt, complete an inventory of your Assets, and follow the instructions in your Will. Your Executor must not give your Beneficiaries their gifts, until your remaining debt has been paid. An Executor can be held personally liable for any debt that is not paid before the where Assets are given to your loved ones.

Being an Executor is an important job for more information about the roles and responsibilities of an Executor see *Mi'kmaw Wills & Estates: Book Two: How to Settle an Estate*.





## Part Three

# Giving Away Your Property

### What are Assets?

When giving away your Property in your Will, it is important to identify what interests you have in the Property you wish to give away. The Assets of your Estate include all your Property, both **Real Property** and **Personal Property**. The following are non-exhaustive lists of Assets you may own:

#### **Real Property, may include:**

- Land
- Buildings
- Permanent structures attached to the land
- Improvements to the land.

#### **Personal Property, may include:**

- Household goods
- Vehicles
- Jewelry
- Business equipment
- Cultural items
- Leaseholds
- Shares
- Stock certificates
- Legal settlements or judgment awards
- Patents
- Trade marks
- Computer programs you create.

#### *A. Real Property*

### Band Owned Home

You cannot include a band owned home or land in your Will. You can only give away things you have legal ownership of. However, if you live in a band owned home, you may write a request to the Band Council asking that the home be passed on to another family member who is a band member.

The Band Council does not have to comply with your request and the house can be allotted in accordance with the band's Land Code, policies, customs or traditions.

#### **Example**

I am aware that the house I live in is a band-owned home, but I would like to request that Chief and Council allow my grandchild, [LEGAL NAME] to take over living in my house located at: [ADDRESS].

**Real Property:** Land, buildings attached to the land, as well as permanent fixtures or improvements to land.

**Personal Property:** Assets other than Real Property that physically exist and are easily moved and not permanently attached to a dwelling or structure.



## Certificates of Possession

A band member who is in lawful possession of reserve land holds a **Certificate of Possession (CP)**. In order to obtain a CP, you must get a **Band Council Resolution (BCR)** approving the allotment.<sup>11</sup> After the Band Council has approved the BCR, the Minister may issue a CP to the band member.<sup>12</sup>

You may gift a CP in your Will. However, you should find out if your interest in the CP is held solely in your name, or if others are listed on the CP with you. If you have **Sole Ownership** of the CP, or hold it as a **Tenancy in Common**, the CP will become part of your Estate and can be given to another band member of your choice. If the CP is held in **Joint Tenancy**, ownership of the CP will transfer to any surviving co-owners listed on the CP with you, and cannot be given to anyone in your Will.

The *Indian Act* sets out the rules and limits for giving a CP in a Will.

- A CP cannot be transferred to a non-band member.<sup>13</sup>
- If a CP is left to a non-band member, the property will be offered for sale to the highest bidder among band members.<sup>14</sup>
- Once the Minister approves the sale, the money received will be given to the non-band member Beneficiary of the CP.<sup>15</sup>
- If the CP is not sold within six months, the Minister may give the CP back to the band, at no cost; and decide whether or not to compensate the non-band member for the CP.<sup>16</sup>

### CP of Reserve Lands under FHRMIRA

- A Surviving Spouse or Common Law Partner (including non-band members) has an automatic right to occupy the family home for up to 180 days. (*FHRMIRA*, s 14)
- The Surviving Spouse or Common Law Partner (including non-band members) may apply to receive half the value of the deceased's interest in the family home and other matrimonial interests and rights on reserve lands. (*FHRMIRA*, s 34)
- Only band members can receive a transfer of ownership for a CP or interest in reserve lands. (*FHRMIRA*, s 36(1)(b)(iii))

**NOTE:** Make sure you check with your Band Council to find out if *FHRMIRA* applies to your community.

### Certificate of Possession:

A document prescribed under the *Indian Act* confirming that a band member is legally entitled to occupy and possess a specific piece of reserve land defined in the document.

### Band Council Resolution:

Refers to a written resolution of the Council of the band adopted at a duly convened meeting.

### Sole Ownership:

When one person has exclusive ownership, meaning no other person has any interest in the property as an owner.

### Tenancy in Common:

When two or more people own an interest in the same property. Each co-owner has a distinct and separate interest in the property. If one of the co-owners dies, their share of the property is added to their Estate.

### Joint Tenancy:

When two or more people own the same property. If one of the owners dies, their interest in the property is automatically given to the other named owner(s).



## Veteran's Allotments

After the Second World War (WWII), the federal government promised returning Veterans benefits, such as land, training, grants and loans in recognition for their service to Canada. INAC administered the Veteran's benefits program for Status Indians after WWII. Through this program, Indian Agents gave Veterans land under a Veteran's Allotment (VA).

During the administration of the VA program confusion arose as to whether the benefits for Status Indians included entitlement to reserve lands. Some Indian Agents had granted reserve land, on the mistaken belief that the grant of land was necessary in order for the Veteran to receive other financial benefits, such as loans and grants. Also, during this time recordkeeping was inconsistent. Some Indian Agents recorded a Veterans interest in lands as a VA, whereas others did not record a Veterans interests.

Each First Nation treated VAs differently. This created difficulty when Veterans attempted to formalize their VA interest as a CP. In some cases, with the consent of the community, the Band Council would request that INAC issue a CP in place of the VA. In other cases, the Band Council negotiated a cash settlement or gave the Veteran a CP for a different or smaller piece of land. While other communities never recognized VAs.

If you received a CP for your VA, you may gift the CP in your Will. If you were promised a VA by an Indian Agent, but the VA was not formalized you should contact your band and INAC about your situation.

**Veteran's Allotment:** Is an interest in land that was given as part of a WWII benefits program.



## *B. Personal Property*

### **RRSPs, Pensions and Life Insurance Policies**

Your Registered Retirement Savings Plans (RRSP), Tax Free Savings Accounts (TFSA), Pension Plans, and Life Insurance Policies, usually contain a Beneficiary designation on their forms. The Beneficiary identified on the form will receive the value of those plans. The Beneficiary named on the forms can be a person, charity, or your Estate.

If the policy Beneficiary named is a person or charity, they will receive the proceeds of the policy and none of the proceeds will form part of your Estate. However, if you directed the proceeds to be paid to your Estate, the value of those policies will become an Asset of your Estate. As an Asset, the policies can be distributed in the same manner as Assets under a Will.

Problems can arise if your policy and your Will name different Beneficiaries for the same policy.



### **Legal Settlement or Judgment Award**

If you are entitled to a legal settlement or have been awarded a judgment by the courts, you should name a person to receive this money in your Will. If you do not name someone to receive the settlement or judgment award, the value of the settlement or judgment will be placed in the Residue of the Estate.





## Organizing Assets in a Will

Now that you know what your Assets are, how do you organize the distribution of your Assets in your Will? Assets in a Will can be distributed under two categories: Specific Gifts and Residue.

### A. Specific Gifts

A specific gift is a specific sum of money, Property, land, or a defined group of items (my coin collection) given to a named Beneficiary in a Will.

How you write instructions in your Will is important. If it is not clear to your Executor who you intended to be the Beneficiary of a specific gift, the Executor will have to place the gift in the Residue of your Estate.

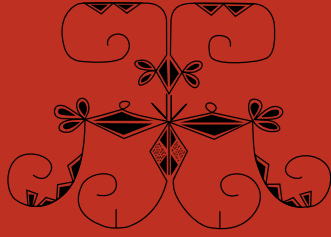
### B. Residue Clause

If there are no clear instructions on how items are to be distributed in your Will, then these items will fall into the Residue of your Estate. The Residue of your Estate shall be distributed according to the instructions under the Residue clause of your Will.

The Residue of an Estate is usually made up of any Property that has not been gifted to a particular person or organization. The Property left in the Residue of an Estate can be sold or distributed to Beneficiaries listed under the Residue clause. The Residue of an Estate can be given to one person or it can be divided amongst a number of people and organizations (charities, churches, extended family members, friends or other organizations).

If a Will does not have a Residue clause the Assets will be distributed according to the Intestate provisions of the *Indian Act*. Under the *Indian Act* the first \$75,000.00 goes to the Surviving Spouse.<sup>17</sup> If the Residue is more than \$75,000.00 the amount greater than \$75,000.00 is divided between the Surviving Spouse and children.<sup>18</sup>





## Part Four

# Providing for Your Children

As a parent of a **Minor** Child you should consider who will care for the Child when you die and how will the Child's financial needs be met after you pass away.

### Who Will Care for Your Children?

When one spouse dies, the surviving parent continues to care for the children. In situations when both parents die at the same time or close in time, you should consider naming a **Guardian** to care for your children.

Single parents are subject to other agreements (Child Custody Orders) that may affect the appointment of a Guardian for a Minor Child. In order to assist the court in appointing a Guardian you should name a Guardian for your Child in your Will.

A Guardian will make the day-to-day decisions about your Child's maintenance and care; this includes health care, education and activities. A Guardian may be a Godparent, relative, or friend of the family - anyone you trust. The person you name as Guardian is considered a recommendation and is not legally binding. To make the appointment binding, an application for guardianship must be made to and confirmed by the NSSC.

### Meeting the Financial Needs of Your Child

Once you have named a Guardian, you must think about how to meet the financial needs of your children. Your Will must provide for any Minor Child, even if the Child does not live with you.

Any Assets left to a Minor Child must be left to them in **Trust**. Trusts protect any money or Assets that are left to a Child in a Will until the Child reaches the age 19 years old.

**Ankwe'aq (Ankweyaq):** "to take care of, to bring up as your own." *This word is used in reference to foster families in L'nu communities. Foster children are raised as part of the family, treated no differently from other children, but always reminded of who their kin relations are.\**

**Minor:** A person who is under 19 years of age.

**Guardian:** The person named in a Will or appointed by the court to care for Minor children or Mentally Incompetent dependants of the deceased.

**Trust:** A trust is an arrangement where a person manages property (including cash) for the benefit of another. A Trust is created and must be managed according to the terms and conditions of the trust, which can be set out in a Will.

**Trustee:** An individual person or member of a board given control with the legal obligation to administer the property in a trust solely for the purposes specified.



\* Tuma Young, "L'nuwita'simk: A Foundational Worldview for a L'nuwey Justice System" (2016) 13: 1 Ind LJ 75 at 96.

You should appoint a **Trustee** to manage the Child's money and Assets in your Will. If you do not appoint a Trustee, INAC will ask a family member to fulfill the role.<sup>19</sup> The Trustee who agrees to act is required to follow certain rules to protect Assets for the Child's future benefit.

If the person you appoint is unable or unwilling to act as the Trustee, INAC will put any money or Assets given to a Child into a Trust account, and hold it for the Child until they turn 19 years old.<sup>20</sup>

Regardless of who acts as Trustee, the goal is to protect the Child's Assets. Your Will may specify how Assets should be used to benefit a Child. Assets held in Trust are meant to provide a foundation for the Child's future. The Guardian who cares for a Child cannot use the Child's Trust money for their personal benefit.

## Providing for Adult Dependants

The treatment of any Assets left to an adult dependant who is **Mentally Incompetent** is under the exclusive jurisdiction of the Minister.<sup>21</sup> The Minister may appoint a Trustee to manage the Assets.<sup>22</sup> Trustees must follow the rules and standards for managing trust Assets. Money held in trust is released as necessary for the adult dependant's maintenance and care. Trust Assets may be sold in order to cover the cost for ongoing care.

**Mentally Incompetent:**  
The Indian Act defines a Mentally Incompetent Indian to be someone who has been declared mentally defective or incompetent for the purposes of any laws of the province in which that person lives.

### Providing for a Spouse or Common-law Partner under *FHRMIRA*

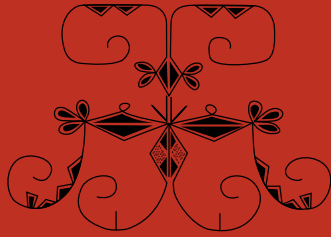
A Surviving Spouse or Common Law Partner can choose to have the matrimonial home and other MRP Assets and interests dealt with under *FHRMIRA*.

**NOTE:** Check with your Band to find out if *FHRMIRA* applies to your community.

#### Survivors Choice

- A Surviving Spouse or Common Law Partner (including non-band members) has an automatic right to occupy the family home for up to 180 days. (*FHRMIRA*, s 14).
- The Surviving Spouse or Common Law Partner (including non-band members) may apply to receive half the value of the deceased interest in the family home and other matrimonial interests and rights on reserve lands. (*FHRMIRA*, s 34)





## Part Five

# Now That Your Will Is Complete

### Can a Will be Challenged?

Yes. The *Indian Act* allows for a Will to be challenged. A Will can be challenge based on the way the Will was written, or a Testator's choice about the giving of a gift. To avoid having your final instructions declared Void it is important to take special care when writing your Will. Having more than one witness present when signing your Will is one way to avoid challenges to your Will.

Your Will or part of your Will can be declared Void in the following circumstances:

1. You did not have Testamentary Capacity when making your Will.<sup>23</sup>
2. You did not make the Will of your own free will. For example, you were threatened (**Duress**) or pressured into making it (**Undue Influence**).<sup>24</sup>
3. You have not provided for a Child or person that was financially dependant on you or that you were responsible for.<sup>25</sup>
4. Your Will is unclear or confusing. For example, your Will states: "I give my car to my neighbour," without giving the name of your neighbour.<sup>26</sup>
5. You have set out terms in your Will that are against public policy. For example, "I give half of my Estate to my son, James, but only if he marries a woman."<sup>27</sup>

**Duress:** Threats or other means to cause a person to do something against his or her will.

**Undue Influence:** When a person takes advantage of a position of power over another person.



## Where Should a Will be Stored?

The original signed Will is the document that will be used to settle your Estate. A Will should be kept safe from fire, water, and any kind of damage. A Will can be stored in a number of places: a safety deposit box at a bank or a fireproof safe at home. Banks will normally let an Executor access a safety deposit box to retrieve a Will.

You must let your named Executor know where your Will is being kept and they must be able to locate and access the Will. You may also want to let a family member or someone you trust know where your Will is stored.

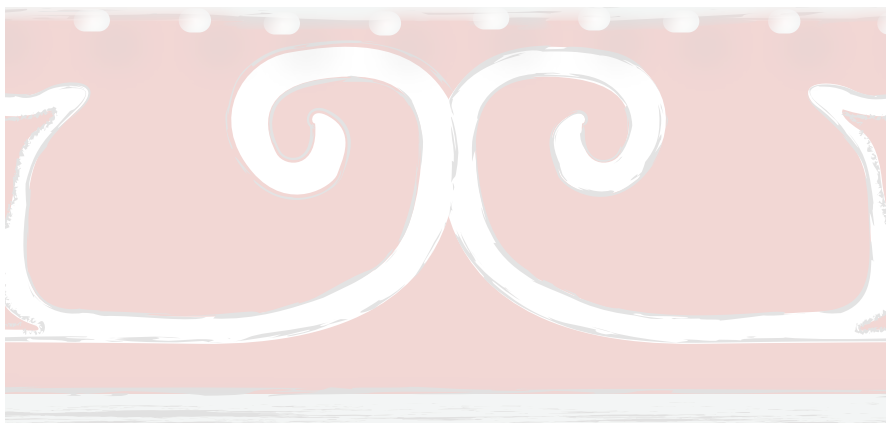


## Changing a Will

A Will can be changed by drafting a Codicil or by making a new Will. You cannot cross out part of your Will, for this reason it is sometimes easier to draft a new Will. If you make a new Will, make sure you destroy the old one with the intention to destroy the Will (shred, tear or burn).

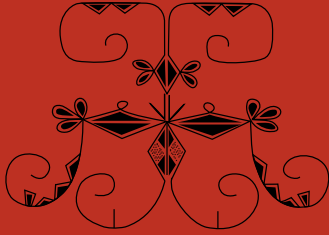
You should make a new Will if there are multiple or major changes to an existing Will; or you are making changes to the Residue clause of the Will.

Codicils should only be used when making minor changes to a Will. However you decide to make changes to your Will, it is important to let your Executor know of any changes you make to your Will.



## Part Six

# Other Estate Planning Tools



A Will is only one way to ensure the proper distribution of your possessions following your death. A **Power of Attorney** and a **Personal Directive** are other documents that can help you plan for the management of your Estate and your well-being.

For more information see *Mi'kmaw Wills & Estates: A Guide for Nova Scotia Mi'kmaq - Book Three: How to Write a Power of Attorney & Personal Directive*.

### Burial Instructions

It is not recommended that burial or *Salite* requests be placed in your Will. This is because a Will may not be read until after the funeral. It is better to write burial or *Salite* instructions in a separate document. For instance, these types of instructions could be written as a letter to your family. If you chose to leave burial or *Salite* instructions, be sure to tell your family and friends where the instructions are located. If you decide to include burial or *Salite* instructions in your Will, make sure you tell your Executor, so they know to look at the Will before the funeral.

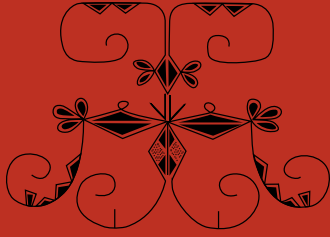
**Power of Attorney:** Is a legal document that lets you give another person authority to make financial decisions on your behalf.

**Personal Directive:** Is a legal document that allows you to name a person you trust to make personal and health care decisions for you when you are not capable of making these decisions.

**Salite:** A community celebration of life held following a funeral during which an auction is held to raise money to help the relatives of the deceased and to contribute to burial and funeral costs.



Malakowe'jk cemetery, historical Mi'kmaq burial site.



## Part Seven

# Hiring A Lawyer to Write Your Will

Writing a Will can be overwhelming, and may not be something you are comfortable doing yourself. You may need a lawyer who practices in Wills and Estates and has knowledge of the rules that apply to the Wills of Status Indians who Ordinarily Reside on Reserve and Crown lands.

Lawyers often bill their clients on an hourly rate, but some lawyers will bill you a flat fee for their service. A lawyer may also charge for disbursements - faxing, phone calls, photocopying, postage fees, etc. Be sure to ask your lawyer what their fee structure is in order to avoid surprises. When you hire a lawyer, you should receive a retainer letter. In the retainer letter the lawyer will set out what legal services they are agreeing to provide to you and how they will bill you for their time and services. If the fees change, your lawyer should advise you immediately and obtain instructions from you before doing any more work on your Will. A retainer letter is the best way to make sure you and the lawyer are both clear in your expectations and obligations.

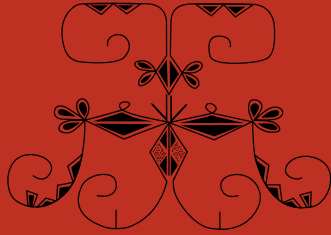
When you go to see the lawyer bring any information necessary to draft your Will. You will be asked a lot of questions. You will need to be accurate and honest in your answers. If you do not understand your lawyer, you must speak up and ask them to go over the part you did not understand.

Here are some questions you may want to ask at the first visit:

- How long have you been practicing law?
- How long have you been practicing in Wills and Estates?
- Do you have experience in drafting Wills for Status Indians living on reserve?
- How long will it take to draft my Will?
- What are the complications that might arise in drafting my Will? Could these complications result in additional fees?
- Do you bill on an hourly rate or a flat fee?

Make sure to discuss the next steps if you have decided to hire this lawyer.

For more information on how to hire a lawyer, contact the Nova Scotia Barristers' Society at (902) 422-1491 or visit online at [www.nsbs.org](http://www.nsbs.org)



**For More Information**

### **Indigenous and Northern Affairs Canada**

10 Wellington, North Tower Gatineau, Quebec

Postal Address:

Ottawa, Ontario K1A 0H4

Toll-Free: 1-800-567-9604

Website: <http://www.aadnc-aandc.gc.ca/eng/1100100010002>

### **Band Governance & Estates of Lands and Trust Services**

PO Box 160

40 Havelock St .

Amherst, Nova Scotia B4H 3Z3

Toll-Free: 1-800-567-9604

Tel: 1- 902-661-6200

### **Legal Information Society of Nova Scotia**

5523 B Young Street Halifax, NS

Toll-Free: 1-800-665-9779

Tel: 1-902-454-2198

Website: <http://www.legalinfo.org/>

### **The Confederacy of Mainland Mi'kmaq**

PO Box 1590 Truro, NS B2N 5V3

Toll-Free: 1-877-892-2424

Tel: 1-902-895-6385

Website: [www .cmmns .com](http://www.cmmns.com)



# Appendix

## Appendix A: Last Will and Testament

### DISCLAIMER

The author and the publisher of this sample Will do not make any representations or warranties regarding the outcome or the use to which this sample is put and are not assuming any liability for any claims, losses, or damages arising out of the use of this sample. The user of this sample should not rely on the author or publisher of this sample for any professional legal advice.

**THIS IS THE LAST WILL AND TESTAMENT** of me, [LEGAL NAME], of [ADDRESS], in the Province of Nova Scotia.

### REVOCATION

1. I **HEREBY REVOKE** any former Wills and Codicils and other testamentary dispositions that I have made.

### APPOINTMENT OF EXECUTOR OR EXECUTRIX

2. I **APPOINT**, [LEGAL NAME], of [BAND NAME], in the Province of Nova Scotia, to be the Executor and Trustee of my Will. **IF [LEGAL NAME of first EXECUTOR]** should die before me, or is unable or unwilling to act as my Executor and Trustee, then I **APPOINT**, [LEGAL NAME], of [AREA of RESIDENCE], in the Province of Nova Scotia, to be the Executrix and Trustee of this my Will.

### DEBTS

3. I **DIRECT** that my Executor pay all my just debts, funeral and testamentary expenses, death taxes, and all related expenses as soon as is convenient after my death.

### DISTRIBUTION OF PROPERTY

4. I **DIRECT MY EXECUTOR TO DISTRIBUTE** all of my assets and property as follows:

#### a) **Specific Gifts –**

- i. To give the primary vehicle, I own at the time of my death to, [LEGAL NAME], of Millbrook First Nation, if he survives me for a period of 30 days. If my beneficiary fails to survive me, this gift shall fall into the residue of my estate.
- ii. To Pay and transfer the sum of \$5,000.00 to, [LEGAL NAME], if she survives me for a period of 30 days. If my beneficiary fails to survive me, this gift shall fall into the residue of my estate.

b) **Residue** – To divide the residue of my estate into two equal shares and distribute them as follows:

- i. Fifty percent (50%) - to, **[LEGAL NAME]**, of Millbrook First Nation, in the Province of Nova Scotia, if he or she survives me for a period of 30 days, for his or her own use, absolutely; and
- ii. Fifty percent (50%) - to, **[LEGAL NAME]**, of Millbrook First Nation, Province of Nova Scotia, if he or she survives me for a period of 30 days, for his or her own use, absolutely.

In the event that, **[LEGAL NAME]**, or, **[LEGAL NAME]**, should predecease me, or die within 30 days of my death, I direct my Executor to divide that child's share among his or her children in equal shares. If any of my children should predecease me leaving no children, my Executor shall pay or transfer that child's share to his or her surviving sibling.

### **GUARDIANSHIP**

5. I APPOINT, **[LEGAL NAME]** and, **[LEGAL NAME]** (“nickname”), or the survivor of them, to be the guardians of any minor child of mine who are alive at the time of my death.

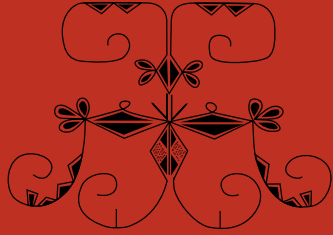
**IN WITNESS WHEREOF** I have subscribed my name to this my Last Will and Testament, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
**[LEGAL NAME of TESTATOR]**

We the witnesses were present at the request of **[LEGAL NAME of TESTATOR]** when they signed this Last Will and Testament. We then signed as witnesses in their presence and in the presence of each other.

\_\_\_\_\_  
**[LEGAL NAME of WITNESS]**

\_\_\_\_\_  
**[LEGAL NAME of WITNESS]**



## About the Authors



**Angelina Amaral, BA, MEd, JD**, is a member of the Miawpukek (Conne River) First Nation of Newfoundland and Labrador; and is of Portuguese heritage. She has two children, Miguel and Jayden Amaral. Through the help and support of her parents, Adelia (John) and Miguel Amaral, she has been able to earn an undergraduate degree in psychology from Cape Breton University, a Masters of Education: Life Long Learning from Mount Saint Vincent University; and a law degree from the Schulich School of Law.

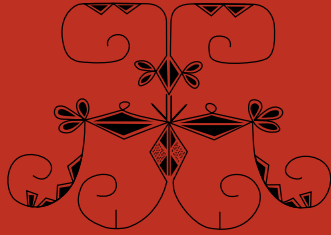
After articling through the *Ku'tawtinu: Shared Articling Initiative*, Angelina, was called to the Bar in June of 2015.



**Angeline Gillis, BA, LLB**, was born in Sydney, Nova Scotia and was raised in East Bay, Nova Scotia. Although a member of the Eskasoni First Nation, Angeline and her siblings were raised off reserve by her parents, Fred Gillis and Donna Stevens. She is the granddaughter of the late Andrew J. Stevens, a former Keptin of the *Sante' Mawi'omi*.

Angeline earned her undergraduate degree from Dalhousie University in 2005 and her LL B from the Schulich School of Law (formerly Dalhousie Law School) in 2009. After completing her articling with Boyne Clarke Barristers and Solicitors, Angeline was called to the Bar in June 2010, having performed her affirmation in both English and Mi'kmaq. She then went on to become a Senior Will & Estate Planner with Scotia Private Client Group. Angeline has worked in various areas of law; however, her primary focus has been in Wills, Estates and Trusts.

Angeline began practicing with The Confederacy of Mainland Mi'kmaq in October 2011 as a Wills & Estates Legal Advisor. In addition to her work with The Confederacy, Angeline also maintains her own practice as a Barrister & Solicitor. In her free time, Angeline sits as the Vice President and is a coach for the Sackville Storm Minor Basketball Association. She is also a member of the Canadian Bar Association, Halifax's Estate Planning Counsel, and is commissioned as a Notary Public.



## About the Authors



**Shelly Martin, BA (Hons), MA, LLB**, was born in Halifax, NS and raised in nearby Mount Uniacke. A member of the Millbrook First Nation, she was raised off reserve by her parents, grandparents, many aunts, uncles and cousins.

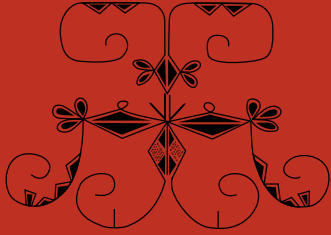
After completing undergraduate and graduate degrees in history, Shelly enrolled at the Schulich School of Law (formerly Dalhousie Law School) in 2003. After articling with Boyne Clarke Barristers and Solicitors, Shelly was called to the Bar in October 2007, the first Mi'kmaq to swear her oath in English and Mi'kmaq. Shelly, in addition to her work as Chair of the Justice Committee for the Halifax Aboriginal People's Network, has sat on the Advisory Council of the Indigenous Blacks and Mi'kmaq Initiative at the Schulich School of Law and is a member of the board of the Halifax and Region Military Family Resource Centre. She currently resides in Fall River with her son, James, and her daughter, Meadow.



**Andrew John, BA (Hons), JD**, is an aspiring Mi'kmaq lawyer from Conne River, Newfoundland. Having grown up on the small reserve he is seeking to better reflect Mi'kmaq values in the current justice system and be a role model for youth in the community.

Andrew has developed a passion for community engagement stemming from his time before law school at Saint Mary's University, where he graduated *magna cum laude* with a Bachelor of Arts in the Criminology program. It was in this program that Andrew volunteered with at risk youth in the Pathways to Education initiative. Andrew has combined his interests in community development and social justice with a prior Paralegal diploma from the Nova Scotia Community College, and he has found this combination has led to a natural progression into the law.

Andrew graduated from Schulich School of Law at Dalhousie University in 2016. He is currently taking part in the *Ku'tawtinu: Shared Articling Initiative*, which allowed for a 3-month placement within Millbrook First Nation as a way to understand and assist our Mi'kmaq communities. After his placement with Millbrook, Andrew will continue placements with Patterson Law and Stewart McKelvey to gain different perspectives on the law.



## Endnotes

<sup>1</sup> RSC 1985, c I-5, at ss 4(3), 5-7, 42-52 [*Indian Act*].

<sup>2</sup> SC 2013, c 20 [*FHRMIRA*].

<sup>3</sup> RSNS 1989, c 505.

<sup>4</sup> *Indian Act*, *supra* note 1 at s 45(2).

<sup>5</sup> *Ibid* at s 45(2).

<sup>6</sup> *Ibid* at s 43(a); also see *Indian Estates Regulations*, CRC, 1978, c 954, s 9.

<sup>7</sup> *Indian Act*, *supra* note 1 at s 48(1).

<sup>8</sup> *Ibid* at s 48(2).

<sup>9</sup> *FHRMIRA*, *supra* note 2 at s 36.

<sup>10</sup> *Indian Act*, *supra* note 1 at s 46(1).

<sup>11</sup> *Ibid* at s 20(1).

<sup>12</sup> *Ibid* at s 20(2).

<sup>13</sup> *Ibid* at ss 46(1)(d) and 50(1).

<sup>14</sup> *Ibid* at s 50(2).

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid* at s 50(3).

<sup>17</sup> *Indian Act*, *supra* note 1 at s 48(1).

<sup>18</sup> *Ibid* at s 48(2).

<sup>19</sup> *Ibid* at s 52.

<sup>20</sup> *Ibid* at s 52.3(1).

<sup>21</sup> *Ibid* at s 51(1).

<sup>22</sup> *Ibid* at s 51(2)(a).

<sup>23</sup> Indian and Northern Affairs Canada, *Decedent Indian Estates Procedures Manual*, Ottawa: Canada, January 2008 at 32.

<sup>24</sup> *Ibid* at 31.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* at 33.

<sup>27</sup> *Ibid*.







PO Box 1590, 57 Martin Crescent Truro, NS B2N 5V3  
Toll Free: 1-877-892-2424, Tell: (902) 895-6385  
Fax: (902) 893-1520  
[www.cmmns.com](http://www.cmmns.com)