Wills

What is a will?

A will may be the most vital piece of your estate plan, even if your estate is a modest one. It is a legal document that lets you direct how your property will be dispersed (among other things) when you die. It becomes effective only after your death. It also allows you to nominate an estate executor as the legal representative who carries out your wishes. In addition, in many states, your will is the only legal way you can name a guardian for your minor children.

Without a will, your property will be distributed according to the intestacy laws of your state. The laws of your state also govern the validity of a will.

What are the requirements?

Requirements vary from state to state. Generally, for your will to be valid, the following requirements must be satisfied.

You must be 18 and of sound mind

Generally, you must be 18 years of age to execute a will, although some states have a different minimum age requirement.

You also must be of sound mind. That means that you must have testamentary capacity--that you know and understand what property you own, its nature, who would inherit it, and the plan for disposition outlined in the will. You must also be free of undue influence or fraud at the time the will is drafted. In other words, you must draw up a will of your own free will.

Will must be properly executed

Your will must be properly executed. Generally, this means that the will must be:

- Written--The general rule is that a will must be written. Usually, the will is typewritten or in some printed form. The one exception to the general rule is a nuncupative (oral) will. Nuncupative wills are generally valid only if made during your last illness and only if the witnesses reduce it to writing very soon afterward.
- Signed by you (the testator)--You or someone in your presence and at your direction must sign the will.
- Witnessed--Generally, your signature must be witnessed by two competent persons. Some states require three witnesses and some require no witnesses in certain cases, such as when a holographic will is executed. A holographic will is a will that is valid despite not being witnessed because it is

completely in the testator's handwriting. Other states may also require that the signatures be notarized.

Technical Note: Competency is a legal term. It means that the witnesses are of legal age (generally 18) and understand what they are witnessing. A witness is generally not considered competent if he or she is a beneficiary under the will and would not inherit if you died intestate. If this happens, the state will generally void the devise or legacy to that beneficiary. Some states void bequests to all witnesses.

What does your will do?

Avoids intestacy

Probably the greatest advantage to a will is that it allows you to avoid intestacy. State intestate succession laws, in effect, provide a will if you fail to do so. This "intestate's will" distributes your property the way the state thinks you would have if you had made a will (i.e., to your spouse or closest blood relatives). However, this may not necessarily be what you would want. Also, intestacy has many other disadvantages (e.g., thwarts tax minimization planning).

Distributes property according to your wishes

With a will, you can leave: (1) a specific bequest (such as jewelry, an heirloom, furniture, or cash), (2) a general bequest (such as a percentage of your property), or (3) your residuary estate (what's left over) to a surviving spouse, a child, another relative, a friend, a trust, a charity, or anyone, according to your wishes.

Caution: There are some limits imposed on how you can distribute your property with a will (e.g., you cannot completely avoid a spouse's right to inherit). For more on this topic, see Limits on Rights to Transfer Property in Will.

Most states will not let you leave property directly to a pet, nor will they let you set up a trust for a pet in the pet's name. However, you can leave money in your will for someone to care for your pet after your death. A more expensive option is to establish a trust in someone's name, and specify in the trust document that the funds are to be used for looking after your pet. Make sure the caretaker agrees in advance to look after your pet.

Nominates a guardian for your minor children

In many states, a will is your only means of stating which individual(s) you wish to act as legal guardian for your minor children after you die.

You can name a guardian of the person, who takes personal custody of the children, and a guardian of the property or estate, who manages the children's assets. This can be the same or a different person.

Caution: The probate court has final approval, but it will usually approve whomever you nominate unless there are compelling reasons not to do so.

Nominates an executor

A will allows you to designate a person to act as your legal representative after your death. An executor carries out many estate settlement tasks, including locating and probating your will, collecting your assets, paying legitimate creditor claims, paying any taxes owed by the estate, and distributing any remaining assets to your beneficiaries.

> **Caution:** The probate court has final approval, but it will usually approve whomever you nominate unless there are compelling reasons not to.

Specifies how to pay estate taxes and other expenses

Unless you direct otherwise in your will, the beneficiaries will bear liability for estate taxes and other expenses according to state law. To ensure that your beneficiaries receive what you intend for them to have, you can provide in your will that these costs be paid from the residuary estate (what's left over). Or, you can specify which assets should be used or sold to pay these costs.

Creates a testamentary trust

You can create a trust in your will, which comes into being when your will is probated. Your will sets out the terms of the trust, such as who the trustee is, who the beneficiaries are, how the trust is funded, how the distributions should be made, and when the trust terminates.

> **Tip:** Using a trust may be especially important if you have a spouse or minor children who are unable to manage property themselves.

Funds a living trust

If you have or plan to establish a living trust (one that is created while you are living), your will can transfer (pourover) any assets that were not already transferred to the trust.

Minimizes taxes

Your will gives you the chance to minimize taxes and other costs.

> **Example(s):** Ken drafts a will that leaves his entire estate to his wife, Sue. Ken dies. None of Ken's property is taxable because he left it all to his wife, and it is therefore fully deductible under the unlimited marital deduction.

Are there any tradeoffs?

Although the benefits of a will far outweigh the drawbacks, there are some tradeoffs.

Assets disposed of through a will are subject to probate

Probate (the court-supervised process of administering your will) can be expensive and time-consuming. The length of probate can be affected by several factors including the size and complexity of the estate, any challenges to the will or its provisions, creditor claims against the estate, who your beneficiaries are, state probate laws and the state court system, and tax issues.

Owning property in more than one state can result in multiple probate proceedings. This is called ancillary probate. Generally, real estate is probated in the state in which it is located, and personal property is probated in the state in which you are domiciled (i.e., reside) at the time of your death.

Will provisions can be challenged in court

The validity of your will can be challenged in court. Usually, an unhappy beneficiary or a disinherited heir will present the challenge. Some common claims include:

- You lacked testamentary capacity when you drew up the will
- You were unduly influenced by another individual when you drew up the will
- The will was forged or was otherwise improperly executed
- The will was revoked.

Tip: You can attempt to discourage challenges to your will by including a "no contest" provision. Stipulate in your will that if beneficiaries try to gain a greater portion of the estate, they will be disinherited entirely. For the "no contest" provision to have any bite, however, you must make a bequest to a beneficiary you expect may contest the will, so that he or she has something to lose by contesting your will. The degree to which "no contest" provisions will be enforced varies by state. A typical provision would look like this:

"If any beneficiary should contest the probate or validity of my will, then all benefits for the beneficiary shall cease and this instrument shall be interpreted as if the beneficiary had predeceased me"

Wills are public documents

Once probated, a will becomes a public document, available to anyone who wishes to read it. This can be discomfiting for anyone who has privacy concerns. Anyone can find out what you have left in your estate and to whom you have left it, thus exposing your beneficiaries to fraud or other crimes. Also, if you make negative or embarrassing statements about a person in your will, you leave your estate vulnerable to a libel suit.

How do you make a will?

Hire an attorney

Although a will need not be drafted by an attorney to be valid, it is highly recommended that you seek an attorney's advice to ensure that your will does what you intend.

Determine what you leave in your will

You must determine whether (1) you can dispose of an asset in your will and (2) whether you should dispose of an asset in your will.

Before you can give away what you own, you must figure out what it is that you own. The way in which you own property will determine whether you can transfer that asset in your will. Solely owned property is property owned by you alone and generally can be transferred by will. Property held in joint tenancy, tenancy by the entirety, and community property, on the other hand, generally passes in whole or in part directly to the joint owner at your death. Property held as joint tenants or tenants by the entirety can't be transferred by will.

Also, remember that property in which you have already named a beneficiary does not pass by your will (e.g., life insurance, pension plans, IRAs, Totten Trust accounts, Payable on Death accounts). For further information on property that passes outside the will, see Will Substitutes.

Once you have determined what you can give away in your will, you need to decide if you should. It may be better to dispose of property while you are living, rather than at death. For example, you may want some transfers to remain private or you may want to reduce estate taxes by giving away during your lifetime property that is likely to greatly appreciate (increase in value).

Tell someone your funeral wishes

Because your will might not be read immediately after your death, it may not be possible to have your funeral and burial wishes honored if you include them in your will. Instead, put funeral wishes in a separate letter of instruction; leave the letter with a trusted friend, close relative, or your executor; and have it read immediately upon your death.

Choose your beneficiaries

Beneficiaries are the people and organizations to whom you leave property. They can be relatives, friends, trusts, or charities. The essence of the will-making process revolves around thinking about the property you own and who you want to have it after your death.

Select a guardian for your minor children

If you have minor children, you will want to nominate a guardian in your will to care for them and their property after you die, should their other parent not be able to care for them. This is an extremely important decision.

Select an executor

Your executor is responsible for carrying out the instructions of your will and managing the probate process. This includes locating your will, collecting your assets, paying legitimate creditor claims, paying any taxes owed by the estate, and distributing any remaining assets to your beneficiaries. Choosing an executor is another very important decision.

Draft a will

Each state has its own laws governing the validity of will provisions, the format a will must take, and execution formalities. Here are some tips:

- Include a clause revoking any prior wills and codicils
- Use specific and definite language to avoid questions later about your intent.

Example(s): "I leave my daughter, Judy, nothing. I intentionally omit Judy from my will, not because I do not love her, but because she is wealthy in her own right and does not need my money."

- Mention personal effects (especially valuable articles) specifically
- Mention outright cash gifts specifically
- Mention dispositions of real estate specifically
- Make special provisions for any business interests
- Make special provisions for the payment of taxes and other costs
- Consider making special provisions to reduce the amount of specific bequests and legacies in the event that the value of your estate falls below a certain level

Properly execute the will

Your will must be properly executed. Generally, this means that the will must be:

- Written--The general rule is that a will must be written. Usually, the will is typewritten or in some printed form. However, some states allow a holographic (handwritten) will. The one exception to the general rule is a nuncupative (oral) will. Nuncupative wills are generally valid only if made during your last illness and only if the witnesses put it in writing very soon afterward.
- Signed by you (the testator)--You, or someone in your presence and at your direction, must sign the will.
- Witnessed--Generally, your signature must be witnessed by two competent persons. Some states require three witnesses and some don't require any in certain circumstances. Others require that the signatures be notarized.

Technical Note: Competency is a legal term. It means that the witnesses are of legal age (generally 18) and understand what they are witnessing. A witness is generally not competent if he or she is a beneficiary under the will and would not inherit if you died intestate. If this happens, the state will generally void the devise or legacy to that beneficiary. Some states void bequests to all witnesses, which has the effect of making interested witnesses competent and the will validly witnessed.

Store the will in a safe, accessible place

Wills should be stored in a secure and accessible place. Your executor and at least one close family member should know where you keep your will. Storage options include a file in your attorney's

office or a fireproof safe at home. In some areas, it is possible to keep a copy of your will on file at the local probate court.

> **Caution:** It is not recommended that you store your will in a bank safe deposit box. Some states seal safe deposit boxes upon the owner's death, and the box can be opened only after obtaining the probate court's approval.

Review your will annually or upon certain events

A will is not a static document and should be reviewed at least annually or whenever your life situation changes. Here are some circumstances under which you may want to revise your will:

- You marry or remarry
- You have a child
- You divorce
- Your spouse or child dies
- You move to another state
- Your income changes
- You retire
- The value of your estate changes
- Tax laws change

Can you change or revoke your will?

You can amend (change) your will by executing a codicil. A codicil is a separate, written, and formally executed document that becomes part of your will. A codicil generally should be used only for minor changes to your will. You should execute a new will if there are many changes or a major change.

Revoking your will must be done very carefully. If not done correctly, the will remains valid until properly revoked or superseded. Most state laws require that the will be revoked by a subsequent instrument (a new will) or by a physical act (e.g., destroying or defacing it). That means that the will must be either burned, torn, or canceled with the intent to revoke.

> **Example(s):** Example A: Mary executes a valid will leaving her entire estate to Jason. Mary throws her will in the trash by mistake. The will is burned. The will is not revoked because there was no intent on Mary's part to revoke.
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> Example B: Steven executes a valid will leaving his entire estate to Jill. Steven later changes his mind and decides to leave one-half of his estate to Jack. Steven executes another will and includes a provision that specifically revokes the first will. Steven also writes "REVOKED" on the top and across all signatures on the first will, dates it, and signs it. The court will probably honor the revocation of the first will and uphold the validity of the second will.

What types of wills are there?

Preprinted wills

Preprinted wills or wills generated by computer software packages are legally valid in some states. However, they are generally inappropriate for people with more than small, uncomplicated estates because of their one-size-fits-all nature. Instead, they may be an appropriate starting place for determining what type of property you own and to whom you want to leave it.

Holographic wills

Holographic wills are permitted in some states, but only under certain conditions. A holographic will is a will that is valid despite not being witnessed, because it is written entirely in the testator's handwriting.

Nuncupative wills

Oral or nuncupative wills are recognized by very few states and only in very limited circumstances--usually when a person is near death, has no will, and has no time to write one. Often, states require that the provisions of an oral will be committed to writing soon after they are stated, and they limit the value and type of property that can be distributed in this manner.

Video wills

Currently, no state accepts a videotaped will. However, if you are concerned about challenges to your will, a video showing how the will was executed may help prove that you were of sound mind or that the will was executed properly.

Pour over will

With a pour over will, you can leave all or part of your estate to a trust after your death.

Joint will

A joint will is a single will that serves two or more people. Joint wills are extremely rare and generally undesirable.

Mutual will

A mutual will is drawn up by one individual and is conditioned on an agreement with a second individual to dispose of his or her property in a particular way. It is sometimes called a contractual will. Like joint wills, mutual wills are quite rare and generally undesirable.

Living will

Unlike a traditional will, which disposes of your property, a living will specifies which medical means, if any, are to be used to keep you alive under certain conditions.