



## Wills

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### Background

A will, sometimes known as a "last will and testament," is a legal document that provides written instructions for the distribution of a decedent's (dead person's) property. Generally, people should consider making a will if they care how their property will be distributed when they die, they want to name the person who will handle financial and legal matters they may leave behind, or they want to name a [GUARDIAN](#) for their minor children.

### What is in a Typical Will?

A will most likely will include the following provisions:

- Your name (the [TESTATOR](#))
- The name of your spouse and the date of your marriage, if any
- The name of your children (and how you wish any foster and stepchildren to be treated), if any
- A statement revoking any wills you may have previously made
- Your nomination of a personal representative to administer the estate and usually at least one alternate.
- A list of powers that you want your personal representative to have (these are often enumerated in your state's statutes)
- A list of any special gifts

## Encyclopedia of Everyday Law: Wills

- Instructions for distributing the remainder of your estate after your debts, taxes, and expenses incurred in administering your estate have been paid
- A [WAIVER](#) of any surety bond requirements

Your will may not cover everything that you consider "your property." The following types of property are examples of assets that may pass directly to a [BENEFICIARY](#) you have named in a separate document:

- [PENSION](#) plan assets
- 401(k) plan assets
- life insurance
- annuities
- property held through a "trust"

These assets would usually pass to beneficiaries you have previously named in documents under the supervision of the manager of the pension plan, the company sponsoring the 401(k), life insurance companies, annuities, and in a trust instrument. However, if you name "my estate" the beneficiary of any of these kinds of assets, then your will would control who receives the property and benefits. Be aware that by doing this your eventual beneficiaries may experience some significant delays and/or some important tax disadvantages.

Your will should be prepared and properly executed (signed by you and a certain number of competent witnesses) while you still have legal capacity. Thus, if you want a will, you should have one prepared and sign it according to the applicable state law while you have full control over your mental functions. If you wait until you suffer an accident or an illness, it could be too late.

## The Personal Representative

When you die, your personal representative (also known as an administrator or executor) will gather and inventory all of your property at the time of your death. Most states require the personal representative to post a surety bond covering his/her actions, although you can explicitly waive this requirement in your will. The personal representative will also determine your outstanding debts, pay your legitimate debts, and distribute the remaining property according to the instructions in your will. Your personal representative will be appointed in a [PROBATE](#) proceeding. The personal representative must usher your property through the probate process, subject to your state's probate rules and procedures. In many states, the court maintains tight control over the activities of the personal representative. For example, the personal representative must obtain the court's permission to sell, distribute, or otherwise take action with respect to property in your estate.

It is important to choose someone who you think will be competent and trustworthy to serve as your personal representative. The personal representative will have access to all of your property and the authority to conduct certain business on your behalf. To the extent that you can, it is a good idea to choose a person with some business experience, intelligence, and high integrity. Your will should name the person you wish to nominate as your personal representative. You will probably also name one or more alternates to serve in the event that your first choice for personal representative is unwilling or unable to serve. Because you cannot speak in your own behalf, your will acts as your voice to inform the probate court about who you think will be best suited to this job.

## Changing a Will

The most common reasons to change your will after it has been executed include the following:

- You get married or divorced
- Your family increases through the birth or [ADOPTION](#) of child
- There is a death of a family member or of a beneficiary
- There are changes in the Federal Estate Tax laws or State Tax laws that may effect your estate
- There is a substantial change in the value of your estate
- You change the nature of your property holdings, which impacts your distribution plans
- A potential guardian, executor, or [TRUSTEE](#) moves away, dies, or refuses to serve in that capacity
- Your children reach the [AGE OF MAJORITY](#), or are old enough to manage financial matters on their own
- You move to a different state
- You need or want to eliminate gifts to certain people

To change your will, there are two basic choices, and professional assistance is in order for both. First, you can prepare and properly execute an entire new will that revokes the previous will. Second, you can prepare and properly execute a [CODICIL](#) to the will. A codicil is a separate document that adds to and/or replaces one or more provisions in an existing will. What makes the most sense for you will depend on the facts and circumstances. For example, if there is a new tax provision that favors provisions in existing wills, but not new wills, or there may be a question subsequently raised about your mental competence. In these cases, a codicil would generally be the best choice.

Codicils were used frequently in the past, but lawyers now use computer technologies that can quickly integrate any changes you want to make—even minor ones—into an entirely new will that is up to date. Because of the ease of making the changes, the fees charged to make these modifications are usually modest. Your lawyer may even suggest revisions to your will that take account of new laws, tax rules, and changes in your circumstances that you may have overlooked in your previous will. Regardless of the ease of making these changes, never try to make changes in your will on your own. If you write in the margins, add material, cross out words, lines, or sections of the original will you could possibly create some confusion or ambiguity and thereby invite unpleasant and protracted will contests.

## Competency

Someone trying to have your will accepted for probate generally must establish that you were of sound mind and memory at the time you executed your will. Even if one becomes old, frail, and forgetful, it is difficult to get a court to regard a will as invalid. Generally, those who witnessed the will being signed will almost always say that the deceased was of sound mind, was aware of his surroundings, the day or date, who his family members were, and knew that he was signing a will. The burden then shifts to the person challenging the will to prove it should not be accepted for probate.

Courts maintain a strong presumption that a will is valid. Thus, it can be costly and difficult to prove that someone was mentally incompetent, made a mistake, or was subject to [FRAUD](#), [COERCION](#), [DURESS](#), or undue influence when making and/or executing the will. Even if the testator suffers weakened mentality after the will was made has no bearing. The validity of the will is only called into question should an incompetent testator want to change the will at a later date.

## Contesting or Challenging a Will

Will contests challenge the admissibility of wills in probate courts. It is a kind of [LITIGATION](#) that questions whether a will should be properly admitted by the court as [EVIDENCE](#) of a decedent's wishes regarding the distribution of his estate, appointment of guardians for minor children, or other issues dealing with the decedent's estate. One may not contest the validity of a will merely because that person does not like the will's provisions. A will's validity is not determined by one's sense of "fairness" of the will's contents. Nor is a will's validity determined by how reasonable the will's provisions appear nor on the timing of disbursements.

Despite the feelings of a decedent's family or friends, a will is most likely to be challenged by someone claiming one of the following:

- The will was not properly written, signed or witnessed, or did not meet the state's formal requirements
- The decedent lacked mental capacity at the time the will was executed
- The decedent was a victim of fraud, force, or undue influence
- The will is a forgery

If a will contest is successful, the entire document may be thrown out. Alternatively, the probate court may reject only the part of the will that was challenged. If the entire will is disallowed, the court will distribute the decedent's property as if the person died without a will. If possible, the court may use a previous will, but such action will depend on state law and the facts and circumstances of the case.

If someone files an objection to your will or produces another will, a "will contest" has begun. Will contests are not uncommon, but few people actually win one. They can be very expensive and create lengthy delays in the distribution of an estate's assets. Not just anyone can contest a will. A person must have legal "standing" to object to a will. What constitutes standing is determined by state law, but generally it means someone who either is a party mentioned in a will or perhaps should have been a party to the will based on a legal relationship to the decedent. For example, if a decedent revises his will and the later will is less favorable to someone than an earlier will, that person has standing. Someone may initiate a will contest to have a different person, bank, or [TRUST COMPANY](#) serve as the personal representative for an estate or serve as a trustee of trusts created by the will. Some of the most common challenges to wills come from potential heirs or beneficiaries who received less than they had anticipated.

## Disinheriting

Can you disinherit your child? The answer is generally yes. To do so, you must explicitly state that you intend to disinherit that child in your will. If your child is a minor, the state laws typically provide some sort of allowance out of the assets of your estate to support your child until he or she reaches the age of majority.

Can you disinherit your spouse? The answer is generally no. But if you and your spouse waived the right to be included in each other's estate in a prenuptial or postnuptial agreement, you may then entirely omit your spouse from taking anything under your will. In the absence of such an agreement, you can limit the amount your spouse will receive to a statutorily defined minimum. All states have laws that shield a surviving spouse from being completely cut off.

Typically, your surviving spouse could choose between the property you left to him or her in your will or a [STATUTORY](#) share set by state law. Depending on the state law where you reside, this spousal share is usually one-third or one-half of your estate. The rules for calculating the amount of the share differ remarkably from state to state. Additionally, in [COMMUNITY PROPERTY](#) states, the surviving spouse

already owns half of the community property at the death of the other spouse.

The threat of will contest and the expense and delay they occasion prompts competent lawyers to encourage their clients to avoid completely cutting someone out. Instead, it may be advisable to leave the person a relatively small amount and put in an "in terrorem" clause. These clauses state that if the person contests the will, he will [FORFEIT](#) that small amount. The consequences of will contests are another important reason most people should avoid a do-it-yourself will. Lawyers are trained and experienced to prepare wills and will make sure the wording and [EXECUTION](#) is done according to the law. If it seems possible that someone may later claim that the testator lacked competence, the lawyer can produce qualified medical and other witnesses at the execution ceremony to ameliorate those claims.

## Divorce

The effect of a [DIVORCE](#) on the legality or sufficiency of a will depends on your state's law. In some states, a divorce [DECREE](#) will automatically revoke your entire will. In other states, a divorce will only revoke the provisions that would distribute assets to your former spouse, not the will itself. In either case, should you experience a divorce, you should review the property arrangements in your will. This is also true of other important documents, such as life insurance policies and bank accounts. This is such a fundamental principle that divorce courts frequently require litigants to address these issues as part of divorce decrees.

## Dying Without a Will

If you die without having made a will (also known as dying "intestate"), the probate court will appoint a personal representative for your estate. This representative is frequently known as an "administrator." The administrator will receive creditors' claims against your estate, pay debts, and distribute your remaining property according to the laws of your state. There are many differences between dying [TESTATE](#) and dying [INTESTATE](#). The main difference, however, is that an intestate estate is distributed to beneficiaries according to the distribution plan established by state law; a testate estate is distributed according to the decedent's instructions provided in the decedent's will. For more detailed information about [INTESTACY](#), see the heading "Intestacy" in the *Gale Encyclopedia of Everyday Law*.

## Guardians

A major impetus for making a will is to provide for the care of minor children. If you have a minor child or children you may want to choose a guardian to serve in your place should you die before your children reach the age of majority. There are two basic types of legal guardians: a guardian of the person and a guardian of the estate of minor children, but these functions can be performed by one person. The guardian of the person is responsible for decisions about the health, education, and welfare of the minor child. The guardian of the estate is responsible for the child's property and for managing finances for the minor child.

When one natural parent dies, generally the other natural parent is appointed as the guardian for minor children, whether or not the parents were married at the time. If someone besides a surviving natural parent of a minor child is named as guardian in a will, the surviving natural parent can contest that nomination. The court will then determine whether the appointment of the other parent as the guardian would be detrimental to the best interests of the minor child. Courts strongly prefer that children be placed in the guardianship of their natural parents whenever possible. It is very difficult from a legal standpoint to overcome this presumption. However, if both natural parents are deceased, it is important to name a guardian for minor children, to ensure

the children (and their financial assets) will be cared for by someone the parents trust.

## Life Insurance

It is not a good idea to name a beneficiary for your insurance in your will. This adds an unnecessary level of administration and expense as insurance proceeds become caught up in the probate process. Because life insurance proceeds generally pass to your beneficiaries free of the claims of your creditors, passing insurance proceeds through your will may unnecessarily subject your life insurance proceeds to your estate's debts. Currently, you may contact your insurance company to ask for a beneficiary form on which you name your life insurance beneficiaries. If your life insurance is part of your employer's benefit plan, your employer may provide you with insurance beneficiary forms. With the forms from your insurance company or employer, you may name the beneficiaries of your choice and file the new beneficiary designation with the insurance company or with your employer. Do not forget to ask for written confirmation that the form was received and properly filed. In the event of your death, the insurance company would pay the insurance proceeds directly to the beneficiaries you have named without having your beneficiaries going through the delay, expense, and trouble of probate.

## Lost Wills

Sometimes, a family knows that a deceased relative made a will, but the will cannot be found. Missing wills raise many legal issues. The outcomes of these situations depend on the specific facts and circumstances, as well as on the law of the state in which the deceased resided. If the will is missing because the deceased attempted to revoke it, depending on state law, an earlier will or the state's rules on interstate [SUCCESSION](#) would determine how to distribute the deceased's estate. If the will is missing because it was destroyed in an explosion or fire, the probate court may accept a photocopy of the will. The court may also accept the deceased lawyer's draft or computer file. In either of these cases, the court will require evidence that the deceased executed the original will according to state law.

## Moving from State to State

The laws of all states differ with respect to wills. If you move to a different state after you make and execute your will, it may be a good idea to have your will reviewed by a lawyer in your new state. Basically, a will properly drafted and executed in your former state—and that would be valid in your former state— will typically be regarded as valid under the law of your new state.

Do not forget that the laws in your new state may be more favorable than the laws of your previous state. For example, your new state may have different processes to "prove" the will. Or your new state may permit some probate matters to be handled on a less formal and less expensive basis. Sometimes this can be accomplished simply by adding language that refers to certain statutory provisions in your new state's laws.

Sometimes complications will occur because different states maintain different statutory classifications of property. The differences between states without community property schemes and those that have them can create important complications. If your will was executed in a state that does not have a community property scheme and you subsequently move to a community property state (or vice versa), you may want to confer with a lawyer in your new state to determine whether to create a new will to achieve your intended result.

## Revoking a Will

As mentioned above, a change in your marital status may revoke all of your will, or it may revoke the part of your will relating to your former spouse. If you are mentally competent at the time you do it, you can revoke your will by burning it, tearing it up, or otherwise destroying it. Be aware that revoking your will must be properly witnessed and recorded. If not, someone may later claim that your will was simply "lost" and not revoked. Thus, copies of the will you thought you had revoked can be produced and duly probated. Alternatively, someone may claim that you lacked mental competence at the time you "attempted" to revoke your will.

## Probate

Probate is the process by which legal title of your property will be transferred from your estate to your beneficiaries. If you die with a will ("testate"), the probate court determines if your will is valid, hear any objections to your will, orders that your creditors be paid, and supervises the process to assure that property remaining is distributed in accordance with the terms and conditions of your will. The cost of probating your estate is determined either by state law or by practice and custom in your community. The usual cost to probate an estate varies between 3% and 7% of the value of the estate.

## Taxes

As part of his or her duties, your personal representative will file tax returns for your estate to report the assets of your estate. The personal representative will also file an estate income [TAX RETURN](#) to report any income generated by your estate. Federal estate taxes are the highest in the federal tax code. Currently, estate tax is levied on decedents' estates when the estate is valued over \$675,000. This exclusion amount will rise in annual increments to \$3.5 million in 2009. Federal estate tax rates range between 37% and 50% in 2002. Prior to 2002, the federal estate tax rate was 55%. This tax rate will drop 1% each year until it reaches 45%. The Federal Estate Tax begins in § 2001 of the Internal Revenue Code. (26 U.S.C. 2001). Merely making and executing a will does not reduce federal estate tax. However, through competent legal advice on estate planning, including the careful crafting of your will, you can minimize or avoid these taxes. Such tax benefits would not be available to you and your family if you died without a will.

## Types of Wills

### *Do-It-Yourself Wills*

So-called do-it-yourself are wills that individuals create themselves, usually with the aid of self-help legal literature. There are numerous guides, form books, websites, and fill-in-the-blank literature in the marketplace geared for non-lawyers. This material purports to help you create a valid will and avoid the costs of hiring an attorney to prepare a will for you. While this may be true in some cases, there is much to be cautious about. Mainly, the consequences of preparing a do-it-yourself will can be potentially devastating. If you die and your will is declared to be invalid, you will not be around to explain what you had intended to accomplish in your will. Instead, a probate court will either interpret your will or distribute your property according to the state intestacy scheme. Keep in mind that your will is an important legal document. If it is not prepared and executed according to state law, your entire will can be set aside by a probate court. Additionally, just about anyone who envisions an alternative distribution of your estate can contest a do-it-yourself will. If it does not meet some very stringent tests mandated by state law, the court can disregard your do-it-yourself will.

### ***Oral Wills***

Oral wills are those whose contents and terms are merely spoken to a witness or witnesses, but not written down. There is great potential for fraud or even simple misunderstanding in oral wills. In most cases an "oral will" is only recognized by a probate court when made by members of the armed services or merchant marine in active service in time of conflict. Oral wills are not uncommon in situations in which a person feels he or she does not have time to prepare a written will and have it properly executed.

### ***Death-Bed Wills***

Deathbed wills are those created and executed when the testator is facing imminent death. These wills may be perfectly valid and binding, but the closer to the testator's death the will is prepared the more likely it is to be challenged. The contest is usually based on a premise that the testator lacked sufficient mental capacity or was subject to undue influence. As previously stated, challenges can lead to costly and protracted will contests.

A deathbed will can potentially lead to errors. Its hasty preparation can be such that the will may not distribute the property in the manner that the testator intended. Hasty preparation can also fail to take advantage of some features that can reduce or eliminate the Federal Estate Tax. It is also more likely that the will would be found invalid because it does not conform to some legal requirement. These are some of the reasons many lawyers urge their clients or potential clients to create and execute their wills while they are still of sound mind and body.

### ***Holographic Wills***

A holographic will is one that you have written yourself. They are generally handwritten, although some states may allow for a holographic will to be created on a typewriter or with word processing software. These kinds of wills are not allowed in some states, but other states permit this kind of informal will. In states that permit them, the laws relating to holographic wills can be very specific or restrictive. For example, California requires that you write all material provisions entirely by hand and that you must sign your holographic will. On occasion, a holographic will is better than no will at all. In cases where the holographic will creates an ambiguity or an unintended result, it may have been better to have no will at all.

### ***Self-Probating Wills***

You can help simplify the probate process by adding to your will the affidavits (sworn statements) of the witnesses who saw you signing your will. When these affidavits are included with a will, it is sometimes called a "self-probating will." In the affidavits, the witnesses state that they saw you execute or sign the will, that you asked them to be witnesses to the will, that you appeared mentally competent at the time, and you acted voluntarily. Without these affidavits, the process is more complicated and lengthy. In those cases, the executor would usually need to contact the original witnesses and have them appear in probate court (if they can). Before the personal representative or executor can even file your will in probate court, the witnesses would usually appear in court (or sometimes provide an [AFFIDAVIT](#)) to state the circumstances surrounding the execution of the will. This [TESTIMONY](#) helps to "prove" that the will is genuine.

Probate courts usually permit your will to be filed along with the affidavits, without the need to summon witnesses or obtain new affidavits. The court then gives notice to other heirs at law who are given a specific amount of time to file any objections to the will being admitted to probate. If any of these choose to challenge your will, the probate court is more likely to require your witnesses to come into court (if they are still available) to [TESTIFY](#) about the circumstances in which your will was signed. In some states, self-authenticating affidavits are not accepted in situations where the testator dies shortly after the will is signed, or the will was not executed with the assistance of a licensed attorney.

## **Living Wills**

A LIVING WILL is something of a misnomer. It does not direct how your property is to be disposed of after you die. Rather, it is a document that specifies the general kinds of medical care you would want— or not want—in the event you became unable to communicate with your health care providers. Living wills are sometimes known as "medical directives" or "medical declarations."

## **Additional Resources**

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*The Wills and Estate Planning Guide: A State and Territorial Summary of Will and Intestacy Statutes.* American Bar Association, The Association, 1995.

*Wills and Trusts in a Nutshell.* Mennell, Robert L., West Publishing, 1994.

## **Organizations**

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