

# Wills: An Overview

Wills are the most common way for people to state their preferences about how their estates should be handled after their deaths. Many people use their wills to express their deepest sentiments toward their loved ones. A well-written will eases the transition for survivors by transferring property quickly and avoiding many tax burdens. Despite these advantages, many estimates figure that at least seventy percent of Americans do not have valid wills. While it is difficult to contemplate mortality, many people find that great peace of mind results from putting their affairs in order.

Wills vary from extremely simple single-page documents to elaborate volumes, depending on the estate size and preferences of the person making the will (the "testator"). Wills describe the estate, the people who will receive specific property (the "devisees"), and even special instructions about care of minor children, gifts to charity, and formation of posthumous trusts. Many people choose to disinherit people who might usually be expected to receive property. For all these examples, the testator must follow the legal rules for wills in order to make the document effective.

## Will Requirements

Formal requirements for wills vary from state to state. Generally, the testator must be an adult of "sound mind," meaning that the testator must be able to understand the full meaning of the document. Wills must be written. Some states allow a will to be in the testator's own handwriting, but a better and more enforceable option is to use a typed or pre-printed document. A testator must sign his or her own will, unless he or she is unable to do so, in which case the testator must direct another person to sign the will in the presence of witnesses, and the signature must be witnessed and/or notarized. A valid will remains in force until revoked or superseded by a subsequent valid will. Some changes may be made by amendment (called a "codicil") without requiring a complete rewrite.

## Will Limitations

Some legal restrictions prevent a testator from giving full effect to his or her wishes. Some laws prohibit disinheritance of spouses or dependent children. A married person cannot completely disinherit a spouse without the spouse's consent, usually in a pre-nuptial agreement. In most jurisdictions, a surviving spouse has a right of election, which allows the spouse to take a legally-determined percentage (up to one-half) of the estate when he or she is dissatisfied with the will. Non-dependent children may be disinherited, but this preference should be clearly stated in the will in order to avoid confusion and possible legal challenges.

Some property may not descend by will. Property owned in joint tenancy may only go to the surviving joint tenant. Also, pensions, bank accounts, insurance policies and similar contracts that name a beneficiary must go to the named party.

## Appointing a Representative

A will usually appoints a personal representative (or "executor") to perform the specific wishes of the testator after he or she passes on. The personal representative need not be a relative, although testators typically choose a family member or close friend, as well as an alternate choice. The chosen representative should be advised of his or her responsibilities before the testator dies, in order to ensure that he or she is willing to undertake these duties. The personal representative consolidates and manages the testator's assets, collects any debts owed to the testator at death, sells property necessary to pay estate taxes or expenses, and files all necessary court and tax documents for the estate.

## Choosing a Guardian

Testators who have minor or dependent children may use a will to name a guardian to care for their children if there is no surviving parent to do so. If a will does not name a guardian, a court may appoint someone who is not necessarily the person whom the testator would have chosen. Again, a testator usually chooses a family member or friend to perform this function, and often names an alternate. Potential guardians should know they have been chosen, and should fully understand what may be required of them. The choice of guardian often affects other will provisions, because the testator may want to provide financial support to the guardian in raising surviving children.

## When No Valid Will Exists

If a person dies without a valid will and did not make alternative arrangements to distribute property, survivors may face a complicated, time-consuming, and expensive legal process. Dying without a will leaves an estate "intestate," and a probate court must step in to divide up the estate using legal defaults that give property to surviving relatives. The court pays any unpaid debts and death expenses first, then follows the legal guidelines. The rules vary depending on whether the deceased was married and had children, and whether the spouse and children are alive. If the intestate individual has no surviving spouse, children, or grandchildren, the estate is divided between various other relatives. Therefore, intestacy may mean that people who would never have been chosen to receive property will in fact be entitled to a portion of the estate.

Additionally, state intestacy laws only recognize relatives, so close friends or charities that the deceased favored do not receive anything. If no relatives are found, the estate typically goes to the state or local government. Intestacy also poses a heavy tax burden on estate assets. When made aware of the consequences of intestacy, most people prefer to leave instructions rather than subject their survivors and property to government-mandated division.