

What Are the Requirements for Making A Will?

Anyone of legal age (18 years old in most states) and sound mind can make a Will. If you have property that you wish to distribute at the time of your death, you should have a Will.

When you make out your Will, you'll need to designate beneficiaries and an executor. The beneficiaries are the people or organizations who receive your property. The executor is the one you designate to see that your wishes are carried out.

If you have minor children, you should also nominate a guardian to provide for the physical welfare of your children.

Legal Age

In most states, a minor becomes an adult at the age of 18. Once he or she reaches that legal age, certain rights and privileges are granted. That holds true for most states when it comes to making a Will. Forty-seven states currently require the Will maker to be at least 18 years of age. South Dakota is the only state that requires the Will maker to be older than 18. Louisiana sets the minimum age at 16, while in Georgia, you can make a Will as early as 14 years of age.

A number of states make provisions for those younger than 18 years of age to write a Will if they are married, economically independent, or a member of the armed forces.

Mental Competence

"Being of sound mind and body" is a phrase made famous by movies and television versions of Will making. And it's true, mental competence is an essential factor in making sure your Will is legally binding. Being mentally competent means that you know you are executing a Will, and are familiar with your property as well as your family and descendants. Witnesses are required to sign the Will and one of their functions is to validate your mental well-being.

If it is anticipated that dissatisfied heirs might contest the Will based on mental incompetency, extra steps should be taken at the time of the signing of the Will, such as a doctor's assessment.

Distribution of Property

The main purpose of a Will is to make provisions for the distribution of your property after your death. In general, you can designate anyone you wish to be your beneficiaries and you can distribute your assets in any fashion, but there are a few exceptions. Many states have provisions that provide the surviving spouse with the ability to elect to take a defined portion of the estate regardless of the provisions in the Will.

As we have seen many times in literature and drama, unusual or excessive provisions can be attached to an inheritance. For example, someone includes a Will provision that the first child to bear a child gets the largest share of the estate. While this makes for good storylines in fiction, most probate courts in the real world frown on such provisions. A dissatisfied beneficiary may decide to contest the Will in court.

Leaving Property to Spouses

Most of the time, spouses are the major beneficiary in a Will. Even so, there are laws in all states that protect the surviving spouse from being disinherited. Some allow the spouse to take an elective share of the estate, usually one-half or one-third, regardless of the provisions in the Will. One method to disinherit a spouse may be through the use of a premarital agreement, but the courts are apt to closely scrutinize such agreements to make sure that the agreement was signed in good faith and with full disclosure of assets.

It's possible to put limitations on the property that you leave to a spouse through the establishment of trusts for the benefit of your spouse, that come into existence after you die. You should consider the following factors in deciding what kind of trust is best for your circumstances:

- the possibility that your spouse's needs may increase in the future
- the manner of living to which your spouse is accustomed
- the ability of your spouse to provide for his or her own needs

- the ability of your spouse to manage the trust assets
- the possibility that your spouse may remarry and the affect the marriage may have on your children or other beneficiaries.

Providing for Minor Children

Many times a spouse is given the entire estate with the expectation that he or she will provide for minor children. That expectation is not always sound however, especially when the surviving spouse is not the parent of the children, or if the spouse is not available to care for the children at the time of your death.

One of the most common practices under these circumstances is the establishment in the Will of a minor children's trust. The trust provides financial support for the children until they become adults, at which time the remaining assets of the trust are distributed to them. It is important to carefully select the trustee, who will manage the trust and make the distributions to your children. The trustee will work closely with the person you've named as guardian to raise your children. In many cases, the trustee and the guardian are the same person.

Leaving Property to Adult Children

It's common for adult children to receive a significant portion of their parent's property. On the other hand, in every state except Louisiana, it is legally permissible to disinherit a child, regardless of his or her needs or age. Louisiana law provides that no child under the age of 23 at the time of the parent's death can be disinherited.

Leaving Property to Grandchildren

Grandparents often leave portions of their estates to their grandchildren to help pay for special needs or educational expenses. Grandparents may also leave property to grandchildren because their parents already have sufficient assets.

Written Requirements

Most Wills are documented with the written word. These are usually formatted with typewriters or word processors. If properly signed and witnessed according to the requirements of the state where signed, these are legally valid in all states. However, there are other types of Wills.

Some states recognize Holographic Wills. These are handwritten, unwitnessed Wills, signed only by the Will maker. A few states still recognize Oral Wills, under certain conditions. Others offer a standard Will form, where you just fill in the blanks.

A relatively new type of Will is the Video Will, where the Will maker usually reads his or her Will out loud before a video camera. Videotaping a Will can help avoid a Will contest by showing that the Will maker was competent and following proper signing formalities. Keep in mind that many states will not recognize a video Wills as a substitute for a written Will; the Will maker should do both.

Signing Requirements

In order to make your Will valid, you must sign the document in the presence of at least two witnesses. They, in turn, must sign it as well, in your presence and in the presence of each other. At the time of the signing, most state require that you be mentally competent and at least 18 years of age.

Witnesses

Witnesses are very important to the validity of a Will. The signature of at least two witnesses is required in order to affirm that you were mentally competent and under no duress at the time you executed the Will. Each witness must understand that they are witnessing a the signing of a Will and they must be competent to testify in court. Witnesses should sign in the presence of each other.

In many states, a witness cannot be a beneficiary of the estate. States have adopted these laws to prevent any conflict of interest from those who may be in line for gifts, or who may benefit from your death. Some states will allow for a beneficiary to act as a witness, but in doing so, that witness may lose some or all of the property that he or she would have to inherited.