

Wills ~ Types of Wills and How They Work



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Overview of Wills

Your last will and testament is a very important document that ensures your wishes are carried out after you die. Many people think they need to be old, sick or wealthy to need a will. The truth is, everyone of legal age should have a will. Even if you're young, you probably have possessions that you care about. In the case of accidental or unexpected death without a will there's no way the courts can know what your intentions were for your possessions -- be it money, land, your computer or your pet cat.

Before getting into the specifics, it's important to know the legal terms you might see in a will. Let's take a look at them:

1. **Testator** - the person whose will it is
2. **Executor** - the person named by the testator to carry out the terms of the will
3. **Beneficiary** - the person or group that receives assets from the deceased
4. **Probate** - the court that proves the validity of the will and oversees the executor
5. **Bequest** - the gift of personal property from the testator to the beneficiary
6. **Codicil** - a written amendment to a will
7. **Intestate** - when a person dies without a will (the opposite of "testate")
8. **Trust** - an entity that holds assets until a later date and allows a beneficiary to bypass probate

Now that we know some of the main terms that are found in a will, we can get more involved. In this paper, we'll learn how to draft, change and challenge a legal will. We'll also explain what a living will is and take a fun look at some very unusual and famous wills.

The Specifics of a Will

Drafting a will is a lot easier than most people think. Having an attorney draft or review the will is a good idea, but it's not necessary in order to make it legal and binding.

State law applies in the case of wills, and each state has different rules. When drafting a will, it's important to research your state's laws. Most states require that the will be signed by the testator and at least one witness. Here's some basic information that most states require in order for wills to be valid:

1. Your name
2. If you're married, your spouse's name and when you got married
3. Your children's names and how you want any stepchildren or foster children to be treated
4. A statement revoking any other existing will, if there is one
5. The name of your executor and usually one alternate
6. A list of powers you wish your executor to have
7. List of any special gifts or personal property
8. Instructions for distributing your estate after debts, [taxes](#) and other expenses have been paid

Burial instructions are often included in a will, but it's generally a good idea to have them written up in a separate statement that can be easily accessed. Imagine the difficult spot your family would be in if your burial wishes were locked in a safe or difficult to find.

Pension Plans, life insurance policies and annuities should not be in the terms of a will. Those benefits are passed directly to the beneficiary named in those documents. You can name your estate as the beneficiary of these assets, but doing so can lead to delays in the execution of the will or create tax disadvantages.

Probate court rules whether or not a will is valid based on a few important details. Most states require that you be at least 18 years old. All states require that you be of sound mind. While some members of your family may doubt this from time to time, legally speaking, it means you are:

- Mentally competent and not suffering from a mental illness
- Clear that you're creating your will
- Aware of what property you own
- Appraised of the estate plan you're making
- Aware of the people related to you

These requirements apply only at the moment the will is drafted. If someone creates a will and later falls into mental illness, the will still applies.

The executor, or personal representative, is the most important person named in the will. He or she gathers and makes an inventory of all personal property, pays the deceased person's legitimate debts and distributes the assets under the terms of the will. The personal representative can be anyone -- a family member, close friend or personal attorney. He or she should be someone that you trust implicitly. It's also a good idea if the executor has some business experience and is intelligent and thoughtful. Serving as executor and dealing with grieving families is never an easy task. Most testators name an alternate in case the first choice for nomination isn't able to perform the required duties. If you don't name an executor, probate will appoint one, typically one of your heirs.

Now, we'll learn about the different types of wills and how they function.

Types of Wills

There are several different types of wills that are recognized as legal and binding in probate. **Oral wills** are spoken to a witness instead of written down. This type of will is common when someone feels like there isn't enough time to draft a document. Many times, armed service members in active combat will make an oral will, witnessed by their fellow soldiers. This situation is one of the more common ones that a probate court will recognize as legitimate in cases of oral wills. As you can imagine, there is great opportunity for fraud and misinterpretation of oral wills. They aren't recommended.

If you're faced with certain death, you might draft a **Deathbed will**. While they can be binding, these wills are more difficult to prove legal and are the most common wills to be challenged. People often challenge deathbed wills on the grounds of the mental capacity of the testator, with the argument that the individual can't be of sound mind when facing imminent death. A deathbed will is also commonly filled with errors because of how fast it's made. Even if mistakes aren't made, possessions can be overlooked, leaving them to be divided by the court.

Holographic wills are informal and typically handwritten. Not all states recognize holographic wills as valid. States that do allow holographic wills have specific laws that must be adhered to. Holographic wills must be signed by the testator, and it's best if they're witnessed and signed by another person. As with the deathbed and oral variety, holographic wills are commonly made when something unexpected and tragic happens. A person trapped or lost in the wilderness or alone and near death may write a holographic will. In these cases, there is no witness, and it would be up to probate to rule on the will's validity.

If paying a lawyer seems like too high an expense, you can always use a form book or Web site to help draft a **Do-It-Yourself (DIY) will**. The numerous guides to creating your will can be very helpful, but it's still important to do follow-up research on your state's regulations and possibly have an attorney go over the will to make sure it's legal. Many people make the mistake of assuming the fill-in-the-blank forms or Internet Web sites are foolproof and once they're deceased, it's too late to do anything about it. Getting an attorney's stamp of approval on your DIY will is still less expensive than hiring a lawyer to draft it for you.

When speed of execution is important, **Self-Probating wills** can be a real time saver. When the will is created, witnesses sign sworn statements that verify the will was created and signed in their presence, and that the testator was of sound mind at the time. Without these statements, the witnesses must be contacted by the executor and are usually required to appear in probate to provide in-person testimony before the will can even be filed. As you can imagine, this can draw out

the entire process and create stress on your family. Self-probating wills that are drafted with the aid of an attorney are the most solid and least likely to be successfully challenged.

Wills can be, and often are, challenged by family members of the deceased. We'll look at that process in the next section.

Challenging Wills

It's perfectly legal for wills to be changed. Circumstances often change after the initial will is drafted, and it's up to the testator to make sure that the final will goes along with his or her wishes. The testator is the only person legally allowed to change his or her own will.

Most changes to wills are commonplace and easy to make. Some reasons you may want to change your will are if you have a baby or get married or divorced. You may also want to change your will if your executor or beneficiaries die, tax laws change in your favor, or if there's a considerable change in your assets.

Aside from these reasons, there's always the case of a testator that wishes to make major changes in how his or her assets are divided. A family member might fall out of favor, or the testator may simply feel philanthropic and decide to give his or her money to charity.

In order to change your will, you can either draft a new one that revokes the previous will, or add a codicil to the existing will. The codicil is a separate document that legally amends the existing will. These days, attorneys are able to make changes in the computer file so the will can be updated with minimal cost attached. Changes should be executed by a professional to guarantee that they're accurate and binding.

Wills can be contested in probate, but only by persons of legal standing. The laws for legal standing vary by state, but it typically means an individual either included in the will, or one that should have been included in the will. Wills can't be challenged on the grounds of the fairness. They're usually challenged for the following reasons:

- The will is forged.
- The testator wasn't of sound mind when the will was drafted.
- The will didn't meet the requirements of the state.
- The testator was coerced into making the provisions.
- The testator was a victim of fraud.
- The beneficiary doesn't approve of the executor.

Wills can be found partially or fully inadmissible in probate. If the will is fully rejected, it's thrown out and the court gives away the assets as if the deceased died without a will. If partially rejected, probate abides by certain requests and rules on the others. Contesting a will is a very expensive, long process and as long as the will was drafted under the legal terms of the state, the challenge is seldom successful.

Trusts

If you want to avoid the cost of probate, you can form a trust instead of writing a will. Trusts are entities created to hold assets for the benefit of an individual or a group.

One reason someone may set up a trust is to manage the assets of a minor beneficiary. Doing so avoids the need for a conservator -- someone established by probate to oversee the assets of a minor. In most states, minors aren't allowed to handle their own finances until they're 18.

Trusts can be managed and changed by the trustor. Upon death, the trustee takes over, and the trust can't be changed. Individuals with a large amount of assets are generally encouraged to form trusts. Death taxes on personal property or money still apply, but they can usually be delayed and reduced by using a trust.

Now, we'll look at some more components of a last will and testament

Other Components of a Will

Disinheriting a family member in a will is more common than most people think. In order to prevent your children from receiving assets from your estate, you must legally disinherit them by saying so your will. If the child is a minor, state laws will usually provide them with an allowance from the testator's assets until they reach the age of 18. Spouses are much more difficult to legally disinherit. Unless there's a prenuptial agreement that stipulates such action, all states prevent spouses from being completely cut off in a will. The set share for surviving spouses in most states is one-third to one-half of the assets. Attorneys generally discourage testators from attempting to cut a family member out of a will completely.

Instead, they might advise their client to leave a small amount and include an in terrorem clause that prevents the beneficiary from receiving any assets if the will is contested.

Divorce can also complicate the terms of a will. In some states, divorce immediately makes the current will invalid. In others, only the parts of the will that apply to the spouse are revoked. No matter what state you live in, if you get a divorce, it's important to review the impact it has on your will.

Dying without a will, known as dying **intestate**, is a common occurrence. In all cases, probate appoints a personal representative to be in charge of your assets. This administrator acts as executor, pays all debts and inventories assets of the estate. The inventory is then turned over to the state and divided according to state law among the beneficiaries.

A lost will is another problem many families face. The specific circumstances and state laws determine the outcome in these cases. If there's an earlier will that was in the process of being revoked, sometimes the initial will is used. Photocopies of the will can be accepted in the case of wills lost by fire or other destruction. Wills should always be kept in a safe place, either a safe deposit box or home safe. It's also smart for your attorney to retain a copy.

If your will was properly drafted in one state, it's generally valid in another state, but it's wise to have it reviewed by an attorney. In some cases, the tax laws in your new state may favor your estate, so it can be financially advantageous to change the will.

Estate taxes are federal taxes that must be paid by the beneficiaries of the estate. The amount of money owed is established as a base amount, plus a percentage of the overall taxable estate. For instance, in 2006, if the taxable estate is more than \$10,050, the estate tax would be \$2,596, plus an additional 35 percent over and above \$10,050 [source: IRS]. As you can see, estate taxes are hefty, and most wealthy people use various loopholes, tax shelters and trusts to prevent their beneficiaries from having to pay so much. Debate is non-stop on so-called **death taxes** and will continue as long as the Internal Revenue Service (IRS) demands such large percentages. Estate tax law is very complex. More information about the current laws can found at the IRS Web site.

Next, let's take a look at living wills and why they're important.

Living Wills

The term **living will** is somewhat misleading, as it has nothing to do with personal property or assets. Living wills are documents that outline a person's health care wishes in case of a severe injury or illness. They've become increasingly popular over the years as medical technology has achieved the ability to keep terminal patients alive for indefinite periods of time.

As with a last will and testament, the laws that govern living wills vary from state to state, and it's important that they're drafted with this in mind. The terms for life-threatening conditions are very specific, so a great deal of time should be invested in researching them. If not, the will can be challenged by family members who want to see their loved one kept alive at any cost.

Living wills are required to be signed and witnessed, and a power of attorney is commonly included in case the terms of injury or illness aren't covered. In this case, the person designated power of attorney, typically a spouse or parent, has the right to decide whether or not to keep their loved one alive or to "pull the plug." Many people don't wish to be kept alive by artificial means at the monetary expense and mental anguish of their families. Many people would prefer to be kept alive no matter what. In either case, it's very important that you draft a living will so your wishes are honored. There are simple DIY forms on the Internet for each state that can be filed for little cost. If you want to learn more about living wills, contact our offices for a 'no obligation' discussion and how a living will might apply to your situation.

Conclusion

When you have worked all your life to build a portfolio of assets for your family, it is important that you take the "all important step" of protecting the wealth you have created when it is handed on to your family.

All Rasch and Associates specializes in putting together family financial plans that help increase your wealth, protect what you have already acquired... and insure its safe and complete transference to your heirs.