

Q U E S T I O N S  
A N D  
A N S W E R S

*About Wills*

*a donor's guide*

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## QUESTIONS AND ANSWERS **About Wills**

**F**or most people, making a will is not easy. Perhaps that is why millions continue to avoid doing it. Four presidents of the United States—Ulysses S. Grant, Abraham Lincoln, Andrew Johnson and James Garfield—each married with children, died without a will. Today 60 percent of the United States’ adult population living in households with children do not have a will.

Commentators say that many people avoid making wills because they are afraid to face their mortality. Perhaps. But, more people would be inclined to make a will if they thought about their wills as a way to extend their love for their husband or wife, their care for their children and grandchildren, and their generosity and gratitude to friends and charitable causes that had benefited their lives.

Here are some questions and answers that may take the mystery out of will-making and impart the important role a will plays in your estate plan.

### **What happens if you don't have a will?**

“Can I write my own will, or should I make an appointment with a lawyer, answer questions, pay and leave satisfied that my spouse and family are cared for ‘if,’ in the vernacular of you-know-what, ‘something happens to me?’”

Perhaps there would be more wills if more people learned what happens if they die without a will. The Uniform Probate

Code, adopted at least in part by 18 states and serving as an example to all, has a section on “Intestate Succession” (how your property is passed if you do not have a will). Reading the following five conditional statements about the disposition of an intestate decedent’s property, you can quickly understand why, as good as that Code is, it does not reflect personal lifetime concerns for family, friends and favorite charities—and why you need to make your own will.

### **Summary of the Intestate Succession From the Uniform Probate Code**

- If there is a surviving spouse and no children, all property passes to the spouse.
- If there is a surviving spouse and one child, half of your property passes to your spouse and the other half passes to the child.
- If there is a surviving spouse and two or more children, one-third of your property passes to the spouse and the remainder is divided in equal shares among the children.
- If there are children, but no surviving spouse, the property is divided in equal shares among the children.
- If there is no spouse and no children, the property is evenly divided between your parents. If no parents are living, it is evenly divided among the descendants of the parents.
- If there are no living relatives, the property reverts to the state.

Note: Nowhere in the Uniform Probate Code is there a provision for making a charitable gift.

## **Do you need an attorney to make your will?**

Only you know the special circumstances to allow for in your life or in the lives of family and heirs. An attorney will not know how you want to distribute your estate, who you want to be executor or what charitable organizations you wish to support. However, you may need an attorney to *draft your will* so that it is legally acceptable and accomplishes exactly what you want it to do.

For example, you may want your will to do the following:

- Name the executor of your estate
- Name the guardian for anyone under your care
- Ensure lifetime care for any child with a disability
- Pass what you choose to children of a first marriage
- Distribute personal property as you promised during life
- Set up trusts to save on taxes and provide financial management
- Give your property to those you choose
- Set guidelines for will distributions upon simultaneous accidental death of you and your spouse

Experts agree that you need an attorney to draw up your will if you own your own business, if your estate is substantial (a \$1.5 million estate makes tax planning a factor under current law) or if you anticipate a challenge to the will from a disgruntled relative or anyone else.

However, even with a rather simple estate, with one whose assets are less than \$1.5 million, you would be wise to hire a lawyer experienced in drafting wills. Paying a fee to have an

attorney guide you through the maze of testamentary legalese is more of an investment than an expense. Tell him or her exactly what you want your will to do. Ask about a living will and a durable power of attorney in case you become incapacitated.

Always remember that you have specific wants and that you are employing an attorney to help you satisfy them.

In addition, you will undoubtedly need a qualified or certified estate planning attorney if your circumstances are complex and will require the use of some of these estate planning opportunities.

- The marital deduction
- The nonmarital deduction trust
- The credit shelter trust
- The QTIP (qualified terminable interest property) trust
- The revocable living trust
- Grantor retained income trusts
- Personal residence trust
- Irrevocable life insurance trust
- Charitable remainder trusts
- Charitable lead trusts

### **Who can make a legal will?**

Any person of “legal age” (by his or her state’s statute) is legally qualified to make a will so long as that person is of “sound mind.” The “sound mind” test, as lawyers understand it, asks:

- Does the testator know what a will is, what it is not and that he or she is actually making a will?

- Does the testator know who would ordinarily be included in the will because of his or her relationship with them?
- Does the testator know what property he or she owns and how it is owned?

Only property owned solely by the testator can be passed by will. Other property such as jointly owned property or life insurance passes outside the will.

### **What are some typical parts of a will?**

In preparing your will and before you visit an attorney, you may want to look at the following “articles” that may be in a will to determine how you want them to read.

**My identification and domicile:** The listing of your domicile, your legal place of residence, is very important because property in different states and property in more than one state have different taxing consequences.

**Revocation of prior wills and codicils:** Have you any other wills? This must be your current will, and you must state that this will revokes all other wills and codicils.

**Naming an executor:** This is a serious decision, one that guarantees that the executor (or personal representative, in some states), the person named in your will to manage your estate, will follow your wishes to the letter—even despite family pressure.

**Taxes and administration expenses:** Are taxes to be paid by the estate or are they to be charged pro rata to the beneficiaries under state statute?

**Bond:** This is to protect your estate assets. The requirement may be waived if your executor is your spouse, a family member or close and reliable friend.

**Payment of debts:** Your debts live after you and will be charged against your estate before any assets are distributed.

**Specific gifts:** What specific gifts have you promised to which loved ones? What items of sentimental value do you want to leave for whom? You must be very specific so there is no confusion or wrangling about who gets what. Leaving your heirs at peace by inhibiting envy or jealousy is also a gift.

**Gifts of real estate:** If your house is not held in joint tenancy, you can will it to your spouse, children or charitable causes. Even if your house is held in joint tenancy, you need to provide what will happen to it should you survive the joint tenant.

**The residuary estate:** This is the article in which you give assets to beneficiaries, including charitable organizations, closest to you. Here you will want to be especially specific. The attorney drafting this article must be certain these are exactly the assets and the amount of assets you want distributed to whom. Upon your death your will becomes irrevocable, so you will want to read it carefully to make sure it is according to your wishes.

**Survivorship:** In case of a joint disaster, this clause will specify whether you will be presumed to have survived your beneficiary.

Your attorney may well suggest other articles.

As mentioned previously, you can set up trusts by will. These are called “testamentary trusts.” You can also have your will pour funds from your estate into a trust you have previously set up, making your will a “pourover” will.

By thinking about these articles before you meet with your attorney, you will be in a better position to help your attorney draft the will exactly as you wish.

### **How is a will executed?**

A will must be in writing and typewritten. (Oral and hand-written wills are acceptable in some states, but for special reasons.) The pages need to be numbered and stapled together so nothing is misplaced or lost.

You must sign your will, certain that what you are signing is your will. There must be present at that signing “competent and disinterested” witnesses who understand what is going on and who would be capable of testifying, if necessary, in court. They witness your signature, then they themselves sign—in the same room at the same time.

Any will may be simultaneously executed, attested and made self-proved by your acknowledgment and affidavits of the witnesses. These are completed in the presence of a notary and evidenced by that officer’s official seal in the state where your will is executed.

### **How do you leave a charitable gift in your will?**

You can leave major gifts by will to charitable causes and your estate enjoys the benefits of the “unlimited charitable contribution deduction” available to them. Some individuals plan on leaving gifts to their church or temple or hospital or

favorite social service agency, talk about it to these organizations and their friends, but never get around to properly conveying these gifts in their wills.

If some beneficiaries of a will decide to make gifts to a charitable organization in the decedent's name because they knew the decedent wanted to, but didn't, the gifts are theirs and the estate receives no charitable contribution deduction for the donations. Why mention this? Because if you have a particular charitable organization, such as ours, whose mission you wish to support, make sure it is properly designated in your will to ensure your good intentions.

Testamentary (after-death) charitable remainder unitrusts, charitable remainder annuity trusts and charitable lead unitrusts and annuity trusts are just some of the preferred ways of caring for children and grandchildren, and your favorite charitable organization, by will. Ask us for details.

### **Can you revoke your will?**

Relationships and situations change. You are free to alter your will with a codicil or to change your will entirely. Note that an article in your will is "Revocation of Prior Wills and Codicils." It is a good idea to keep your old will but to write on its pages that it has been revoked and replaced by the new will and the date of the new will. This may be very useful in situations where disgruntled individuals want to challenge new wills.

## **Conclusion**

When you have finished making your will, you can leave one copy with original signatures with your attorney or, for a small fee, with the probate court. You keep a second copy with original signatures for yourself. (Many people put that second copy in a safe deposit box or some special place at home.) Notify your executor or personal representative how to get a copy of your will.

There may be no better time than now, while the information is fresh in your mind, to plan for your will. We would be glad to answer any questions and assist you in your planning.

The information in this publication is not intended as legal advice. For legal advice, please consult an attorney. Figures cited in examples are based on current rates at the time of printing and are subject to change.

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