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## WILLS

### What is a will?

A will is a legal document in which a person (called the “testator”) directs what is to be done with their property after death. The will usually includes the name of the person that the testator wants to serve as the executor of the estate. The “executor” is the person who will arrange for the distribution of the testator’s property and payment of any debts the testator owed. (If a person dies without a will, someone may need to be appointed by the court to be the “administrator” of the estate. That person does basically the same thing as an executor does; it’s just a difference in terminology.)

### When does my will take effect?

Your will does not take effect until you die. The people you leave your property to have no rights to your property, and you keep all your rights, until after you pass away. In order to carry out the provisions of your will, it must be submitted for probate in Circuit Court.

### Who may make a will?

In Virginia, to make a valid will, a person must:

- Be at least 18 years of age, and
- Be of sound mind (sometimes referred to as being “competent” to make a will), and
- Act voluntarily, without undue influence or fraud by other persons.

To be “of sound mind,” or “competent,” a person must understand exactly what property they own, and the consequences of what will happen to that property according to the terms of the will they’re signing.

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## Do I need a will?

You are not required to have a will. However, having a will gives you more control over what will happen to your things after you pass away. It is a way of having your wishes carried out. A will removes some of the confusion and uncertainty that might arise if you don't have one.

Here are some reasons for having a will:

- You can name the person you want to handle your estate after you pass.
- You can name who you want to receive your property, including alternatives in case they die before you do.
- You can name a charity, a friend, or some other person or organization to receive some of your property. This can include those who wouldn't inherit from you if you don't have a will. For example, stepchildren don't inherit from you by law, but you can provide for them in your will.
- You can name someone you want to serve as the guardian of your children who are minors or disabled at the time you die. That person may be someone you want to have the custody and care of your children, or to handle whatever money or property your minor children inherit from you, or both.
- You may provide for a trust for the support and education of your children.
- You can provide for the payment of your debts that you owe at the time you die.

## What happens to my property if I die without a will?

If you die without a will (called "intestate"), the state laws control how your property is divided. This is true even if you told other people about who you want to have your property, or what your wishes are. Unless you have it in a written valid will, the state laws control. Those laws say that your property will go to your survivors in a very specific order of descent, which starts as follows:

- Surviving spouse. **However**, if you have children with someone other than your spouse, then only 1/3 of your estate goes to your surviving spouse, and the other 2/3 goes to all of your surviving children. If your children are not alive, then their 2/3 goes to their descendants.
- If there's no surviving spouse, then the whole estate goes to all your children or their descendants.
- If there are no surviving spouse or children, then to your parents or their heirs.
- If there are no surviving spouse or children or parents, then to your brothers and sisters or their descendants.
- And so on, through other branches of your "family tree."
- If there are no identifiable heirs as defined by law, at some point your estate may go to the state, but that is rare.

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## **If I have a will, does that mean there won't have to be a probate proceeding after I die?**

There may still need to be a court probate proceeding even if you have a will, so that your property can be distributed correctly, and so that any debts can be paid off.

### **What property is controlled by a will?**

Your will controls what happens with the property that's in your probate estate. Your "probate estate" includes most of the property you own at the time of your death, with some very important exceptions. The following paragraphs explain some of the property you own that may go to other people, regardless of what your will says.

If you own property "jointly with the right of survivorship" with someone else, whether it's your spouse or another person, then that property does not become part of your probate estate. It automatically passes to the other joint owner(s) rather than by the terms of your will. It depends on the wording in the documents by which you got joint ownership, for example, a deed. You should get advice from an attorney if you have questions about how your property is owned and who will get it after you die.

Joint bank accounts are usually set up in such a way that the money in the account will go to the other joint owner, rather than through the will. This may be true of a checking or savings account, a certificate of deposit, or other similar account.

When you establish a bank account, a CD, or an IRA, you may be given the opportunity to name a beneficiary of that account. This means that even though that person isn't a joint owner, when you die, the account would go to that beneficiary rather than by the terms of the will.

Another example of property that does not pass according to the will is life insurance. A life insurance policy names the beneficiaries who will get the proceeds when you die, so it's not distributed according to the will. It is possible for you to have a life insurance policy in which you name your estate as the beneficiary, rather than a particular person. In that case, the policy benefits do go into your probate estate and are distributed according to your will.

### **What are the requirements for a will to be valid?**

See the earlier section on "Who may make a will." In addition to those requirements, the following things must be done in order for it to be valid:

- It must be in writing.
- It must be signed by the testator (the person making the will).
- It must be witnessed by at least two people.

If you make a will, but it does not meet the requirements above, then it will be invalid and your property will be passed on as if you had no will.

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## **Who can be witnesses to my will, and what are they saying by signing as witnesses?**

Any person who would be competent to testify in court that the testator signed the will can sign as a witness. There is no requirement that a witness be over 18 years of age, but it is highly recommended, so as to remove doubt. A person may sign as a witness even if they are also someone who might inherit something from the will, but this is not recommended because it might raise questions about the validity of the will.

A witness who signs the will is only saying they know it is the will of the testator and that the testator signed it. The witnesses are not saying anything about whether the provisions of the will are proper, or whether it meets the other formal requirements. However, a witness to a will may be called to testify in court if there is a challenge based on the testator's competency. In that case, the witness would not testify about the testator's mental capacity, but would be asked to testify in general what they observed about the testator's behavior and statements at the time they signed.

## **Does my will need to be notarized?**

No, it does not need to be notarized in order to be valid, but it is highly recommended. If there's a proper statement of "acknowledgement," and the signatures of the testator and witnesses are notarized, the will is considered to be "self-proved." This means the witnesses do not have to go to court after the testator dies to testify that they witnessed the will. Their sworn statement at the time the will is signed is enough. The will is presumed to be valid if the signatures are properly acknowledged and notarized. So, having all signatures notarized will avoid work, time, and expense in the future.

## **Do I need an attorney to prepare my will?**

No, but it is highly recommended. As explained earlier, there are many laws that cover how your will needs to be done in order to be valid. You will want to make sure it's done right. An attorney can explain what may be included in your will, and the consequences of what you say in your will.

## **Can I handwrite my own will?**

Yes, but it is not recommended, because there may be questions as to its validity after you die. You can draft your will completely in your own handwriting. It's valid if you sign it and it's in your own writing. You should date it. It does not need to be notarized. It does not need to be witnessed. (Remember that a will that is not in your own handwriting does need to be witnessed.) If there is a probate of your estate, then the person who petitions the court for probate will have to prove that it's your handwriting.

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## **To whom may I leave my property in my will?**

You can leave your property to any person or organization you wish. If someone you leave property to is a minor, such as your children, at the time you die, then there may need to be a guardian appointed or a trust set up to manage that property until the person reaches adulthood.

## **Can I have a separate list of specific things that I want to go to specific people?**

Yes. Your will usually doesn't contain an itemized list of your property, but is more general in its terms. So you may want to have a written list of certain items you'd like to give to specific people. The list needs to be signed by you, but does not need to be witnessed or notarized. In order for it to take effect after you die, you need to refer to it in your will. This is called having it "incorporated by reference," which means the separate list essentially becomes part of your will. The separate list doesn't have to exist at the time you sign your will. You can mention it in your will and then prepare it later.

Do not try to use a shortcut method such as placing labels on items you want to go to certain people. That is not valid as part of your will, and may cause more confusion for your survivors.

Do not rely on telling people things you want them to have when you die. For example, do not simply say to someone: "when I die, I want you to have my grandfather's mantle clock." Instead, if that is what you want, either say that in your will, or include it in your separate list that is incorporated by reference in your will.

## **Can I disinherit my spouse by leaving him/her out of my will?**

No. The law says your surviving spouse can claim an "elective share" of your estate, even if they weren't named in your will. The amount they may claim is 1/3 of your estate if you have surviving children or their descendants, or 1/2 of your estate if you have no surviving children or their descendants.

## **Can I disinherit my children by leaving them out of my will?**

Yes. If that is your wish, you should specifically name them and state they are to receive nothing from your estate.

If you have children after you make your will but do not change your will, the law assumes leaving them out was an oversight and will allow them to take a share of your estate. So it is a good idea to update your will for situations such as this, so your wishes are made clear and are given full legal effect.

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## **What is an executor?**

The executor is the person you name in your will to take care of collecting and distributing your property, and paying your debts after you die, according to the provisions of your will. The executor is usually the person who will start the probate proceedings in court.

If you die without a will, the person who takes care of your estate and starts the probate is called the “administrator.” The duties are basically the same as those of an executor.

## **Who can be my executor?**

Anyone can serve as your executor as long as they are 18 or older. Many people choose a spouse or adult child, but it does not have to be anyone related to you. The executor may be a bank or trust department. Whoever you choose, it should be someone you completely trust, and who you believe has the ability to handle your affairs. You should talk with the person you want as executor before you do your will, to make sure they’re agreeable to it, and that they understand the responsibilities of an executor. You may want to get some advice from a lawyer as to what those responsibilities are before you talk to your intended executor.

You can name co-executors, who would share the duties. You can name an alternate executor, in case the primary executor is unable or unwilling to serve when the time comes.

## **Can I change my will if I change my mind, or if my circumstances change?**

Yes. You can change your will by signing a separate legal document called a “codicil.” A codicil must be written, it must be signed by you, and it must meet all the other requirements of a will. (*See above for the requirements.*) Your codicil should clearly say what parts of your original will you want to change, and anything you want to add to it.

Another option is to simply do a new will, rather than doing a codicil.

Do **not** try to change your will by writing changes on the will itself. That will raise questions later as to the validity of your will. Also, as noted above, any changes to your will must meet the formal requirements; writing changes on the will does not meet those requirements, so the changes would not take effect.

You should consult with an attorney if you want to change your will.

## **Can I revoke my will?**

Yes. There are several ways you can revoke your will:

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- You can do a new will, which includes a statement that you're revoking any prior wills you've made. If you do a new will, but don't specifically say you're revoking your prior wills, a court might still consider the earlier will to be revoked if your later will is very different from the earlier will. To remove doubt, you should clearly state in your later will that you're revoking the earlier one.
- A codicil to a will can state that you're revoking the earlier will instead of just changing it or adding to it.
- You can do a separate written statement (not a new will or a codicil) that says you're revoking your will. That statement must meet all the formal requirements of a will.
- You can revoke your will by physically destroying it or significantly defacing or striking out the words, as long as that's combined with some showing that it's your intent to destroy the will.

If you are revoking your will, it is a good idea to destroy the original and copies of your earlier will.

### **What happens if someone wants to challenge my will after I die?**

Your will may be challenged in court after you die by someone who has a possible interest in your estate. Some of the most typical claims are that:

- the testator was defrauded by someone else into making the will the way they did;
- the testator was the victim of undue influence by someone else, so that the provisions in the will were not made of the testator's free will;
- the will does not meet the formal requirements under the law;
- the challenger was not named in the will but the testator really intended to name them, or;
- the challenger was actually named in the will but the testator really intended to leave them more than the will provides.

The will can be challenged as part of the probate proceeding, or by a separate petition to the court within one year after the order of probate.

### **What if I was married at the time I made my will, left some of my property to my spouse, but then get divorced and don't make a new will before I die? Will my ex-spouse still get that property?**

No. The law assumes that you no longer want your ex-spouse to inherit from you. The divorce revokes the part of the will that included your ex-spouse. **However**, you can say in your will that you want your spouse to inherit from you even if you later get divorced, if that's your intent. If you do that, then your ex-spouse will inherit; otherwise, not.

### **Can I have something in my will to control who will have care and custody of my children after I die, if they're still minors at that time?**

You can appoint someone as guardian for your minor children in your will and express your wishes as to their future care. However, your appointment of the guardian does not take legal effect unless

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that person petitions the court and gets an order appointing them as guardian after your death. Your wishes stated in the will are not binding on the court, but they will be good evidence. The court will look at all the circumstances and decide what's best for the children.

### **Where should I keep my will?**

You should keep your will in a safe place, such as a lock box or a safe at home. Wherever you decide to keep it, the original should be easily accessible at the time of your death, especially for the executor. Some people choose to leave their will in a safe deposit box at a bank. That may present a problem if you are the only person authorized to have access to the box. When you die, your executor and heirs may have difficulty getting the will because the bank operates under legal restrictions as to who can have access.

You should give a copy of your will to your executor and notify your executor of the location of the original.

### **What should I do before drafting a will or before going to a lawyer to talk about getting a will prepared?**

The following steps will save time and make the drafting of your will easier:

- Make a list of the people you want to receive your property. Add to that list the names of any immediate family members whom you do not want to share in your estate.
- Make a list of all your assets, and who you want to get certain items.
- Make a list of your debts.
- Make notes of other things you'd like to accomplish by making a will.
- Write down the questions you want to ask the lawyer. This will help organize your thoughts, and it will help your lawyer to understand and advise you.

### **What is probate?**

Probate is the legal procedure in Circuit Court through which the provisions of your will are carried out. The executor is usually the one who will start the probate process. The first steps are to submit the will and a petition for the executor to be formally appointed. After the executor is appointed by court order, they have the legal authority and duty to inventory the estate, distribute the property, and pay the debts. When all of that is done, a final accounting is made by the executor and the estate is closed.

If the value of the estate is small, there may not be a formal probate proceeding. Instead, there is a simpler procedure for collecting and distributing the estate by affidavit. You should consult an attorney for help with this.

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