

# **LAST WILL AND TESTAMENTS**

## **GENERAL INFORMATION**

A will is a legal document you use to dispose of your property at your death. It may also name people to do important jobs, such as administrator of your estate or guardians for your children. The maker of the will is called the testator or testatrix (male or female respectively). To be valid, a will must comply with specific legal requirements. If you die without a will, the intestacy law of the state where you were domiciled at death will determine who should receive your property. Your domicile is the state where you are a legal resident and is not necessarily the state where you resided or lived before your death.

If you leave no valid will, the estate will be divided according to the "intestacy statutes." This generally means your spouse and child(ren) inherit your property or estate. If you die without a surviving spouse or child(ren), under State law certain other blood relatives receive the estate. This division can become complicated. These same laws also specify who will be in charge of the estate (called your personal representative or executor) and guides a judge in deciding who will be guardians for children. Little flexibility in these laws exists to provide for special needs or family security -- a good case for being sure to write a will.

Not everyone needs to create their own will. Many military members do prepare a will when they are married or have young children. Our Legal Assistance Office is available to help you determine if you should prepare a will.

## **FREQUENTLY ASKED QUESTIONS**

### **Who can make a will? When should I make my will?**

A person 18 or over, of sound mind, can make a will. These are the basic requirements, but other factors are important if the will is to be upheld. The person should be free of coercion and have an awareness of his or her immediate family (regardless of whether they're included in the will) and have a general understanding of the extent of his or her possessions. When you write a will is important. Writing a will under life-threatening situations invites litigation, so don't put it off until you're contemplating a trip, illness occurs, etc.

### **Can assets be given to whomever the person names?**

This is generally true, with two notable exceptions.

- In most States, the surviving spouse can choose to receive a fixed share of the estate regardless of what the will states. This may not apply if a spouse receives property by other means than the will, such as life insurance proceeds.
- Also in some States, a child born after the will is signed takes a share of the estate as if no will existed, unless it's made clear that the testator intended to exclude the child.

### **Can I change my will?**

Yes. You may change your will, in whole or in part, as long as certain conditions are met. An amendment is called a codicil. Requirements for a codicil are the same as for writing the original will. Changes should never be made by writing on the will. Frequently, a will is changed because the person has changed his mind about how to divide personal property. In some States, to change this, you don't have to write a new will or a codicil. You can use a memorandum disposing of personal property. It's a simple document that doesn't require the formalities of a will. This can be used only if the will specifically refers to the use of such a memorandum. Discuss this with a legal assistance attorney to be sure your desires will be effective. Most of the time it is better to prepare a completely new will.

### **Does a will dispose of all property?**

No. Certain types of assets pass automatically at death according to statute (such as joint tenancy) or according to beneficiary designations (such as life insurance).



**U.S. Coast Guard Legal Assistance Office**  
**Maritime Law Enforcement Academy, South Carolina**

### **What else does a will do besides distribute property?**

Through a will, you can nominate who will be the personal representative (administrator, executor) of your estate. You can set up a trust for long-term management of assets and the protection and security of your surviving family members. You can select the guardian of minor children, although there are some restrictions. Even if you intend to leave your estate to the same people who would receive it under the intestacy laws, a will can simplify administration and allow for different distributions. A well-drafted will can often reduce the time and expense of administering an estate.

### **If I want my entire estate to go to one person, perhaps my spouse, can I use joint tenancy instead?**

I have heard this avoids probate. Joint tenancy is frequently used between spouses and also between other family members (for instance, putting a bank account in two names). However, the blanket use of joint tenancy for all assets may not be right for everyone. It may cause unintended tax consequences or expose one joint tenant to the creditors of another. Consult your legal assistance attorney before you decide to use joint tenancy instead of a will.

### **What happens to my will if I get divorced? If I get married?**

If you get divorced after you've written a will: under some State law, a spouse named in a will is automatically eliminated as a beneficiary when the divorce is final, but only for those assets passing under the will. If you marry after you've written a will: your spouse receives the same share he/she would have received without a will unless the will makes clear that the omission was intentional or if the spouse was provided for outside the will. An intentional omission doesn't change the rights of the spouse to take a fixed share unless such rights have been relinquished in a marital agreement. You should discuss a change in your marital situation with a legal assistance attorney to evaluate whether you need to change or prepare a will.

### **Can I save taxes by using a will?**

This depends on the size of the estate and other factors. But a will has the potential to save taxes when properly prepared. It can also reduce taxes in future generations, if not in the present generation. It's a common misunderstanding that "avoiding probate" saves taxes. Probate and taxes are separate matters.

### **If I have a will and don't want any changes, is there any reason to have it reviewed?**

#### **Do I need to change it if I move or change my domicile?**

Because of changes in State law and federal tax law, it is usually wise to have a legal assistance attorney review your will periodically - especially whenever your marital or family status changes or you are considering changing your will. Under State law, a will is valid if it was valid where it was signed, even though the will would not be valid if it was signed in the State you move to. Most states have this same type law, so your will would not be invalid in another state. Still, it is smart to have your will checked when you move because of factors that could affect a will, e.g., community property states, differing rules about the disposition of personal versus real property, local rules affecting marital rights, etc.

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

Most States generally recognize wills that are handwritten and signed by the testator; these are known as holographic wills. Still, the drafting of a will does require special skills and it would be prudent to have this done by an attorney. Holographic wills are frequently ambiguous or defective, inviting delay, expense and litigation.

***Disclaimer:** This document has been prepared for informational purposes only and does not represent the legal advice of an attorney or other representative of the legal assistance office.*



**U.S. Coast Guard Legal Assistance Office  
Maritime Law Enforcement Academy, South Carolina**