

WILLS

What is a will? How do you create one? What happens if you don't have one? What are the advantages and drawbacks of a will? What should you see in your will?

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WHAT IS A WILL?

A will is a legally enforceable document that describes how you wish your property to be distributed after your death. A court will ensure that the directions that you make in your will are carried out.

When you support a person with a disability, a will serves as a tool to help you continue to provide for that person after your death, much as you did before your death. Through a will, you may provide financial support, property, a recommendation for a guardian, and more.

HOW DO YOU CREATE A WILL?

There are several ways to create a will. You may create a will by completing a pre-printed will form that you purchase from an office supply store. You may buy a book or search the Internet for instructions on how to create a will and create your own will. You may also have an attorney create a will for you.

When you support a person with a disability, it is advisable to have an experienced attorney create your will. To be legally enforceable, a will must be created according to state law. An attorney, and more specifically a *probate attorney*, is an expert in the law of wills and can ensure that your will is legally enforceable. You should also engage a probate attorney with experience in planning for someone with a disability.

If you support a person with a disability, it is likely that you have a much more complicated situation than if you did not. For example, if the person receives or is likely to need public benefits, such as Medicaid, public benefit eligibility should be considered when planning; an attorney with knowledge and experience in public benefit law can help address this situation.

HOW MAY THE RECEIPT OF PROPERTY AFFECT THE PERSON WITH A DISABILITY?

When you create a will you must consider how the receipt of property— whether money, personal items or real estate — will affect the person with a disability. This consideration makes it especially important that you engage an attorney who is knowledgeable about planning for a person with a disability. When you leave property outright to the person, the following may happen.¹

1. As the result of too many assets, the person may become ineligible for public benefits, such as Medicaid or SSI. If ineligible, he or she will be forced to deplete or spend down the assets left by you before becoming eligible again for public benefits.
2. The person may not be able to manage the inherited property and a guardian, not of your choosing, may be appointed to do so.

¹ See *Alternatives, A Family Guide to Legal and Financial Planning for the Disabled* by L. Mark Russell.

3. If the person is not competent, and therefore unable to create a valid will of his or her own, the probate court will determine the distribution of the property that remains at the person's death.
4. The State of New Hampshire may seize the property as a reimbursement for payments that the State previously made for the person under the State Financial Assistance or Medicaid programs.
5. Creditors of the person may seize the property.

An experienced attorney can help you with these matters.

HOW DOES YOUR WILL WORK FOR YOU?

Upon your death your *executor* begins the *probate* of your will. The executor is the person that you name in your will to represent you and carry out the provisions of your will. Probate is a proceeding in which the probate court establishes your will as a valid will. Within 30 days of your death, your executor will file papers to begin probate proceedings in the probate court. Your will remains in probate for 6 months. During this time, any party may challenge your will. (You should note, however, that not everything is put "on hold" during the probate period. During the probate period, the court may appoint a guardian for the person with a disability, if a guardian is necessary.)

The role of your executor is important. Your executor will act as the liaison between your estate and the probate court and manage the administration of your will. In the performance of these duties, the executor must use utmost care when carrying out all duties. In the following order, your executor will: (1) collect and manage the estate; (2) settle and pay your debts; and (3) according to the provisions of your will, distribute the remaining assets. If the executor wishes, he or she may employ an attorney to perform these duties.

MUST ALL OF YOUR PROPERTY GO THROUGH PROBATE?

The probate proceeding does not apply to all of your property. Non-probate property is property over which the probate court has no authority and includes life insurance policies, retirement benefits, property held in joint tenancy, trusts created during your lifetime, and gifts made by you during your lifetime. Non-probate property may be distributed immediately or in accordance with any distribution provisions that you made. These are often referred to as alternative ways of leaving property rather than leaving the property by will.

WHAT HAPPENS IF YOU DO NOT HAVE A WILL?

When you do not leave a will or you do not leave a will that is valid under the law, the probate court will step into your shoes. When there is no will, there is no executor named to represent you. Therefore, the probate court will appoint a personal representative, known as an administrator, to administer your estate.

Since the administrator has no will to direct the distribution of your property, the administrator must follow the distribution scheme outlined in New Hampshire law.

If you are survived by your spouse, your spouse receives:

- The entire estate, if you leave no surviving children, grandchildren or parents;
- The first \$50,000 plus one-half of the remainder of the estate, if—
 - You have one or more surviving parents but no surviving children or grandchildren;
 - You have surviving children or grandchildren and all are also children or grandchildren of your surviving spouse;
- One-half of the estate, if there are surviving children or grandchildren and at least one is not a child of the surviving spouse.

The remainder of the estate that does not pass to your surviving spouse or the full estate, if you have no surviving spouse, passes to the first surviving of the following:

- Your surviving children or grandchildren;
- Your parents;
- Your brothers or sisters and the children of your deceased brothers and sisters;
- The children of your brothers and sisters;
- Your grandparents;
- The children of your grandparents;
- The State of New Hampshire.

Notice that in this distribution scheme, there is no accommodation for the care of a person with a disability or for the preservation of his or her public benefits. If you do not make a will or other provisions for him or her, the probate court will make no special accommodations for the person with a disability.

WHAT ARE THE ADVANTAGES AND DRAWBACKS OF HAVING A WILL?

Each person has a unique set of circumstances and property. Therefore, each person must design a will, or select appropriate alternatives to a will, to meet their unique needs. In this process you should consider the advantages and drawbacks of a will.

Advantages of a will—

- You may designate to whom and how your property is distributed after your death.
- You may select the person (executor) who will administer your estate.
- You may create a testamentary trust for the person with a disability and name a trustee for that trust.
- You may leave funds and other assets to an existing trust for the person with a disability.
- You may nominate a guardian for the person with a disability for the court to consider when making a guardianship appointment.
- You may receive tax benefits by transferring property through a will or an associated mechanism, such as a trust.

There are drawbacks to a will. Probate may become time-consuming and expensive. Federal and state tax consequences may make passage of some property through a will less beneficial.

Alternatives to a will include leaving non-probate property, such as, life insurance benefits, retirement benefits, property in joint tenancy, trusts created during your lifetime, or property gifted by you during your lifetime. Joint tenancy between spouses, for example, may be very appropriate for a small estate, allowing for immediate passage (no probate) to your surviving spouse.

WHAT SHOULD YOU EXPECT TO SEE IN YOUR WILL?

In a nutshell, New Hampshire law requires that to be a valid and legally enforceable will the will must be:

1. Made by a person 18 years of age or older and of sane mind;
2. In writing;
3. Signed by the person creating the will (the *testator*); and
4. Signed by 2 or more witnesses.

When the will and these steps are completed, the will is complete or *executed*. However, the will is not final and enforceable until the death of the maker.

Your attorney should give you a rough draft of your will to review prior to your signing it. The list below outlines the different types of provisions that are commonly found in a will. Check the draft to be sure that it has all the provisions that you expect and that it is clear. The final copy of your will should have no erasures or corrections. Finally, make sure that you and at least two witnesses sign the final copy.

Common Will Provisions

- Statement of your intent to make a will
- Revocation of prior wills
- Provision for payment of debts
- Instructions for a funeral and burial
- Specific gifts of money or property
- Residuary clause (property remaining after all the gifts are made)
- Appointment of an executor and a back-up
- Recommendation of a guardian for the person with a disability
- Simultaneous death provision (for spouses)
- A trust
- Signature statement and your signature
- Witness statement and witness signatures

After you create a will, you may modify it by creating a *codicil* or *revoke* it when your situation or wishes change. You should periodically review your will to ensure that it continues to be appropriate and meets your wishes. You should also review your will when you experience significant life changes, such as a marriage or a divorce.

If you want to make a small change in your will, you may do so by creating a *codicil*. A *codicil* is an addition to a will that may modify or revoke a provision in your original will but does not entirely cancel the original will. It is important that you ask your attorney to draw up a *codicil*; the law requires that the *codicil* be created with all the legal formalities of a valid will.

If you want to make substantial changes to your will or cancel the will all together, you may revoke your will. A *revocation* makes the will inoperative. You can revoke your will in any number of ways. You may, for example, burn it, shred it, or write “revoked” or “cancelled” across it. It is best to destroy a revoked will.

You should keep your will in a safe and accessible place. You should not keep your will in your safety deposit box if no one else will have access to the box. When you die, your bank may seal the safety deposit box pending the probate of your will.

You should leave any papers that may affect what is done after your death with your will. For example, you should leave your Letter of Intent for the person with a disability with your will. Although the Letter of Intent is not legally binding, it will inform the probate court of your wishes and help the court to make decisions regarding the person with a disability.

The Checklist for Wills and Estate Planning found at the end of this volume, contains a checklist of items that your attorney should know when preparing a will and planning your estate. Terms related to wills and their definitions are found on the following page.

TERMS RELATED TO WILLS

Administrator: The personal representative appointed by the probate court to administer the estate of an individual who dies without a will.

Codicil: An addition to an existing will that modifies or revokes provisions in the will.

Distribution Scheme: The plan of distribution of the remainder of the estate, after payment of debts, to those legally entitled to the remainder.

Estate: All of the property owned by a person. "Estate" includes personal property and real estate.

Execution of Will: The writing, signing, and witnessing of a will.

Executor: The personal representative named in a will to represent and administer the estate after the death of the maker of the will.

Fiduciary: A person with the duty of utmost loyalty and trust and the duty to act in good faith, all for the benefit of another person.

Intestate: Without a will.

Joint Tenancy: The equal ownership of property (personal property or real estate) by two or more persons with right of survivorship.

Personal Property: All property that is not real estate. Personal property includes clothing, household items, money, life insurance and more.

Probate Court: A court having jurisdiction over the probate of wills.

Probate: A proceeding in which a court establishes a will as a valid will.

Real Property: Real estate or realty.

Residuary Clause: A clause in the will that disposes of the residue of the estate.

Residue: The remainder of a deceased person's estate after all debts of the estate are paid and specific gifts are made.

Revocation of will: Annulment of an existing will by an act of the maker of the will.

Testamentary: Having to do with a will.

Testate: Having made a valid will.

Testator: The maker of a will.