

# Answering your legal questions about wills/estate planning

While you're living and healthy, you value being able to make your own decisions about your finances, property, health care, and raising your children. Should you die or become incapacitated, you hope others will handle these matters for you according to your wishes.

The only way to assure that will happen is through estate planning. This process involves weighing various personal and financial decisions and creating legal arrangements to carry out those decisions. This brochure looks at key estate-planning tools: wills, living trusts, powers of attorney, and living wills.

## What is a will?

A will is a written document that allows you to designate:

- who will receive your estate (your property that does not pass by beneficiary designation or joint ownership arrangement; see more below) after you die;
- who will raise your children if you die while they're still minors, and your spouse is unavailable to care for them;
- whether your beneficiaries receive their inheritance outright or in a trust; and
- who will serve as your personal representative – that is, the person who will pay your bills and taxes and distribute the rest of your estate to your beneficiaries. (For more on personal representatives, see the State Bar of Wisconsin's pamphlet, "Probate.")

## When should I write a will?

If you have accumulated some assets, and you care who will receive those assets after you die, it's time to write a will.

Anyone with minor children definitely should have a will. In it, you can name the person you want to raise your children, should something happen to you and your spouse. Discuss this carefully with the prospective guardian, to be sure he or she is up to the job. Also, name an alternate guardian in your will as a backup.

On the other hand, if you're a young adult, have no children, and own few possessions, you probably don't need a will yet. The state would distribute your possessions to your parents. But if you'd rather leave your car to your girlfriend, or your prized Spider Man comic book collection to a favorite nephew, then a simple will is a good idea.

## What if I die without a will?

In this case, the court appoints a personal representative who distributes your entire estate to your surviving spouse or registered domestic partner – unless you have children from outside your current marriage. In that case, your spouse or registered domestic partner retains half the marital property and receives half your individual property, with the rest of your estate split equally among all your children, from this marriage and outside it. (See also the State Bar of Wisconsin's pamphlet, "Marital Property.")

If you have no spouse, registered domestic partner, or surviving children or descendants of children when you die, your estate goes to other surviving relatives. State law lists the order of inheritance as follows: parents, brothers and sisters, nieces and nephews, grandparents, and descendants of grandparents. The state school fund receives your assets if you leave no heirs closer than the descendants of your grandparents.

This pamphlet, which is based on Wisconsin law, is issued to inform and not to advise. No person should ever apply or interpret any law without the aid of a trained expert who knows the facts, because the facts may change the application of the law. 9/09



If you leave behind minor children and have named no guardian in a will, a court must choose a guardian. Ask yourself: Is that a decision you want someone to make for you?

Having a judge decide who will raise your children can be emotionally wrenching for other family members. Also, court-supervised guardianships entail extra costs. Avoid the upset and expense by naming a guardian in your will.

Finally, bear in mind that if you have no will, the court will appoint a personal representative to administer your estate. Having a will allows *you* to choose this person. Also, you can stipulate in your will that the personal representative need not post a surety bond, thus saving money for your estate.

## What types of property pass to your beneficiaries outside of a will?

These include:

- Survivorship marital property – goes directly to a surviving spouse. An example would be a house that has both spouses' names (and only their names) on the title.
- Property that is jointly owned – goes to the surviving owner(s).
- Life insurance proceeds and funds in IRAs and other retirement plans – go directly to beneficiaries you listed on the appropriate forms.
- Transfer on Death (TOD) and Payable on Death (POD) assets and accounts – go directly to the beneficiaries named on the account or deed.

If all your property falls into the above categories, *and* you have no minor children, you might think you have no need for a will. You may be right. On the other hand, a will may still be wise.

For example, you and your spouse, the other joint tenant, or your beneficiary could die at the same time or that person could die before you. A will would enable you to name alternate beneficiaries. Also, you could save on estate taxes, thus leaving more to your beneficiaries, by using a will to set up a trust.

### **What makes a will legal?**

To be valid, your will must be in writing, and you must date and sign it. At least two witnesses also must sign the will. They can do this after they watch you sign it. If they weren't present then, you can state to them that the signature is yours, and then the witnesses can sign. The witnesses should not be beneficiaries named in the will or your heirs as designated by law.

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

Yes, if you comply with all the above-mentioned requirements to make your will valid. But if in creating your will, you encounter any questions or complexities you don't understand, it's a good idea to see your attorney. Remember, this document must spell out all the conditions for transferring your assets. And, if you have minor children, it names their guardian.

A will is an important document. You'll want to be sure it correctly expresses your wishes and that it's legally enforceable. A lawyer can give you advice about not only your will, but also other aspects of estate planning you might otherwise overlook. We'll discuss some of those later.

### **How does someone challenge my will?**

A person can attempt to prove in court that:

- you were under duress or undue influence when making your will;
- you were incompetent or unable to understand the results of your will when writing it; or
- your will does not meet the requirements that make it valid, as listed earlier.

### **How can I change my will?**

You have two options. You can simply write a new will, which automatically replaces an older one. Or you can add a supplement, called a codicil, to your existing will. For a codicil to be valid, it must satisfy the same legal requirements as those mentioned for a will.

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

Place your will where it's safe from theft, fire, or other damage. A safe-deposit box is one possibility. You also may deposit it with the register in probate for your county.

Be sure your personal representative knows where your will is. Some people also give a copy to their personal representative. You'd want to do this, for instance, if you include funeral preferences in your will. Usually the reading of a will doesn't happen until after a funeral. So you'd want your personal representative to have a copy on hand, to be able to carry out your funeral wishes.

### **Is a will written in another state legal in Wisconsin?**

To be valid in Wisconsin, the will must comply with the laws of one of the following: Wisconsin, or the place where you properly signed your will, or the place where you lived when you properly signed your will.

Be aware, however, that Wisconsin has a marital property law and a same-sex domestic partnership law. If your will is from a jurisdiction with no such laws, you should have an attorney review your will. That way you can assure it still achieves the results you intend.

### **What is a trust created by a will?**

You can use your will to create a trust upon your death. The trust holds your property for another person's benefit. For example, a trust may provide an income for your spouse. Or it can hold property for your minor children until they become adults.

You name a trustee to oversee the trust. The trustee can be either a trusted individual (a friend, relative, or professional advisor) or a financial institution (a bank, brokerage firm, or trust company). The trustee is responsible for protecting the assets, paying out income earned, and terminating the trust as your will instructs.

### **What is a living trust?**

You can create a living trust to control your property while you are alive. The trustee then would control your property after you die. Under this arrangement, you sign documents to give your property to the trust. As long as you're living, the property usually is treated the same for tax purposes as if you still owned it.

An advantage of a living trust is that property can pass to heirs after you die without going through probate. A drawback is that buying, handling, or selling assets held in a living trust may be more cumbersome while you're alive. Ask your attorney how a living trust would affect your property.

For more information, see the State Bar of Wisconsin's pamphlet, "Revocable Living Trusts."

### **If I have a living trust, do I still need a will?**

Yes. A will would be important for several reasons. You may have property that never got transferred to your trust while you were alive. You would need a will to transfer that property to your trust after your death. Or your estate might receive money after your death. For instance, if your death was the result of an accident, your estate may receive wrongful death benefits. Again, you would need a will to transfer this money to the trust.

You also need a will in order to name a personal representative and a guardian for your minor children. That's not part of setting up a living trust. A personal representative can take certain actions on behalf of your estate that a trustee cannot, such as pursuing a wrongful death claim.

### **What is a durable power of attorney?**

This authorizes another person, called an agent, to act for you in financial matters. The agent's rights to act on your behalf depend on what you say in your durable power of attorney document. These rights might include the authority to sign legal documents, pay bills, buy and sell real estate, and take other actions on your behalf. Choose a person you trust absolutely.

A durable power of attorney can take effect in one of two ways. If you wish, it can take effect immediately. Or you can provide that before the durable power of attorney takes effect, two physicians must state, in writing, that you are incapable of handling your affairs. The latter is called a "springing" durable power of attorney.

A durable power of attorney ends at your death. Your agent retains no further authority to handle your finances. If you want your agent to settle your financial affairs after you die, you need to name that person as your personal representative in your will.

### What is a durable power of attorney for health care?

This arrangement gives your agent the authority to make health-care decisions for you when you're unable to make them yourself. This is a heavy responsibility for anyone to assume. Be sure you discuss your health-care preferences with your agent, so he or she knows what you'd want. This makes the agent's job much less difficult during what may already be a stressful time.

To create a durable power of attorney for health care, you can use the standard state form. Or, an attorney can create an individualized document for you. Either way, a durable power of attorney must meet specific requirements for it to be valid.

### Can I have the same agent for both finances and health care?

Yes, one person can serve as both. If you feel you need to name two different agents, be sure they can work together. This would avoid a situation, for instance, in which your agent for finances could interfere with health-care decisions by refusing to pay certain medical bills.

### What is a living will?

A living will is a separate legal document, not a part of your will. And, it's not the same as a durable power of attorney for health care. The latter allows your agent to make health-care decisions for you. A living will, on the other hand, allows you to state in writing your preferences about life-prolonging medical treatment.

In a living will, you can declare that you wish medical professionals to withhold or withdraw life-sustaining procedures or non-orally ingested food and water – *if* you are in an incurable condition, or you're near death, or you're in a persistent vegetative state.

Your living will takes effect only when you become incapacitated, cannot speak for yourself, and there's no hope for your recovery.

Your durable power of attorney agent also can make these sorts of end-of-life health-care decisions for you, if you grant that power. If you have both a living will and durable power of attorney for health care, the latter rules if there is any conflict between the two.

The current law regarding living wills went into effect Nov. 25, 1991. If your living will was written before then, you should have your attorney review it to be sure it still expresses your wishes.

For more information on durable power of attorney for health care and living wills, see the State Bar of Wisconsin's pamphlet, "Health Care." ◀

This is one in a series of consumer information pamphlets sponsored by the State Bar of Wisconsin's Communications Committee and produced by the Communications Department. Single copies are available by sending a self-addressed, stamped envelope with your request to: Public Information Pamphlets, State Bar of Wisconsin, P.O. Box 7158, Madison, WI 53707-7158. These titles also are available for viewing on the State Bar's consumer Web site, LegalExplorer, at [www.legalexplorer.com](http://www.legalexplorer.com).

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