LAST WILL AND TESTAMENT

Resource:

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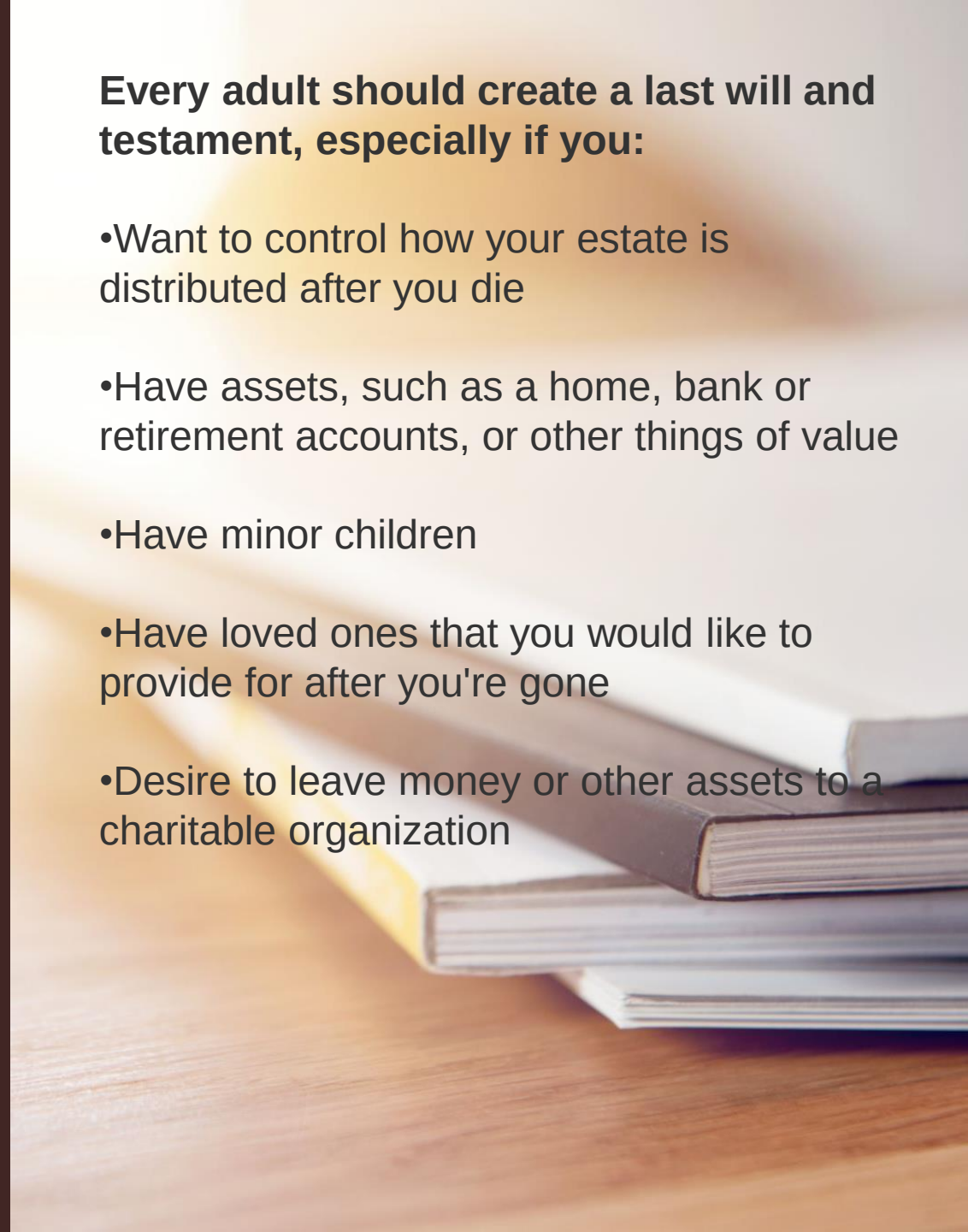
INTRODUCTION

A Last Will and Testament is a legally binding document that allows you to designate how your property will be distributed upon your death, who will serve as guardian of your minor children, and who will settle your estate upon your death.



Every adult should create a last will and testament, especially if you:

•Want to control how your estate is distributed after you die

•Have assets, such as a home, bank or retirement accounts, or other things of value

•Have minor children

•Have loved ones that you would like to provide for after you're gone

•Desire to leave money or other assets to a charitable organization

DYING WITHOUT A LAST WILL AND TESTAMENT

If you die without a Last Will and Testament, state laws will determine how your estate is distributed and who receives your assets.

Creating a Last Will and Testament

The testator (person who creates the will), must be of sound mind in order to create a valid will. You should know the nature and extent of your property, appreciate the legal effect of creating a will, and understand who will inherit your property when you die. The testator should also be free from any outside pressure to create a will or include a specific beneficiary

Creating a Last Will and Testament

Once the Last Will and Testament is complete, the testator should sign the will in the presence of at least two witnesses (three is recommended). These witnesses must also sign the will in the testator's presence. Your witnesses should not be anyone related to you by blood, marriage, or adoption, anyone who would stand to benefit from the Last Will and Testament, or anyone under 18 years of age

Creating a Last Will and Testament

Upon signing your Last Will and Testament, in most states you can also sign a self-proving affidavit, a sworn statement signed by the testator and his or her witnesses that attests to the Last Will and Testament's validity. When a will goes through probate, the executor has to prove the validity of the will to the probate court. However, if you execute and attach this affidavit to your will, it does not need to be proved to the court. It also prevents your witnesses from having to testify to the will's validity.

Leaving Property to Others

The people or entities that you leave property to in your Last Will and Testament are called beneficiaries. You can give all or part of your estate to one or more beneficiaries. People typically consider leaving all or part of their property to their spouse, children, grandchildren, and favorite charitable organization.

In a typical will, there are two types of gifts, specific gifts and general gifts. Specific gifts, which leave a particular item or sum of money to someone, are optional but they are the first gifts that are bestowed from a Last Will and Testament. A general gift leaves a percentage of all that remains after the specific gifts are made. Finally, when a gift is made in a will, it is a one-time transfer of property without any conditions.

Debts

Upon death a person's property is first used to pay for probate and funeral expenses, then to pay debts. Generally, all debts must first be paid before any assets are distributed. Your outstanding credit card balances, for instance, will be paid before gifts are distributed to your heirs.

A major exception to this general rule is for secured debts such as home loans or auto loans. In the case of secured debts, property can be distributed with its debt but it will be the beneficiary's obligation to pay off the loan

Minor Children and Guardianships

Naming a guardian for minor children is one of the most important aspects of your Last Will and Testament. Guardians are responsible for a child's health, education and other daily needs. In most cases they are also responsible for managing a child's property.

Your Last Will and Testament gives you the right to nominate guardians for your minor children. However, your named guardians will still need to file papers with the court in order to request approval of your nomination. If you fail to include a guardianship nomination in your Last Will and Testament, the probate court will make its own appointment.

Typically, if one parent dies, the surviving parent will remain responsible for the children. However, complications arise if both parents die simultaneously, or if one parent has re-married. Unless you name guardians for your minor children, the court decides who takes custody of the children in those situations.

Gifts to Minor Children

Under the Uniform Transfers to Minors Act (UTMA), you can appoint an adult custodian to manage property left to minor children. Most states require the designated custodian to manage a child's inheritance until the child reaches age 21. However, California, D.C., Kentucky, Louisiana, Maine, Michigan, Nevada, Oklahoma, South Dakota, and Virginia allow a custodian to distribute inherited property once the child reaches 18 years of age. Vermont and South Carolina are the only states that have not adopted the UTMA, and therefore do not have this custodian option.

If you would like to set aside money or other assets in your estate for your child for longer than the UTMA allows or if you live in a state that does not have a UTMA, EstateGuidance.com gives you the option to include a testamentary trust clause in your will. A testamentary trust allows you to appoint someone to manage property left to minor children until such child reaches a specified age

Marriage and Divorce

It is advisable to create or re-write your Last Will and Testament upon getting married or divorced.

If you get married after making your will and do not rewrite it, your new spouse will automatically get a share of your estate.

Divorce automatically revokes any gift provisions to your now ex-spouse. However, this only applies to a Last Will and Testament written before your divorce. If you create a Last Will and Testament after the divorce is finalized and leave all or part of your property to your ex-spouse, that ex-spouse will still be able to inherit under the subsequent Last Will and Testament.

If you are unmarried you will need to create a Last Will and Testament in order to leave any property to your partner after your death.

Unmarried Domestic Partners

There is a widely held belief that if you live with your partner for a certain period of time, usually seven years, then you are common-law married. However, this is not the law in any state.

Only a few states legally recognize common-law marriage. The statutes in these jurisdictions vary on specific common-law marriage requirements. However, you must satisfy all of the following criteria in order to establish a common-law marriage:

- You and your partner have an express mutual agreement to be married;
- You live together with your partner in a state that recognizes common law marriage;
- You have lived with your partner for a substantial length of time; and
- You and your partner present yourselves to the community as a married couple. This can be accomplished by referring to your partner as your “husband” or “wife,” using the same last name, or by filing joint income tax returns.

Unmarried Domestic Partners

States that recognize common-law marriage typically grant inheritance rights where one partner dies without a Last Will, and the surviving partner can prove that a common-law marriage existed. States that do not recognize common-law marriage may grant a surviving partner inheritance rights, but only if you spent time as a couple in a state that recognizes common-law marriage. Since the laws around common-law marriage vary from state to state, it is critical that you specify how your estate will be distributed and who will receive your assets.

In order to ensure that your partner inherits your property, you will need to create a Last Will and Testament. The instructions you leave in your Last Will and Testament will be followed regardless of your state’s laws about common-law marriage.

Choosing a Legal Representative

Also known as an executor, administrator, or personal representative, a legal representative is the person responsible for managing the testator's estate after death. Some of the legal representative's responsibilities include: distributing property to beneficiaries, paying valid claims of creditors, starting the probate process, and closing credit card and bank accounts.

Ideally, you should pick a younger friend or family member who you believe will honestly and effectively carry out your final wishes. You may want to discuss the responsibilities with the individual before making your selection. However, if you are not comfortable naming a specific individual, you may name professional fiduciary like a bank, trust company, or attorney to administer your estate. Also, in some states a convicted felon cannot serve as a legal representative.

When you appoint your legal representative, you should also name an alternate in the event your first choice is unable or unwilling to serve. If you do not name an alternate and your legal representative cannot serve, one will be appointed by the court

Probate

Probate is the legal process that formally appoints the executor and/or guardian, determines how your property will be distributed, and transfers title of solely owned property into the names of your beneficiaries. Many states have a simplified probate procedure for "small estates" valued under a particular dollar amount. The simplified probate process takes significantly less time than a complete probate administration

Avoiding the Probate Process

The probate process formally transfers title of solely owned property into the names of your beneficiaries. In general, only assets solely titled in your name need to pass through probate. This includes real property and any other accounts solely titled in your name.

However, there are many ways to avoid probate and ensure that your property passes directly to your beneficiaries:

- **Joint Ownership of Property:** Any property held jointly with right of survivorship automatically passes outside of probate to the surviving owner(s).
- **Beneficiary distinctions:** Life insurance policies, IRAs, and retirement benefits can pass outside of probate and directly to your named beneficiaries.
- **Payable-On-Death (POD) Accounts:** You can add POD beneficiaries to any of your existing bank accounts and CDs. The money in your account(s) will avoid probate and go directly to your named beneficiaries.

Avoiding the Probate Process

•**Transfer-On-Death (TOD) Deeds & Registrations:** Some states allow vehicle registrations to have TOD beneficiaries as well. A few states also permit TOD real estate deeds. This type of deed does not take effect until your death. The property will avoid probate and transfer to your named beneficiaries.

•**Revocable Living Trust:** A living trust allows you to transfer ownership of all, or some, of your property to your trust. During your lifetime, you will still be able to control any property you place in trust. Any property contained in your trust will avoid probate and go directly to your named beneficiaries. If you would like to change any beneficiary distinctions, add or remove property from the trust, or completely revoke the trust, you may do so at any time. You may wish to consult with an attorney in order to create an effective and legally valid trust document.

REVISING OR REVOKING YOUR LAST WILL AND TESTAMENT

Once your Last Will and Testament is complete, make a habit of re-reading it at least once per year, if not more often. You'll want to update your Last Will and Testament if:

- You get married or divorced
- You have a new child, through birth or adoption
- A family member or other beneficiary of your estate dies
- The individual named as executor, trustee or guardian dies or is unable to act as such
- You decide to name someone else as your executor, trustee or guardian
- The size of your estate changes significantly
- You move to another state
- There are changes in federal or state laws that could affect your will or estate

REVISING OR REVOKING YOUR LAST WILL AND TESTAMENT

You can make amendments to your will by creating a separate document called a codicil. However, this document must also be signed and witnessed just like the original Last Will and Testament. Because of the potential complications that can arise when a codicil is created, revising your will on EstateGuidance.com is often times the simplest solution.

You can revoke a Last Will and Testament by physically destroying the document. You can burn it, tear it, or shred it to pieces as long as you do so with the intention to destroy it. The easiest way to revoke a Last Will and Testament is by simply creating a new one. Your new Last Will and Testament should include language that reflects your desire to revoke any previously executed wills.

Making your Last will and testament Legally Valid and Enforceable

You will need to sign and date your Last Will and Testament in the presence of three qualified witnesses. The presence of three witnesses will insure the validity of your Last Will and Testament in case one witness is later determined to be disqualified. Your witnesses should not be:

•Anyone related to you by blood, marriage, or adoption

•Anyone who would stand to benefit from your Last Will and Testament

•Anyone under 18 years of age

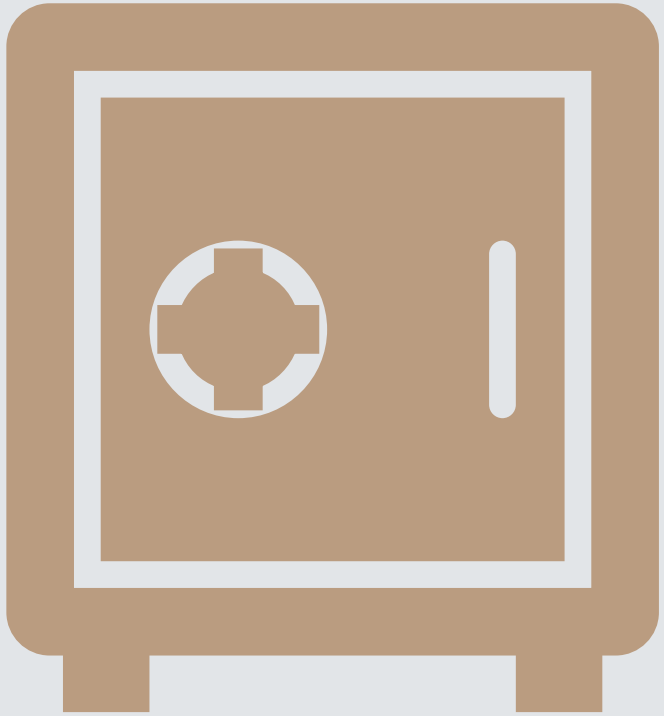
Making your Last will and testament Legally Valid and Enforceable

Tell your witnesses that you intend for this document to be your Last Will and Testament. Initial and date the bottom of each page. Sign and date the last page of your Last Will and Testament while the witnesses watch. Your witnesses should also sign in the designated areas of the signature page to your Last Will and Testament. They should state that they understand this document serves as your Last Will and Testament.

Although not required, it is advisable to complete the Affidavit of Execution (attached to the end of your Last Will and Testament), which makes it easier for the court to prove the validity of your Last Will and Testament in probate. To complete the Affidavit of Execution, you will need to sign it in front of three witnesses and a notary public. While you have all three witnesses gathered together with the notary, you should sign both your Last Will and Testament and the Affidavit of Execution. Currently, California, the District of Columbia, Maryland, Ohio, and Vermont do not recognize Affidavits of Execution.

Storing Your Last Will and Testament

Placing your original will in a safe deposit box is a common solution. However, you should name at least two joint registrants who will have access to the safe deposit box after your death. Other possibilities include keeping your Last Will and Testament in a fireproof lock box or in a filing cabinet at home. Your executor and at least one beneficiary should know where either the cabinet or lockbox and key are located.



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Create your own free will online at www.freewill.com and show documentation to receive a $50 gift certificate to our ReStores in Inverness or Crystal River.

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