Write Your Will: *No More Procrastination*

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CITIZENS LEGAL GUIDE

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AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM

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Estimates vary, but studies show that many of us, regardless of income level, are dying without a will. A 2004 nationwide survey conducted by one of the largest financial advisors in the country found that many affluent Americans have not taken the necessary steps to plan their estates. This PNC Advisor's survey found that more than one-third of the nation's wealthiest individuals do not have wills, health care proxies or trusts, nor have they named trustees or administrators for their estates. Procrastination is the excuse most cited by the survey respondents who do not have a will. Twelve percent say they do not want to confront their own mortality.

But if you die without a will (known as dying *intestate*), the state gets to decide who will get your property, who will act as your personal representative and who will be your children's guardian. Under state intestacy laws, your joint property will typically pass directly to a surviving spouse (if you have one), but only a portion of your separate property will go to your spouse if you have other heirs. And if you have dependent children, they could end up living with a relative you wouldn't have picked. For these and other reasons, it's a good idea to write a will.

Who can create a will?

The law requires you to meet certain requirements before you can draft a legally valid will. You must be:

- at least 18 years old when you sign your will. (In some states, you can be younger if you're married or in the military); and
- of "sound mind," which means you know the people you've named as your beneficiaries and that you know the nature and extent of your assets. (Proof of mental incompetence presented at the time a will is signed can lead the court to reject the will.)

It's particularly important to write your will if you marry, become a parent or acquire property you want to pass along someday.

While anyone 18 or older who meets the above requirements can create a will, it's particularly important to write your will if you marry, become a parent or acquire property you want to pass along someday. Even if the only *equity* in your property (the difference between the current market value of your property and the amount you still owe on your mortgage) is the amount of money you put down to purchase it, that's still something you can give away.

What makes a will legally valid?

Creating a valid will requires proper execution. That is, you must fulfill the requirements of your state's laws regarding the form, witnessing and signing of the will. If you are interested in writing your own will (discussed in the next section) you'll find that most self-help will writing products discuss in detail what you need to do to make your will comply with state law. While state laws vary somewhat, every will must address the following three topics: people, property and plans.

People. Who are the people or charitable interests for whom you would like to provide and to whom you will leave your assets? Who would you like to be your executor (personal representative)? Who would be your second choice if your first choice declines or can't serve for some reason? If you have children, who would you choose as their guardian? Make a list of your spouse (if you have one), children, grandchildren, parents, siblings, other dependents, and any other friends or relatives to whom you'd like to leave gifts. You might also list any charitable organizations to which you'd like to make a bequest. Finally, if there is anyone whom you wish to specifically leave out of your will, make a note of that as well.

While disinheritance is governed by state law, the rules are fairly uniform among states. For instance, you are allowed to disinherit a child in every state except Louisiana. Children, unlike spouses, generally do not have a legal right to a portion of an estate.

Reason to Draft Your Will Sooner than Later: The Case of Jimi Hendrix

Although Jimi Hendrix passed away in 1970, his estate endured a continuous stream of legal challenges for the next 34 years, stemming from the fact that the young guitar virtuoso died before creating a will. It took 20 years for Jimi's father to wrestle control of the estate from a California lawyer and keep it within the family. It took what amounted to nearly an additional decade to quell the in-fighting over the $80 million fortune—ironic considering Jimi's calm demeanor and the numerous messages of peace and love in his music.

Because Jimi Hendrix died without leaving formal instructions for the future of his estate, those who had been closest to Hendrix during his life, particularly relatives on his mother's side, did not receive any material benefit from Jimi's music, according to a Hendrix biographer.

Property. What property do you have to leave? Consider all of your property, and how you own it (for instance, wholly or with others). Remember your assets can include cash and bank accounts, insurance and annuity contracts, stocks, business interests (including interests in partnerships or closely-held corporations), real estate, and personal property (such as vehicles, boats, furniture, jewelry, electronics or artwork).

If you are married, remember that many states have provisions that allow a surviving spouse to take a defined portion of the estate regardless of what your will says. This provision is known as the *right of election* in probate law, which acknowledges the legal right of a surviving spouse to decide to take either what the deceased spouse provided under the will or the share of the estate as set forth by statute.

Plans. How do you want to "match" your property to the people or charitable organizations you listed above? These are the choices a will allows you to make so that your assets will be distributed according to your wishes. You may decide to give away specific gifts (called bequests) such as a treasured pocket watch or diamond ring to special friends or relatives and leave the remainder of your estate (your residential estate) to surviving family members or a favorite charitable organization.

You need to have your will witnessed by two disinterested adults (three in Vermont). Despite what you may have heard, you do *not* need to notarize your will to make it valid (except in Louisiana). Nevertheless, you might consider asking your witnesses to sign a notarized statement (called a self-proving af-

fidavit) because it will make proving your will's validity in court after you've died a lot easier. If you have a self-proving will, it means your witnesses will not need to appear in court unless someone is specifically challenging the validity of your will.

Can I write my own will?

For the vast majority of us, the answer is yes, especially if your estate planning needs are relatively simple. Your estate ceases to be simple, however, if it is worth more than the federal estate tax limit, set at $2 million per person ($4 million for married couples) until 2008. The amount per person climbs to $3.5 million by 2009, but Congress is scheduled to repeal that increased limit in 2010. If that happens, the federal estate tax limit reverts back to $1 million unless Congress extends the increase.

If the value of your estate is over that limit, it poses special federal tax-planning problems. Your will also becomes more complex if you want to set up special trusts or make conditional gifts. For example, you may want to leave money to a niece for use if and when she attends graduate school. In these cases, it's wise to hire a professional (such as a lawyer with estate planning expertise, a financial planner, an accountant or a tax attorney) to help you with these needs and to review your will. In general, you have the following options for writing your will:

Legal self-help materials. For most do-it-yourselfers, the easiest way to write your will is through your computer. If you own a personal computer, consider using a software program such as *Quicken WillMaker Plus*, which helps you write a will in every state except Louisiana, or Broderbund's *WillWriter Deluxe*. Both programs—rated HALT "Do-It-Yourself Best Buys"—are interactive software programs that help you produce state-specific, custom-made wills based on your answers to a series of questions. Each gives you the critical guidance you'll need on topics such as making bequests, naming guardians for children or property, or controlling property after your death by including a trust. If you're not computer savvy, you can still create your own will through do-it-yourself books and kits such as Nova Publishing's *Prepare Your Own* Will, Sphinx Publishing's *How To Make Your Own Simple Will* and Nolo's *Simple Will Book*. For a listing of HALT recommended titles, see our Citizens Legal Manual, **Do-It-Yourself Law**. You'll find that most self-help will books and kits cost less than $30, while do-it-yourself software, can run as high as $80 (still considerably cheaper than hiring a lawyer to write your will). And when you consider that many of us pay $60 a month or more for cable TV, it is money well spent.

Independent paralegals and prepaid legal service plans. Other options for drafting your will include using independent paralegals, which are popular in Florida, California and Arizona. Many offer routine legal services and access to self-help publications. Paralegals don't have a law degree or a license to practice law, but many have experience working in law firms and some attended paralegal school. Because they're not lawyers, independent paralegals are not permitted to provide legal advice. They may not tell you what type of will is best

All wills include clauses that state:

- your full name and address
- that all previous wills are revoked
- your marital status and your spouse's and children's names, if any
- the individual or charitable organizations who are to receive specific gifts of property
- who is to receive any property that remains after specific gifts are made
- the name of your personal representative or executor
- your nominee for guardian of any minor children
- what trusts, if any, you want to create in your will
- directions for paying debts and expenses
- your signature and a witnessing clause with the witnesses' signatures

explain the law governing wills. Some independent paralegals stay within these guidelines; others find it difficult to restrict themselves to distributing forms and filling in the blanks for you without giving advice on how the forms should be filled out. This is particularly true of those who have prepared numerous estate plans.

If you belong to a prepaid legal service plan, a will is usually in the cost of your membership. If will preparation is the main reason you're joining a plan, however, make sure the "simple will" offered will take care of your estate planning needs.

Lawyers. Finally, you can hire a lawyer to draft your will. What a lawyer charges for a "simple will" will depend on a host of factors, including the location of the law practice and the value and complexity of your estate. Concrete figures are hard to cite given the variable nature of estate planning. Generally speaking, however, you can expect to pay anywhere from $100 to $1,000, especially if you are also getting other estate planning documents, like a durable power of attorney or a living will. If your estate plan includes a living trust, you'll pay considerably more.

What property can pass to my heirs outside of a will?

Obviously, any property you give away during your lifetime is property you no longer own and no longer have to worry about passing on in a will. If one of your goals is to avoid or minimize the effects of probate, consider setting things up so that at least some of your property can pass to your heirs outside of probate. Here are a number of ways to do that:

Own property jointly. Property held in joint tenancy or tenancy by the entirety can pass outside of a will. Under a joint tenancy with rights of survivorship arrangement, each owner (called a joint tenant) owns an equal and indivisible share of the property—whether it's stock, a residence or a savings account. When one owner dies, his or her share automatically transfers to the surviving joint tenant(s) without passing through probate. Joint tenants do not have to be married. In a tenancy by the entirety, they do. Many states allow

Types of wills

Witnessed Wills — As their name suggests, witnessed wills are signed by people who witness you signing the will. They are valid in every state, can be changed (revoked) at any time until your death, can be tailored to meet your specific needs and are most likely to be accepted by a probate court as a valid expression of your wishes.

Oral Wills — Used as a last resort, these wills are most commonly used by active members of the military or merchant marines in times of conflict. Because there is no guarantee the person's wishes will be carried out, these kinds of wills are used very rarely.

Statutory Wills — At least three states (California, Maine and Michigan) offer fill-in-the-blank statutory will forms for those with extremely straightforward estate planning wishes (for instance, leaving all of your property to a surviving spouse or children). You cannot make any changes to the will, such as rewording a clause or adding in a new provision.

Holographic Wills — Handwritten wills which are penned, dated and signed entirely by the person making the will require no witnesses. Less than half the states recognize holograhic wills.

married couples to own property in tenancy by the entirety so that property automatically goes to a surviving spouse, without probate, after the first spouse dies.

Make outright gifts. If your estate is worth more than the federal estate tax limit, you will probably have to pay a federal estate tax (unless you do some careful estate planning). You can reduce your taxes by giving some of your money or other assets to your heirs during your lifetime. This is a common strategy for couples who intend to leave their children all of their property. Under the annual gift tax exclusion, an individual can leave up to and including $11,000 a year; and a husband and wife can together make a gift of up to and including $22,000 a year to each of any number of people, tax-free. Since it's given during your lifetime, the money passes probate.

Name a beneficiary on insurance forms and annuities. Most retirement funds and all life insurance proceeds can be transferred directly to your beneficiaries without going through probate. When you do not name a beneficiary—in your individual retirement accounts (IRAs), employer pension plans, annuities or life insurance policy, for example—or your beneficiary doesn't survive you, the proceeds become part of your estate and are probated.

Create a living trust. The major benefit of a living trust is that the property placed in it isn't considered part of your probate estate and therefore bypasses probate. Another benefit is the amount of control and flexibility living trusts can give you over your property. You can create a living trust that is either revocable (meaning you can change or revoke it at anytime) or irrevocable (you can't change any of the terms of the document after you've signed it). The former gives you total control over what happens to the trust property while you're alive. The latter takes control away but rewards you with potentially large tax savings.

Reason to Leave Clear Instructions in Your Will: Warren Burger (1907-1995)

The former Chief Justice of the Supreme Court's will, at 176 words in length, was an exercise in the parsimonious use of language. However, he did not make provisions for estate taxes and neglected to give any power to the executors of his will. These oversights cost the estate thousands of dollars in fees.

Whom should I choose as executor of my will?

You should name someone you trust who is also personally interested in seeing your estate settled quickly and efficiently. That might be one of the beneficiaries of your will or a trusted friend. Your executor doesn't have to be an accountant, attorney or genius to successfully take your estate through probate and distribute your assets. If it does become difficult, your executor can hire an attorney or accountant to help. It will likely be cheaper and more efficient to appoint someone interested in your estate that can hire a lawyer than to appoint a lawyer as executor.

You're required by law to select someone who is 18 years of age or older, of sound mind and a U.S. citizen. It is often practical to select someone who lives in the same state as you, although it's not a requirement. And, unless you specifically waive the requirement in your will (which almost everyone does because they've selected someone they trust), any executor you name will have to post a surety bond with your estate picking up the cost of the bond. In some states you have to post a bond to cover your estate's debts, even if you waive the requirement.

A bond is a type of insurance that provides some financial protection for your estate and beneficiaries if your executor steals from or mismanages the estate. If you trust your executor, you can save time and money by waiving the requirement. It's wise to require a bond, however, if you have to rely on someone you don't know.

To make your executor's life easier, you should consider leaving a letter of instruction. You can write this on on your own, or create one through a will-writing software program. An informal letter of instruction typically includes information not found in your

will. It is not legally binding, but it does offer your executor guidance. It can include a complete list of your assets and their whereabouts, the location of keys or important papers, important contact numbers and the combinations to safes. You can also convey your wishes about what type of funeral service you would like, where you want to be buried (or cremated), how you want your obituary to read and any other "final arrangements" you've made.

The Executor's Duties. Depending on the size of your estate, your executor will have to follow a simple or more formal process when taking your estate through probate. Duties required for settling an estate include:

Opening the estate. The executor begins the probate process by notifying the court, your beneficiaries, and creditors of your death. The executor must file the original copy of your will and death certificate with the probate court where you lived.

Inventorying the property. The executor needs to list the assets going through probate including personal property, money in accounts, any share in real estate owned by tenancy in common, etc. (Jointly owned property with rights of survivorship, pension plans, trust property, and anything else that passes directly to beneficiaries outside of probate does not need to be included in this inventory.) The inventory must be filed with the court usually within three months.

Paying Creditors. Creditors must file claims against your estate within the time limits required by law. If they fail to file on time, your estate is not legally obligated to pay that debt. If it were, your executor might have to wait a considerable amount of time before settling your estate and distributing your assets. Your executor may be able to pay off some debts with money from savings or checking accounts. Other larger debts may have to be paid out of your residuary estate (the part of your estate that's left after specific bequests have been made).

Closing the estate. In cases where a final accounting is required, you need to follow the court's procedures but what's typically required is a simple balance sheet that shows the estate's assets.

Distributingthe estate. In some states, once the final account and the closing papers have been filed, the executor must wait for the registrar to complete an audit before the estate's assets can be distributed.

What if I want to change my will?

You might think that once your will is written, your job is done and you never have to revisit the issue. But circumstances change, so it's wise to review your will periodically (every five years) or update it immediately if, for example, you buy a house, marry or divorce, or have a child.

One way to update your will is by creating a codicil—an amendment to your will that records the change or changes you are making. Like your will, it needs to be properly signed, witnessed and dated. Codicils are rarely used today because most wills are computer generated. People who need to change their will simply write up a new will on the computer and destroy the original one. If you write a new will, it automatically cancels any earlier wills but it is a sound idea, nonetheless, to include a statement at the start of every will you write that says, "This will revokes all previous wills made by me."

How should I store my will?

Keep your will in a safe and secure place that is accessible to others after your death. If you had an attorney prepare your will, have the attorney retain a copy along with a note indicating where the original can be found. If you name a trust company as executor, it will hold your will in safekeeping. You may be able to file it with the probate registrar at your county courthouse, usually for a small fee. If you wrote your own will, leave it with your executor and inform family members and other appropriate persons of its location. It's unwise to keep the will in a safe-deposit box because your state's laws may require that the box be sealed for a period of time after your death.

Resources:

There is a wealth of free information about estate planning on HALT's Web site (*www.halt.org*). If you're interested in obtaining information about reliable estate-planning self-help resources by other publishers, consult **Do-It-Yourself Law: HALT's Guide to Self-Help Books, Kits and Software** ($12, plus postage and handling).

Glossary of Terms:

Note: Italicized terms in definitions are themselves defined in other glossary entries.

Assets: Money and *real* or *personal property* owned by a person or organization.

Beneficiary: Person who is named to receive some benefit or money from a legal document such as a *will*, life insurance policy or *trust*.

Bequest: Gift of *real* or *personal property* left in a *will*.

Codicil: A supplement or addition to a *will* , which makes changes to an existing will, but which does not replace it. Rarely used because most people who need to change or update a will just computer-generate a new one.

Community Property: Property owned in common by husband and wife, each having an undivided interest by reason of their marital status.

Executor: Person or corporation appointed in a *will* or by a court to settle the estate of a deceased person (female gender: executrix).

Guardian: Person or corporation appointed by a court to handle the affairs or property of another who is unable to do so because of age or incapacity.

Heir: Any person who inherits, or is entitled under law to inherit, property from a deceased person.

Intestate: Dying without a valid *will*.

Joint Tenancy with Right of Survivorship: Form of ownership in which property is equally shared by all owners and is automatically transferred to the surviving owners when one of them dies.

Legacy: Gift of money left in a *will*.

Living (or Inter-Vivos) Trust: A *trust* that is set up and put into effect while the person who created the trust is living.

Non-Probate Property: *Personal* and *real property* which is disposed of through means other than a *will*. Like insurance or a retirement account, non-probate property passes upon death under the terms of the account document rather than the owner's *will*.

Personal Property: Any property one may own or hold legal title to which is not *real property*. For example, cash, stocks, bonds, jewelry, vehicles, furniture.

Personal Representative: Person named in a *will* or appointed by a court to settle an estate; also called "PR."

Probate: Legal process of establishing the validity of a deceased person's last *will* and testament; commonly refers to the process and laws for settling an estate.

Real Property: Land, and generally whatever is built, erected, or grown upon it (i.e. real estate).

Tenancy by Entirety: Form of spousal ownership in which property is equally shared and automatically transferred to the surviving spouse. While both spouses are living, ownership of the property can be altered only by divorce or mutual agreement.

Testate: Having made a legally valid *will* before death.

Trust: *Real* or *personal property* held by one party (the *trustee*) for the benefit of another (the *beneficiary*).

Trustee: Person who holds and/or manages money or property for the benefit of another.

Will: Legal document that declares how a person wishes property to be distributed to *heirs* or *beneficiaries* after death.

Will Contest: Challenge of a *will* by a person who believes the will is unfair or that one or more of its provisions does not accurately reflect how the deceased person wanted his or her property distributed.

Witness: Person who is present at an event or the signing of a document such as a *will*.

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Since 1978, HALT has provided a powerful voice, working on your behalf in Washington and across the nation, to help Americans navigate the legal system with or without a lawyer. And we need your help. Join HALT to help us allow more people to settle their legal affairs simply and affordably.

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