

# Wills: The Cornerstone of Your Estate Plan



If you care about what happens to your money, home, and other property after you die, you need to do some estate planning. There are many tools you can use to achieve your estate planning goals, but a will is probably the most vital. Even if you're young or your estate is modest, you should always have a legally valid and up-to-date will. This is especially important if you have minor children because, in many states, your will is the only legal way you can name a guardian for them. Although a will doesn't have to be drafted by an attorney to be valid, seeking an attorney's help can ensure that your will accomplishes what you intend.

### Wills avoid intestacy

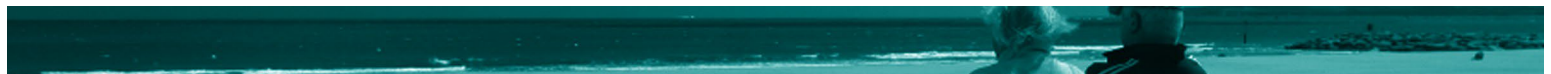
Probably the greatest advantage of a will is that it allows you to avoid intestacy. That is, with a will you get to choose who will get your property, rather than leave it up to state law. State intestate succession laws, in effect, provide a will for you if you die without one. This "intestate's will" distributes your property, in general terms, to your closest blood relatives in proportions dictated by law. However, the state's distribution may not be what you would have wanted. Intestacy also has other disadvantages, which include the possibility that your estate will owe more taxes than it would if you had created a valid will.

### Wills distribute property according to your wishes

Wills allow you to leave bequests (gifts) to anyone you want. You can leave your property to a surviving spouse, a child, other relatives, friends, a trust, a charity, or anyone you choose. There are some limits, however, on how you can distribute property using a will. For instance, your spouse may have certain rights with respect to your property, regardless of the provisions of your will. Gifts through your will take the form of specific bequests (e.g., an heirloom, jewelry, furniture, or cash), general bequests (e.g., a percentage of your property), or a residuary bequest of what's left after your other gifts.

### Wills allow you to nominate a guardian for your minor children

In many states, a will is your only means of stating who you want to act as legal guardian for your minor children if you die. You can name a personal guardian, who takes personal custody of the children, and a property guardian, who



manages the children's assets. This can be the same person or different people. The probate court has final approval, but courts will usually approve your choice of guardian unless there are compelling reasons not to.

### **Wills allow you to nominate an executor**

A will allows you to designate a person as your executor to act as your legal representative after your death. An executor carries out many estate settlement tasks, including locating your will, collecting your assets, paying legitimate creditor claims, paying any taxes owed by your estate, and distributing any remaining assets to your beneficiaries. Like naming a guardian, the probate court has final approval but will usually approve whomever you nominate.

### **Wills specify how to pay estate taxes and other expenses**

The way in which estate taxes and other expenses are divided among your heirs is generally determined by state law unless you direct otherwise in your will. To ensure that the specific bequests you make to your beneficiaries are not reduced by taxes and other expenses, you can provide in your will that these costs be paid from your residuary estate. Or, you can specify which assets should be used or sold to pay these costs.

### **Wills can create a testamentary trust**

You can create a trust in your will, known as a testamentary trust, that comes into being when your will is probated. Your will sets out the terms of the trust, such as who the trustee is, who the beneficiaries are, how the trust is funded, how the distributions should be made, and when the trust terminates. This can be especially important if you have a spouse or minor children who are unable to manage assets or property themselves.

### **Wills can fund a living trust**

A living trust is a trust that you create during your lifetime. If you have a living trust, your will can transfer any assets that were not transferred to the trust while you were alive. This is known as a pourover will because the will "pours over" your estate to your living trust.

### **Wills can help minimize taxes**

Your will gives you the chance to minimize taxes and other costs. For instance, if you draft a will that leaves your entire estate to your U.S. citizen spouse, none of your property will be taxable when you die (if your spouse survives you) because it is fully deductible under the unlimited marital deduction. However, if your estate is distributed according to intestacy rules, a portion of the property may be subject to estate taxes if it is distributed to heirs other than your U.S. citizen spouse.

### **Assets disposed of through a will are subject to probate**

Probate is the court-supervised process of administering and proving a will. Probate can be expensive and time consuming, and probate records are available to the public. Several factors can affect the length of probate, including the size and complexity of the estate, challenges to the will or its provisions, creditor claims against the estate, state probate laws, the state court system, and tax issues. Owning property in more than one state can result in multiple probate proceedings. This is known as ancillary probate. Generally, real estate is probated in the state in which it is located, and personal property is probated in the state in which you are domiciled (i.e., reside) at the time of your death.

### **Will provisions can be challenged in court**

Although it doesn't happen often, the validity of your will can be challenged, usually by an unhappy beneficiary or a disinherited heir. Some common claims include:

- You lacked testamentary capacity when you signed the will
- You were unduly influenced by another individual when you drew up the will
- The will was forged or was otherwise improperly executed
- The will was revoked

# Understanding Probate



When you die, you leave behind your estate. Your estate consists of your assets — all of your money, real estate, and worldly belongings. Your estate also includes your debts, expenses, and unpaid taxes. After you die, somebody must take charge of your estate and settle your affairs. This person will take your estate through probate, a court-supervised process that winds up your financial affairs after your death. The proceedings take place in the state where you were living at the time of your death. Owning property in more than one state can result in multiple probate proceedings. This is known as ancillary probate.

## How does probate start?


If your estate is subject to probate, someone (usually a family member) begins the process by filing an application for the probate of your will. The application is known as a petition. The petitioner brings it to the probate court along with your will. Usually, the petitioner will file an application for the appointment of an executor at the same time. The court first rules on the validity of the will. Assuming that the will meets all of your state's legal requirements, the court will then rule on the application for an executor. If the executor meets your state's requirements and is otherwise fit to serve, the court generally approves the application.

## What's an executor?

The executor is the person whom you choose to handle the settlement of your estate. Typically, the executor is a spouse or a close family member, but you may want to name a professional executor, such as a bank or attorney. You'll want to choose someone whom you trust will be able to carry out your wishes as stated in the will. The executor has a fiduciary duty — that is, a heightened responsibility to be honest, impartial, and financially responsible. Now, this doesn't mean that your executor has to be an attorney or tax wizard, but merely has the common sense to know when to ask for specialized advice.

Your executor's duties may include:

- Finding and collecting your assets, including outstanding debts owed to you
- Inventorying and appraising your assets
- Giving notice to your creditors (e.g., credit card companies, banks, retail stores)
- Filing an estate tax return and paying estate taxes, if any
- Paying any debts or other taxes
- Distributing your assets according to your will and the law
- Providing a detailed report of how the estate was settled to the court and all interested parties



The probate court supervises and oversees the entire process. Some states allow a less formal process if the estate is small and there are no complicated issues to resolve. In those states allowing informal probate, the court may be involved only indirectly. This may speed up the probate process, which can take years.

### What if you don't name an executor?

If you don't name an executor in your will, or if the executor can't serve for some reason, the court will appoint an administrator to settle your estate according to the terms of your will. If you die without a will, the court will also appoint an administrator to settle your estate. This administrator will follow a special set of laws, known as intestacy laws, that are made for such situations.

### Is all of your property subject to probate?


Although most assets in your estate may pass through the probate process, other assets may not. It often depends on the type of asset or how an asset is titled. For example, many married couples own their residence jointly with rights of survivorship. Property owned in this manner bypasses probate entirely and passes by "operation of law." That is, at death, the property passes directly to the joint owner regardless of the terms of the will and without going through probate. Other assets that may bypass probate include:

- Investments and bank accounts set up to pass automatically to a named person at death (payable on death)
- Life insurance policies with a named beneficiary (someone other than the estate)
- Retirement plans with a named beneficiary
- Other property owned jointly with rights of survivorship

## Bypassing Probate



You may have heard about the horrors of probate, but in truth, probate has gotten an undeservedly bad reputation, especially in recent years. If you bypass probate, your estate will go to your beneficiaries without any court proceeding, and you may save a certain amount of time and expenses. However, there is usually little reason for most people to avoid probate today. States continue to revise their probate laws, making them more consumer friendly, particularly for small estates. For most modestly sized estates, the probate process now costs little. In fact, there are some good reasons to distribute your property by will. Decisions are binding and have legal finality once your will is probated. Creditors who fail to file claims against your estate within a specific amount of time — usually six months after receiving notice — are out of luck.



However, some major drawbacks to probate do exist, including the time it can take. The process averages six to nine months to complete but may take up to two years or more for some complex estates, tying up the assets that your family may need immediately. Also, for a larger estate, the cost may be as high as 5 percent of the estate's value. If you feel that the size and complexity of your estate warrant exploring alternatives to probate, you may want to consider one or more of the following:

### **Transfer your assets to a revocable living trust**

A trust is like a basket that holds your assets. A revocable living trust (also known as an inter vivos trust) is flexible enough to include almost any asset that you own. While you are living, you can act as the trustee and can add or remove property as you see fit. You can also terminate or amend the trust at any time. When you die, your successor trustee distributes the trust assets to the trust beneficiaries, according to the trust agreement. Trusts require a significant amount of paperwork, are costly to create and maintain, and usually require a lawyer to draw up the trust documents. Also, a revocable living trust does not shield your estate from your creditors, creditors of your estate, or estate taxes.

### **Own property as joint tenancy with rights of survivorship**

Assets owned as joint tenancy with rights of survivorship pass automatically to the surviving joint owner(s) at your death. To establish joint ownership, you may need to record new real estate deeds, titles for your car or boat, stock and bond certificates, statements of account for mutual funds, registration cards for your bank accounts, and other assets. This costs little and usually does not require a lawyer. Some drawbacks are that the joint owner has immediate access to your property, and your joint owner's creditors may reach the jointly held property.

### **Designate beneficiaries**

Assets pass outside of probate if you establish payable-on-death provisions for your savings accounts and CDs. Ask your agent to set up transfer-on-death provisions for brokerage accounts containing stocks, bonds, or mutual funds. Your retirement accounts, such as profit-sharing plans, 401(k)s, and IRAs can also pass along to designated beneficiaries. Finally, life insurance death proceeds will avoid probate, provided you name a beneficiary other than your estate.

### **Make lifetime gifts**

Another way to avoid probate is to simply give away your property to your beneficiaries while you are living. Carefully planned gifting can also free those assets from gift and estate taxes. The following are usually nontaxable gifts:

- Gifts to your spouse
- Gifts to qualified charities
- Gifts totaling \$18,000 (in 2024) or less per person, per year (\$36,000 in 2024 if and your spouse can split the gifts)
- Tuition payments on behalf of an individual directly to an educational institution
- Medical care expenses paid directly to the provider on behalf of an individual

### **Other ways to bypass or minimize probate**

If your estate is small enough to meet state guidelines, your beneficiaries can simply claim your assets by presenting a notarized affidavit. About half of the states set a limit of \$10,000 to \$20,000 of the qualified estate value; most of the other states allow as much as \$100,000. You can generally deduct estate expenses from your qualified estate value, such as taxes, debts, loans, or family allowance payments, plus the value of any other assets that pass outside probate (e.g., a home jointly owned with a spouse). Real estate is usually disqualified from claims by affidavit. Therefore, your estate may qualify even if it is fairly large. Expect the process to take 30 to 45 days. Another method is for your executor to file for summary, or simplified probate. This streamlined process is generally a paper filing only, requiring no attorney. States vary widely regarding the allowable size of an estate for simplified probate.

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**AMI Benefit Plan Administrators, Inc.**  
**100 Terra Bella Drive**  
**Youngstown, Ohio 44505**  
**800-451-2865**

[ami@amibenefit.com](mailto:ami@amibenefit.com)  
[www.amibenefit.com](http://www.amibenefit.com)



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