

# **Do You Have a Will?**





## **WHAT IS A WILL?**

A will is a written direction controlling the disposition of property at death. The laws of each state set the formal requirements for a legal will. In Florida;

1. You, the maker of the will (called the testator), must be at least 18 years old.
2. You must be of sound mind at the time you sign your will.
3. Your will must be written.
4. Your will must be witnessed and notarized in the special manner provided by law for wills.
5. It is necessary to follow exactly the formalities required for the execution of a will.
6. To be effective, your will must be proved in and allowed by the probate court.

No will becomes final until the death of the testator, and it may be changed or added to by the testator by drawing a new will or by a "codicil," which is simply an addition or amendment executed with the same formalities of a will. A will's terms cannot be changed by writing something in or crossing something out after the will is executed. In fact, writing on the will after its execution may invalidate part of the will or all of it.

## **WHAT CAN BE ACCOMPLISHED BY A WILL?**

1. You decide who gets your property instead of the law making the choice for you.
2. You may name the personal representative (executor) of your will as you choose, provided the one named can qualify under Florida law. A personal representative is one who manages an estate, and may be either an individual or a bank or trust company, subject to certain limitations.
3. A trust may be created in a will whereby the estate or a portion of the estate will be kept intact with income distributed or accumulated for the benefit of members of the family or others. Minors can be cared for without the expense of proceedings for guardianship of property.
4. Real estate and other assets may be sold without court proceedings, if your will adequately authorizes it.
5. You may make gifts, effective at or after your death, to charity.
6. You decide who bears any tax burden, rather than the law making that decision.
7. A guardian may be named for minor children.

## **WHAT HAPPENS WHEN THERE IS NO WILL?**

If you die without a will (this is called dying “intestate”), your property will be distributed to your heirs according to a formula fixed by law. Your property does not go to the State of Florida unless there are absolutely no heirs at law, which is very unlikely. In other words, if you fail to make a will, the inheritance statute determines who gets your property. The inheritance statute contains a rigid formula and makes no exception for those in unusual need.

When there is no will, the court appoints a personal representative, known or unknown to you, to manage your estate. The cost of probating may be greater than if you had planned your estate with a will, and the administration of your estate may be subject to greater court supervision.

## **MAY A PERSON DISPOSE OF HIS OR HER PROPERTY IN ANY WAY HE OR SHE WISHES BY A WILL?**

While any sort of property may be transferred by will, there are some particular interests in property which cannot be willed because the right of the owner terminates automatically upon his or her death, or others have been granted rights in the property by Florida law. Some examples of these types of property rights or interests are:

- Except in certain very specific circumstances a homestead (that is, the residence and adjoining lands owned by a person who is survived by a spouse or minor child up to one-half acre within limits of an incorporated city or town or up to 160 acres outside those limits);
- A life estate : property owned only for the life of the owner;
- Any property owned jointly with another person or persons with right of survivorship (a tenancy by the entireties, which is limited to joint ownership between a husband and wife, would be one of these).

A person may not disinherit his or her spouse without a properly executed marital agreement. The law gives a surviving spouse a choice to take either his or her share under the will or a portion of the decedent’s property determined under Florida’s “elective share” statute. This statute uses a formula to compute the size of the surviving spouse’s elective share, which includes amounts stemming from the decedent’s jointly held and trust property, life insurance,

and other non-probate assets. Because this formula is very complicated, it is usually necessary to refer this matter to an attorney with extensive experience in this area of law. Also, if your will was made before the marriage and the will does not either provide for the spouse or show your intention not to provide for him or her, then your spouse would receive the same share of your estate as if you had died without a will (at least one-half of your estate) unless provision for the spouse was made or waived in a marital agreement.

### **MUST A PERSON LEAVE A CHILD AT LEAST ONE DOLLAR?**

No. This is not necessary and can actually cause considerable added expense to the estate. It is better simply to state in the will that no provision is being made for that child.

### **HOW LONG IS A WILL GOOD?**

It is "good" until it is changed or revoked in the manner required by law. Your will may be changed as often as you desire while you are sane and not under undue influence, duress, or fraud, provided it is changed in the required manner. Changes in circumstances after the execution of the will, such as tax law amendments, deaths, marriage, divorce, birth of children, or even a substantial change in the nature or amount of your estate, may raise questions as to the adequacy of your will. All changes require a careful analysis and reconsideration of all the provisions of your will and may make it advisable to change the will to conform to the new situation.

### **DOES A WILL INCREASE PROBATE EXPENSES?**

No. If there is property to be administered or taxes to be paid or both, the existence of a will does not increase probate expenses. A will frequently reduces expenses. If there is real or personal property to be transferred at your death, the probate court will have jurisdiction to ensure that it is transferred properly, either according to your will, or, if there is no will, in accordance with the inheritance statute. Thus, even if you have no will, your heirs must go to court to administer your estate, obtain an order determining your legal heirs, or obtain a determination that administration is unnecessary. These procedures are often more expensive than administering your will, since a properly drawn will names the beneficiaries and delineates procedures to simplify the administration process.

## **ARE ESTATES BY ENTIRETIES OR JOINT TENANCY WITH RIGHT OF SURVIVORSHIP SUBSTITUTES FOR A WILL?**

Joint tenancies with rights of survivorship can be established when two or more persons title bank accounts and other assets in their multiple names with the intent to have ownership pass directly to the surviving named owners when one dies. A “tenancy by the entireties” is much the same but involves only married persons. These forms of joint ownership can avoid probate of the account or other asset when an owner dies. While this can be very efficient in some cases, use of joint ownership can be fraught with problems at death and cause more problems than it solves.

Among other unforeseen problems, indiscriminate use of joint ownership can cause an increase in estate taxes over the joint lives of married persons, force double probates in the event of simultaneous deaths, create unfairness as to who pays for funeral expenses and claims against the decedent, raise undesired exposure during life to the debts of co-owners, and cause a shortage of funds for payment of estate taxes which can cause litigation with the taxing authorities.

## **IS A LIFE INSURANCE PROGRAM A SUBSTITUTE FOR A WILL?**

No. Life insurance is only one kind of property that a person may own and a will is necessary to dispose of other assets that a person owns at death. If a life insurance policy is payable to an individual, the will of the insured has no effect on the proceeds. If the policy is payable to the estate of the insured, the disposition of the proceeds may be directed by the will. Life insurance can be useful in providing cash at death for payment of taxes and expenses, but like most strategies for insurance, the careful person will consult a lawyer, a life insurance counselor, and a financial advisor. Mistakes in ownership and beneficiary designations in these policies can cause great increases in estate taxes owed.

## **IS A TRUST A SUBSTITUTE FOR A WILL?**

No, in most situations. A trust may be used in addition to a will. This is because a trust can handle only the property that has been put into it. Any property of a person that is not placed in the trust either during life or at death in most instances escapes the control of the trust. It is the will that controls all property in a decedent’s name at the time of death if the will is drafted properly. Trusts can be helpful

to speed administration and save taxes if they are drafted properly and funded during life with the property intended to be transferred by the trust. Often, however, improperly drafted or incorrectly funded or administered trusts can add to the cost of settling estates, not lower it. Furthermore, it is the probate of the will that can clear creditors' claims, which is not possible with just a trust administration.

### **DO YOU HAVE TO GO TO COURT TO PROBATE A WILL?**

No, personal court appearances are usually not needed to probate a will. However, documents must be filed with the court to procure a probate order and administer estates. In most counties, neither the estate attorney nor the interested persons ever appear in the courtroom.

### **CAN A WILL REDUCE TAXES?**

A well-drawn will can reduce estate and income taxes that may arise when someone dies. Estate taxes are often by far the largest cash expense an estate can have. There is also the possibility that Congress may increase the impact of the estate tax in the future. In addition, proper planning must be made for income tax advantages. Proper planning with a will is indispensable in taking these benefits in the tax codes.

### **WHO SHOULD PREPARE A WILL?**

No sensible person would employ "just anyone" to fill teeth, take out an appendix, or deliver a baby. The person who wants these services performed skillfully with the minimum risk to health, life, property, or the accurate execution of his or her wishes, will engage the services of a trained person. Except in dire emergency, these important tasks should not be performed by anyone except the professional.

The drafting of a will involves making decisions that require professional judgment which can be obtained only by years of training, experience, and study. Only the practicing lawyer can avoid the innumerable pitfalls and advise the course best suited for each individual situation. In addition, an experienced attorney will be able to coordinate the use of other skilled professionals, such as an investment advisor, actuary, insurance specialist, and tax accountant to complete a proper estate plan.

Moreover, there is no such thing as a "simple will." Even smaller estates can have complexities only foreseeable by the experienced attorney.

## **SOME SUGGESTIONS CONCERNING WILLS**

1. Marriage does not cancel a will in Florida, but a spouse acquired after the execution of a will may receive the same portion of your estate that he or she would have received had you died without a will (at least one-half).
2. If you have moved to Florida from another state, it is wise to have your will reviewed by a Florida lawyer in order to be sure that it is properly executed according to the laws of Florida, that the witnesses are readily available to prove your will in Florida, and that your personal representative is qualified to serve in Florida.
3. Before your will is effective to dispose of your property, it must be proved in the probate court. If the will is self-proving and otherwise valid, it may be admitted to probate without further proof. If the will is not self-proving, it generally must be proved by the oath of one of the witnesses. The oath must be given before a circuit judge, clerk of court, or a commissioner specially appointed by the court for that purpose. (Under certain circumstances, the court may permit the will to be proved by other means permitted by law.) A will can be made self-proving either at the time of its execution or later, which saves the time and expense of locating a witness and obtaining his or her oath after your death. For your will to be made self-proving, you must acknowledge the will before an officer authorized to administer oaths; the witnesses must make affidavits before the officer; and the officer must evidence the acknowledgment and affidavits by a certificate attached to or following the will. An appropriate form of certificate is prescribed by Florida law. The self-proving procedure is in addition to the normal execution and witnessing of the will, not in place of it.
4. No matter how perfect a will may be prepared for you, unless it is properly executed in strict compliance with the laws of Florida, the will may be entirely void. Be sure that you execute your will in the presence of your attorney, who knows exactly how and in what order the will should be signed.
5. Every person owning property who wishes to exercise control in the disposition of that property when he or she dies, should have a will regardless of the value of the property. Of course, the larger the estate the greater the tax consequences.
6. The following additional documents should be considered for signing when you make your will:
  - Living Will: Florida Statutes now provide for a written declaration by an individual specifying directions as to use of life-prolonging procedures.
  - Durable Power of Attorney: This document can assist in handling the property of a person who has become



incapacitated without having to open a guardianship proceeding in court. This is especially valuable for paying the bills and protecting the assets of an incapacitated person.

- **Health Care Surrogate:** Florida law now allows individuals to designate a person to make health care decisions for them when the individual may not be able to do so. Included in this important appointment is the power to decide when to withdraw medical procedures.
- **Pre-Need Guardian Designation:** Florida law allows you to designate a person who could be appointed guardian over you should you become incapacitated and/or over your children should you become incapacitated or upon your death. If you fail to designate a guardian, the Court will do so for you if and when it becomes necessary.

## **IF YOU NEED A LAWYER**

If you need a lawyer and don't know how to find one, many areas in Florida have lawyer referral services listed under "attorneys" or "attorney referral service" in the yellow pages of the telephone book. This service will give you an appointment with a lawyer for a nominal fee.

If there is no lawyer referral service in your city, the statewide Florida Bar service can locate a lawyer for you. You can call toll-free at 1-800-342-8011. The statewide service, which operates only in cities where there is no local program, will refer you to an attorney for an initial one-half hour consultation for \$25.

In addition, you may want to contact an attorney who is board certified in Elder Law or Wills, Trusts and Estates. Board certification recognizes an attorney's special knowledge, skills and proficiency in various areas of law and professionalism and ethics in practice. There are qualified lawyers who are not board certified, but certification is a good place to start. Visit [www.floridabar.org/certification](http://www.floridabar.org/certification) to see a list of certified lawyers by specialty area and by city.

## NOTES

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