Wills in Virginia

"Do I need a will?"

"What will happen if I don't have a will?"

"How do I make a will?"

These are only some of the many questions that often arise on the subject of wills. The following information is designed by the Virginia State Bar to provide basic answers to fundamental questions about wills under the laws of Virginia.

Of course, these laws can be very complicated. This information is designed to present simple and straightforward answers to commonly asked questions, and is not intended as a guide to preparing wills, or as a substitute for a consultation with a lawyer.

1. What is a will?

A will is a signed writing in which a person (often referred to as the "testator") directs what is to be done with his or her property after death. Each state has its own very specific laws as to what is necessary for a will to be valid in that state.

2. Who may make a will?

Any mentally competent person who is at least eighteen years old may make a will. However, later proof of any fraud, duress, or undue influence by another person on the testator may cause the will to be invalid.

3. Who should have a will and why?

Every mentally competent adult should have a will. Here are a few of the reasons:

- You can direct how you want your property divided at your death.

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- You can name the person you want to handle your estate (called the "executor" or "personal representative").
- You can reduce the expenses of administering your estate.
- You can save taxes.
- You can nominate a guardian for your minor children.
- You may provide for a trust for the support and education of your children without the necessity of costly court proceedings and choose the person you want to handle the trust.

4. Must a will be witnessed? Must it be notarized?

In Virginia, the signing of a will must generally be witnessed by two competent persons, who also must sign the will in front of the testator. (An exception to the witness requirement is made if the testator writes out the entire will in his or her own handwriting and signs and dates it.)

Although the law does not require a will to be notarized, it is a highly recommended practice followed by most lawyers. If the will includes a notarized "Self-Proving Affidavit", the will is presumed to be properly executed and is accepted by the court without testimony from the witnesses.

5. How long is a will valid?

Your will is valid until you revoke it, generally either by physical destruction (tearing or burning it up, for example) or by signing a superseding will or written revocation. However, if you get married or have a child after signing a will, the law may provide for certain distributions to your spouse or the child from your estate regardless of the provisions of your will, and if you get divorced after signing a will, the law may consider the will partially revoked with respect to your ex-spouse. Also, if you are married, your spouse may have rights in your estate even if you sign your will after your marriage, regardless of what is provided in your will.

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6. May a will be changed?

Your will does not take effect until you die; therefore, it can be changed at any time during your life as long as you are mentally competent. Traditionally, wills were changed by an amending instrument called a "codicil," but with the development of modern word processing technology, it is often better and just as easy to sign an entirely new will when you wish to make a change.

7. What happens if you don't have a will?

If you don't have a will, a state statute directs who will receive your property, regardless of your wishes. In Virginia, if you are married, your estate generally passes entirely to your surviving spouse; however, if you have surviving children or their descendants who are not also the children or their descendants of your surviving spouse, your children and the descendants of any deceased child divide two-thirds of your estate, and your spouse takes the other one-third.

8. Is joint ownership a substitute for a will?

In most cases, joint ownership is not an acceptable substitute for a will. While joint ownership between spouses is often appropriate, in some cases, joint ownership of assets between spouses with very large estates may result in unnecessary estate taxes at the death of the survivor. Joint ownership between parent and child or other individuals who are not married to each other, or even between spouses when one spouse is not a U.S. citizen, may cause unexpected and unnecessary gift taxes and, in the case of a parent and child, may also foster disputes among family members. Even where joint ownership is appropriate, it is not a good substitute for a will because typically not all assets are held jointly.

9. Is a living trust a substitute for a will?

A funded revocable ("living") trust can be a valuable and important part of the estate plan for many people, but it does not eliminate the need for a will. If you have a living trust, you will still need a will to dispose of those assets that have not or cannot be placed in the trust. As useful as they are, living trusts are not appropriate for everyone. Only your lawyer can tell you if you should consider one, and only your lawyer should prepare it.

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10. Who should draft your will?

A person who drafts a will must be familiar with the law in order to avoid the many pitfalls and to comply with the formalities necessary to assure the will's validity. Only a practicing lawyer is professionally qualified to give you advice regarding your will, to prepare your will, and to supervise its signing.

Four practical steps to save time and help assure a sound result:

1. **Inventory your assets.** List in reasonable detail all of your property, real and personal; life insurance policies; and retirement plans, with your best assessment of their values. Determine current title on each asset and the current beneficiary designation so that your advisor may review and advise changes consistent with the plan.

2. **Inventory your liabilities.** List all debts and obligations, including principal amounts, payees, and essential terms.

3. **List your family members and any other persons or organizations whom you wish to benefit from your estate.** Decide who might be an appropriate executor, trustee, or guardian for your minor children.

4. **Decide what you want to accomplish.** Determine what your objectives are and to whom you wish your assets distributed. Then meet with your lawyer and other advisors to work out the details and prepare the necessary documents. Be sure to carry your working papers, list of assets and liabilities, and life insurance policies with you. Many estate planning lawyers have forms that will help you to organize this information before an initial meeting.

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