Where There's a Will There's a Way

What is a Will?

A *will* is a legal document that is written by you (the testator or *will*-maker) that dictates how your property and assets will be distributed upon your death. A *will* also directs any estate taxes that you may owe, appoints a person to administer your estate based on your requests or state law (executor/executrix), and appoints a guardian for minor children among other things. If you have any assets, you should create a *will* to ensure that those assets go to the people you intend to have them. This is especially true if you are in a second marriage and have children from a previous marriage. Writing a *will* is not just for the wealthy and is not as costly as you may think. You can revoke or make amendments to your *will* at any time before your death. If you need to amend your *will*, you can create a new *will*, or you can create an addendum to your will called a codicil. A codicil is essentially a supplement to a *will*. It has the same requirements as a *will* to be valid. When your *will* goes through the probate process, the codicil is treated as a part of your *will*.

A *will* cannot dictate where certain property is distributed. Certain property is transferred outside of probate via contracts, titling, and trusts. For example, some assets have a designated beneficiary such as 401(k)s, individual retirement accounts (IRAs), life insurance contracts, payable-on-death (POD) bank accounts, and transfer-on-death (TOD) investment accounts. If an asset has a designated beneficiary, then that assignment prevails over the *will* unless the beneficiary is your estate. In addition, property owned as joint tenancy with right of survivorship (JTWROS), Tenancy by the Entirety (TE) (not available in Georgia), and property held in a trust cannot be distributed via a *will*. Property owned as JTWROS and TE passes directly to the joint owner(s) after an owner dies, and property held in a trust is distributed according to the trust document.

Content of a Will

Each state has its own laws for writing a valid *will*. Regardless of the state where you reside, all *wills* can share some common clauses. The following are some common clauses that are included in a *will*.

The **introductory clause** provides your full name and state of residence. The **declaration clause** states that this *will* is your last *will* and testament. This clause also includes the date the *will* is written as well as revokes any prior *wills* to ensure the *will* is the most current. The **bequest clause** directs who receives specific property or assets and how it will be distributed. The **residuary clause** indicates how any remaining property or assets that are not specifically bequeathed to individuals will be distributed. Without a residuary clause, some property or assets may not be considered to be part of your estate and may be distributed according to the laws of that state. The *will* also includes a **clause that identifies the executor/executrix** of your estate as well as indicates how much power the executor/executrix is given. A **guardianship clause** appoints a guardian for your minor children or other legal dependents. You may list a successor executor/executrix and guardian in the event that the original executor/executrix or guardian cannot or will not accept the appointment. A **clause directing the payment of debts and any estate taxes** is included in the *will*. An **attestation clause** is where the witnesses (the number of witnesses depends on the state's requirements) sign and authenticate the *will*. Georgia requires at least two witnesses to sign the *will*. A **self-proving clause** includes the notary assuring that he or she witnessed you and your witnesses sign the *will*. In Georgia, a notary is not necessary for a *will* to be valid. However, getting a *will* notarized speeds up the probate process because the courts do not have to take the time to contact the witnesses who signed the *will*. A *will* may contain other clauses but these are the more common clauses.

Dying Intestate

Dying intestate means dying without a valid *will* or dying with a *will* that does not provide instructions for distributing all of your property. If you die intestate, then your property will be distributed according to state laws. The courts will appoint an administrator/administratrix to administer the estate as stated by the laws. It is important to understand your state's intestacy laws because they determine how your property will be distributed absent a valid *will* that distributes all of your property. You should realize that property may not end up where you want if you die intestate. This link provides information about Georgia's intestacy laws: **http://www.mystatewill.com/states/GA/GAintcalc.htm**. Not writing a *will* may end up being more costly (attorney fees, time consuming, courts, etc.) than paying to create a valid *will*.

Even if you have a *will*, it may be considered invalid under certain circumstances and the estate will still go through the intestate process. A *will* may be considered invalid for a number of reasons including if you create a new *will*, if you get married/remarried, if you have a child/adopt a child, or if you move to a new state and your *will* does not meet the requirements of that state.

Types of Wills

There are a few common types of *wills*.

A **holographic will** is handwritten by you (the testator). This type of *will* contains all of the same content of a typed *will* and must be signed and dated. Holographic *wills* are valid in the state of Georgia. These *wills* must meet all of the state requirements to be legal including age, capacity, and witnesses. Holographic *wills* can be easy to challenge by other family members, relatives, or whoever may want to contest the *will* and the *will* may not hold up in court. Having a holographic *will* may be better than having no *will*, but it is important to evaluate the advantages and disadvantages of having this type of *will*.

A **nuncupative will** is an oral *will* given on your death bed when you do not have the ability to write down or type your *will*. There may be several limitations to this type of *will* and it is not generally validated. Nuncupative *wills* are not valid in Georgia because they do not meet the requirement that *wills* must be in writing.

A **statutory will** is a *will* that has been drawn up by an attorney and is in line with all of the state requirements for a valid *will*. This type of *will* must be in writing, signed by you, as well as signed by the witnesses. In Georgia, a *will* must be signed by at least two witnesses in the special manner provided by law. In addition, the witnesses should not be persons who are designated to take any property distributed in the *will*.

A **mutual/reciprocal will** is a simple *will* in which two people have the exact same *will* leaving all of their property and assets to the other person. These *wills* are typically used by spouses.

A **joint will** is one *will* in which there are multiple testators. This *will* transfers all the common property or assets to a certain other individual. A joint *will* ensures the distribution of property or assets that has been agreed upon by you and the other testators, typically spouses. A joint *will* is common for individuals entering subsequent marriages who have children from a previous relationship so that children from a previous relationship receive certain property or assets. This type of *will* does have some disadvantages. The *will* does not take into consideration future events that may occur or changing goals over the years and may distribute the property in a way that was not your original intention. Since it is one *will* with two testators, the surviving testator cannot change the *will* without the signature of the other testator.

Requirements for a Georgia Will

Each state has its own requirements for writing a valid *will*. It is important for you to re-evaluate your *will* if you move to another state to ensure that it meets that state's specific *will* requirements. The following are the requirements for a Georgia *will* to be valid.

The age requirement for a person making a *will* in Georgia is 14 years old. You must have capacity. Capacity means that you should be of sound mind and memory and understand what you are doing which is dictating how your property will be distributed upon your death. A *will* in Georgia must be in writing to be valid. You must sign the *will*. If you are unable to sign the *will*, then another person, appointed by direction of you, may sign the *will* on your behalf in your presence. In Georgia, at least two witnesses must sign the *will* in your presence. Additionally, these witnesses should not be receiving property or assets distributed in your *will*. A Georgia *will* may dictate the distribution of your property or assets to any person as long as it is consistent with state laws and policies.

Probate Process

Probate is a legal proceeding. The probate process involves proving the validity of an existing will, supervising the distribution of your assets to your heirs, making sure heirs receive clear title to inherited property, and protecting creditors by making sure debts of the estate are paid prior to distributing assets to heirs. The probate process also involves appointing a person to administer your estate based on your request in the will or state law.

There are several advantages of probate. Most of these advantages entail the protection of the people who are involved in the process. First of all, probate protects you. Since you wrote the *will*, the probate process tries to ensure that your wishes are carried out according to the *will*. Probate also protects the heirs in providing them with clear title and a systematic administration of your property/assets. Creditors are also protected by the probate process. The creditors are ensured that they will receive the payments for your debts before your property and assets are distributed to the heirs.

Although the probate process protects those that are involved, there are also some disadvantages to the process. The whole process can take an extended period of time and there may be frequent delays. If the process takes years to complete, and attorneys are involved, the probate process can become costly. There is also a loss of privacy with probate. Since the process is an open court proceeding, the files and documents may be open to the public for viewing.

How to Get Started Writing a Will

Once you establish the need to write a *will*, the next step is to determine how to go about actually drawing up the *will*. Lawyers can draft *wills* for you. They have the knowledge as well as the training and experience. A lawyer can personalize your *will* and discuss with you your desires and goals with the *will*. A good estate planning attorney can and will help you think about small things that can make a big difference after you die. For example, if you want to give money to your church, you know it is important to list your church's name and address. However, many churches have the same name, and if the location of your church changes but you forget to change the address in your *will*, it is important to put the proper language in the *will* to make sure the correct church receives the money. The fees charged for drafting a *will* are based on estimated and actual time spent drafting the *will*. Lawyers may charge a flat fee or an hourly rate for drafting a *will*. Each lawyer has different costs but you should be able to discuss these costs before incurring too many expenses.

There are several websites that offer templates for *wills* at typically a lower cost than a lawyer. However, a template cannot advise you and may not necessarily include all of the state's requirements for having a valid *will*. It is important to review the template and make sure it is considered valid and this may include consulting a lawyer. There are also websites that allow individuals to fill out a questionnaire and then a *will* is drafted and sent to the individual for possibly a lower cost than a lawyer. These websites should also be researched to ensure the validity of the *will*. Self-prepared *wills* may contain language which is unclear or confusing and that may cause problems during the probate process. A lawyer is always better able to monitor changes in legislation and case law (State Bar of Georgia, 2006). No matter the route taken to draft a *will* it is pertinent that you understand the need for a *will* and the advantages and disadvantages of the different options to draft a *will*.

Disclaimer

This publication contains general information. It is not the intention of the University of Georgia Cooperative Extension to provide any specific legal or medical advice. Individuals are encouraged to consult professionals to help them make an informed decision.

Note

Because laws change, it is important to check with an attorney or other experts to be sure this information is current.

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