Volunteer Lawyers Project
Nebraska State Bar Association

Wills

What is a will?

A will is the legal declaration of your intentions which you desire to be performed after your death. Although this definition has withstood the scrutiny of lawyers and judges for two centuries, it does not adequately portray the function of a will.

A will should be thought of as one part of an estate plan, a plan which represents the culmination of a person's life — his or her work, hopes and dreams. It is not easy to accrue an estate in this day of high taxes, rising costs of living and educating children. An estate represents what is left after a lifetime of work; and, generally it is accrued in the hope of passing on some measure of support to your family.

Careful estate planning is very important for acknowledging your family members and distributing your assets and personal item when you pass. Your will is the most important part of an estate plan, and perhaps the most important document you will ever sign. It serves as a substitute for what you would do for your family if you were still alive.

What are the requirements for a will?

1. You must be 18 years of age, except that a married person of any age may make a will.
2. You must be of sound mind which means that you know you are executing your will, and you are familiar with your property as well as to whom the property should be distributed.
3. The will must be in writing, either typewritten or handwritten.
4. The will must be signed by you and should be witnessed by two or more competent persons, who must sign the will in your presence and in the presence of each other. (Witnesses should not be persons who have been named as beneficiaries in the will.)
5. A will is not required to be notarized; but, it is best practice to get the will notarized. A notarized statement called a "Self-Proving Affidavit" can be added, which makes the will easier to prove in court if the will is challenged.

What is the difference between a testamentary will and a living will?

A testamentary will is a legal document that divides your assets according to you wishes upon your death. This document has no effect until you have died.

A living will, also known as an advance directive, is a legal documents that ensures your medical wishes are honored. This document will set out how you would like to be cared for in an emergency or upon incapacitation. This covers topics such as resuscitation, desired quality of life, and end of life treatments including what treatment you do not want to receive. Unlike the testamentary will, this document is effective during your life.

Who needs a will?

Everyone over the age of 18 should create an estate plan which includes a will. A person does not need to have a large estate to necessitate the need for estate planning. In actuality, small estates may need careful estate planning more to prevent unnecessary taxes and preserve every available asset.

A married couple should each have their own wills, even if they are joint owners of property. This is necessary to control disposition of the property upon the death of the surviving spouse, since neither knows who may outlive the other, or if the survivor will live long enough to write a will. There is also the chance of each individual inheriting money or property from some unexpected source. Those assets would also be subject to the terms of that individual's will.

Very few people die without leaving some type of property, which could be controlled by a will. However, property, which is NOT controlled by a will (such as property held in joint tenancy, property that has been placed in trust, life insurance and other property), should also be considered in planning your estate.

Who should draft my will?

Your lawyer should draft your will. Creating an estate plan, including a properly drafted will, involves making decisions requiring a professional skill. These skills are acquired through training, experience and study of state probate laws and state and federal taxes. A lawyer can review your estate and assets and make informed recommendation and place protections for special needs individuals, minor or the excessive demands of a spouse. The only way to handle these special situations is through a carefully planned will.

Can I draft my own will?

Although you can write your own will, "do-it-yourself" wills are often the cause of litigation, will contests, and problems with the title of real estate. Even a minor error in a will could alter the way in which your property is disposed. Remember that your heirs would be the ones to suffer the results of an improper will.

In Nebraska, the law also allows "holographic" wills. These are handwritten wills, which are not witnessed. To be valid, the material provisions of the will, the signature and the date of signing, must all be in the handwriting of the person making the will. A holographic will can be difficult to prove and is not a recommended way of disposing of property.

It is always recommended to have an attorney at least review your will for errors or issues before you execute it.

Can a will be changed?

A will can be changed or revoked at any time and as often as you wish, as long as you remain competent. Once you are deemed incompetent, usually by a physician, you can no longer change your will. A will does not become final until your death.

Changes might be advisable in case of marriage, birth, death of a beneficiary, a change regarding your personal representative or the guardian of your children, or the purchase or sale of a business or other property. You should review your will from time to time. It is recommended to review your will at least every 10 years.

In the event of divorce, the will is automatically revoked as to the former spouse, unless the will expressly provides otherwise. A decree of separation, which does not end the legal status of husband and a wife, does not automatically revoke a will. If you divorce or separate, you should review your will and decide what changes you wish to make.

Is joint tenancy a substitute for a will?

Two or more persons may own property together in such a way that upon the death of one of them, the property goes to the survivor(s) without going through probate. This form of ownership is called "joint tenancy."

In some cases, and for certain kinds of property, joint tenancy is a useful legal device, but a number of problems may arise from its arbitrary use. There are tax hazards in joint tenancy, which you may not be aware of, as well as other complications and expenses.

In any event, you cannot escape inheritance tax or estate tax by owning property in joint tenancy. It is not an adequate substitute for a will. See the NSBA brochure on joint tenancy for more information.

What happens if you die without a will?

If you die without having made a will, also known as intestate, the law (not you or your family members) provides for the disposition of your property, and that disposition may not be what you want.

Before an estate is distributed, debts and taxes must be paid. In addition, certain allowances are made to the surviving spouse so that he or she will have enough funds to use while the estate is being settled. These include a Homestead Allowance, an Exempt Property Allowance, and a Family Allowance up to a reasonable amount. After these allowances, and debts and taxes have been paid, the property is distributed as follows:

1. If you leave a spouse, but no children and no parents, your spouse will get all of your property.
2. If you leave a spouse and no children, but you have a surviving parent or parents, your spouse will get the first $50,000 of your estate plus one-half of your remaining property. Your parent or parents will get the other half.
3. If you leave a spouse and one or more children, and your spouse is the parent of all of the children, your spouse will get the first $50,000 plus one-half of your remaining property. Your children will get the other one-half in equal shares.
4. If your spouse is not the parent of all of your children, your spouse will get one-half of your estate and your children will get the other one-half in equal shares.
5. If you leave no spouse, your children will get all of your property in equal shares. If you leave no spouse or children, then your grandchildren will get your property in equal shares. If you have no grandchildren, your parents will get your property.
6. If you leave no spouse, children, grandchildren, or parents, your estate would go to your next of kin, as defined in Nebraska law. The portion of your estate that a relative would receive would depend upon how closely he or she is related to you.

The law provides only a rigid formula, and makes no exceptions for those in unusual need. The failure to make a will could mean hardships and added expense for your immediate family, and aid some relatives you may not even know.

The laws make no provisions for friends, business associates, charitable institutions, schools or churches, and they treat all types of property the same. There are no special provisions for family heirlooms or jewelry or a family business. They also fail to take into account the different needs of different beneficiaries, some of whom may need protection against their own spending habits or due to a special need. The only way to handle these special situations is through a carefully planned will.

Can I appoint a guardian for my children in my will?

Yes, you may select the person or persons you would like the court to appoint as guardians of your minor children in your will. While this is not binding on the court, the wishes expressed in a will are usually followed, provided that the persons named are willing to serve as guardians, and that the court finds the appointment to be in the best interests of the children. If you die without a will, the court may appoint a guardian for your minor children without knowing your wishes.

What is a personal representative?

"Personal representative" is the name now used for what once was called an executor or an administrator. You can select who is to be the personal representative of your estate in your will. If you do not select a personal representative, your surviving spouse has first priority to be appointed as your personal representative. Next in priority would be your other heirs. If no personal representative has been appointed within 45 days after your death, any creditor can apply for appointment. Any person appointed as personal representative must be at least 19 years of age.

Does the personal representative have to live in Nebraska?

It is not required by law that the personal representative is a resident of Nebraska, as long as the person named is otherwise qualified by age and suitability.

What are the personal representative's duties and obligations?

In general the duty of the personal representative is to settle and distribute the estate of the "decedent" (the person who died). More specifically, the personal representative must give notice of his or her appointment to interested persons, prepare an inventory of property owned by the decedent, possess and control the decedent's property, pay the taxes, claims and expenses of administration and distribute the property according to the will or according to the laws if there is no will.

A personal representative may utilize a probate attorney to assist with the probate duties and proceedings.

Can more than one person be named as personal representative?

You may appoint one or more persons as co-personal representatives or you can appoint successors to take over in the event your first choice is not willing or able to be the personal representative.

Can I dispose of my property in any way I wish?

Yes, subject to some limitations. You may not be able to stop your spouse from receiving a portion of your estate. In addition, a joint tenant cannot prevent the surviving joint tenants from becoming owners of jointly owned property by rights of survivorship.

Should I leave a separate list disposing of personal property?

Yes; and, this is encouraged. You can leave a separate list, dated and signed, disposing of personal property. To make that separate list effective, however, you must have a will; and, the will must make specific reference to that separate list. The advantage of such a list is that it can be changed without having to change the will.

How can a person contest a will?

A will contest is started by an interested person filing objections to the probate of the will with the court. The will contest must be started within three years after death or within 12 months after an informal probate of the will.

How can a will save money?

A properly written will can reduce taxes, leaving more of your estate for your family. It also gives you the choice of appointing a competent person as the personal representative. In addition, your will can provide that the personal representative need not post bond, which saves the estate the expense of paying the premium on the bond. A will can permit your personal representative to sell real estate without t a court hearing to get the power to sell.

Must the will be read to the family?

There is no requirement in the law for a "reading of the will." When a will is filed with the court, it becomes a public record and anybody may see it. The law does require that notice be given to all interested persons of the probate of a will so that they have a chance to protect their interests. Interested persons may ask for advance notice of any order entered by the court or of the filing of any document relating to an estate.

When should I make a will?

Everyone over the age of 18 should have a will; so, if you do not have a will there is no time like the present to create one. A wise person does not wait for a disaster or other compelling reason to begin planning his or her estate. You can always make changes in your will later if circumstances change.

In any event, you should review your estate plan with your attorney from time to time. Changes in your property holdings, your family (marriage, death, divorce) and simply inflation in values can change results of your intent which has been expressed in the will. Changes in the tax laws can greatly affect the intent that you had when making the will. Review your own will annually; review it with an attorney when family changes occur or at least every three years.

Nebraska Find-A-Lawyer

Visit www.nefindalawyer.com for an online directory of lawyers who advertise professional services on the website. Nebraska Find-A-Lawyer is not a directory of all lawyers licensed to practice law in Nebraska.

Nebraska Free Legal Answers

Visit www.NE.freelegalanswers.org to learn how to ask a lawyer licensed to practice law in Nebraska a civil (non-criminal) legal question online. Qualifying users may receive free basic legal information and advice from an approved volunteer lawyer.

Nebraska State Bar Association
635 South 14th Street #200
Lincoln, Nebraska 68508