

## Last Wills and Testaments

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### What is a Last Will and Testament?

A Last Will and Testament is a document that you sign disposing of your assets at the time of your death. If you die without a Last Will and Testament, your assets will pass under the laws of intestacy. In, NYS, that means that there is an order of priority as to who is entitled to your assets and how much they will receive. That order is as follows:

If a decedent is survived by:

- a. A spouse and children – the first \$50,00 and one-half (1/2) of the remainder to the surviving spouse and the balance to the children
- b. A spouse and no children – all to the surviving spouse
- c. Children and no surviving spouse- all to the children by representation
- d. No spouse, no children – all to the decedent's surviving parents or parent
- e. No spouse, no children, no parent- all to the issue of the decedent's parent(s) by representation (that is, to the decedent's siblings and half-siblings)
- f. No spouse, no children, no parent(s) or parent, no siblings – one-half (1/2) to the surviving paternal grandparent(s) but if neither paternal grandparent survives, then to the paternal grandparent(s) children (that is, the decedent's aunt(s) and uncle(s) on their father's side AND one-half (1/2) to the surviving maternal grandparent(s) but if neither maternal grandparent survives, then to the maternal grandparent(s) children (that is, the decedent's aunt(s) and uncle(s) on their mother's side. If no surviving grandparent or their children on one side, the whole to the surviving grandparent(s) on the other side or their children.
- g. No spouse, no children, no parent, no issue of parents, grandparents or aunts or uncles- one-half (1/2) to the great-grandchildren of the paternal grandparent(s) AND the other one-half (1/2) to the great grandchildren of the maternal grandparent(s). If no great-grandchildren on one side, the whole to the great-grandchildren on the other side
- h. No heirs as listed above, then the property passes (escheats) to the State of New York.

### If I don't have a Will when I die, will my property automatically go to NYS?

No. If someone passes away without a Will in NYS, there is an order of priority as to who is then entitled to inherit from your estate. Only if you do not have any surviving heirs when you die, will your property go to NYS.

### Is a Last Will and Testament the same as a Living Will?

No. A Living Will gives written instructions to your health care agent on what medical treatment you want or do not want. A Last Will and Testament is a written document that disposes of your property, both real and personal, at the time of your death.

### To whom can I leave my estate to under a Will?

You can leave your estate to anyone whom you would like, as long as you do not disinherit your spouse.

If you have a disabled child, you should not leave any part of your estate to that child. If you do, that child will lose whatever government benefits they are receiving such as Medicaid and/or SSI. If you want to leave your estate to a disabled child, you should consult with an attorney to set up a Supplemental Needs Trust under your Will.

## **Can a spouse be disinherited under a Last Will and Testament?**

No. You cannot disinherit your spouse under a Will.

## **What happens if a spouse is disinherited?**

In NYS, a spouse who has been disinherited under a Will can file what is called a "Right of Election" against the estate. A Right of Election entitles the disinherited spouse to receive the amount of \$50,000 or one-third (1/3) of the deceased spouse's assets, whichever is greater.

## **Are there time limits on when a right of election has to be filed?**

Yes. There are time limits on when a disinherited spouse can file their right of election. To ensure that the disinherited spouse's right of election is preserved, he or she should consult with an attorney as soon as possible after the death of their spouse to make a formal election against the estate.

## **Can I disinherit my children under my Will?**

Yes. You can disinherit your children under a Will. If you wish to disinherit your children, you should consult with an attorney. Remember, however, that a disinherited child can seek to have a court declare your Will invalid. If the child is successful, the child would then be entitled to their intestate share of your estate.

## **How many originals of my Last Will and Testament should I have signed?**

You should only have one signed original of your Last Will and Testament.

## **What is a Testator/Testatrix?**

A Testator/Testatrix is the title of the person who signs a Will disposing of their assets.

## **What is an Executor/Executrix?**

An Executor/Executrix is the title of the person you nominate under your Will to carry out the terms of your Will.

## **Can more than one person be nominated as Executor/Executrix at the same time?**

Yes. You can nominate more than one person to act as Executor/Executrix. However, keep in mind that they will be required to sign documents together. This may be problematic if they do not live near each other.

## **What if I have children that are under the age of 18 years?**

If you have children under age 18 years, you should have the following in your Will:

- a. The appointment of a guardian(s) and successor guardian(s); and
- b. A trust to hold onto your assets until your children are old enough to receive them.

## **What if I have a trust provision under my Will for my children?**

In this case, you will need to determine whom you will name as the Trustee(s) and Alternate Trustee(s). The establishment of a trust under your Will should be handled by an attorney. The attorney can explain how the trust works and ensure that the proper trust language is used in your Will, especially if you have disabled children of any age.

## **Can I prepare my own Last Will and Testament without using an attorney?**

While you can find many Will forms online or at legal publisher stores, the better practice is to have an experienced attorney prepare the Will for you. That way, if someone decides to contest the Will, they will have to overcome the high legal burden of proving that the execution and other legal requirements of your Will were met.

### **Is a Will required to be notarized?**

No. In NYS, a Will is not required to be notarized, however, the signing of a Will by a Testator or Testatrix must be witnessed by 2 disinterested persons.

### **What is a Codicil?**

A Codicil is a legal document whereby one makes an addition, subtraction, revocation or amendment to their original Will.

### **I've signed my Will. Now what?**

Your Will should be kept in a safe place. Generally, attorneys file their client's original Will with the local county Surrogate's Court for safekeeping. Some Surrogate's Court charge a fee for filing Wills for safekeeping. Presently, no fee is charged for filing an original Will for safekeeping with the Erie County Surrogate Court or the Niagara County Surrogate Court. After your Will is filed for safekeeping, you will receive a receipt from the Court. You should keep this receipt together with the copy of your Will.

**NOTE** – it IS NOT a good idea to have your original Will placed in your bank safe deposit box for safe keeping. If you do, be aware that a Court order will be required to open your safe deposit box after you die to retrieve your original Will causing unnecessary fees to be incurred against your estate.

### **What is Probate?**

Probate is the legal process of establishing the validity of a Will before the Court. A Will IS NOT a self-acting document like a Power of Attorney. The Will must be recognized by the court as being valid before anyone nominated in the Will as Executor/Executrix and/or Trustee has authority to act and before any beneficiary named in the Will receives any property of the deceased's estate.

### **What is the difference between Probate and Administration?**

**Probate** is the proceeding when someone dies with a Will. **Administration** is a proceeding when someone dies without a Will. Under an Administration proceeding, the person appointed as the representative of the estate is called the Administrator/Administratrix. An Administrator/Administratrix has the same responsibility as an Executor/Executrix. In addition, before anyone can act as the Administrator/Administratrix for an estate, they must be approved and appointed by the court.

### **Do I need a lawyer to probate a Will?**

The probate process can be somewhat daunting for lay persons if they do not have an attorney representing them. In NYS, if the gross value of a deceased's estate is less than \$30,000 and there is no real property involved, you can generally file what is called a Voluntary Administration proceeding, also called a Small Estate Proceeding, without the services of an attorney. Your Surrogate's Court has information on how to file this type of proceeding.