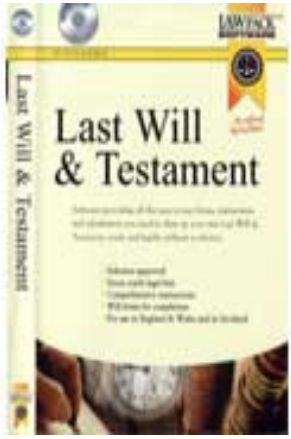
WILLS

[Who needs one? You do!]

Cooper Law Firm



What is a Will?

LAST WILL AND TESTAMENT

A Will is the most basic of estate planning documents. A Will is a legal document that protects your assets, allows you to name the executor of your estate, allows you to name a

guardian for your children and helps minimize the chances of a contest over your estate.

If you die without a Will, your estate will be distributed according to a State mandated rigid legal formula and not as you may have wished. Local [State] law governs your Will.

WHAT IS IN A WILL?

Simply put, a Will is a letter from you [the Testator] to a Probate Judge in your county. In a Will, you identify yourself, describe your property and explain to whom you are leaving your real and personal property. You may also designate whom you nominate to care for your minor children.

If you are concerned about the distribution of your money and property after your death [and you do not have a Trust], you need to have a Will. Many folks intend to get a Will as soon as they get around to it.

"I swear that, as soon as we get into port, I'll see about getting that Will made". –
Anonymous passenger aboard the Titanic.

Once your Will has been submitted to the Probate Court, it is public record. Anyone can see it, read it and get a copy of it.

WHAT IS PROBATE?

Probate can be simply described as a means of transferring title to property. Obviously, once a person dies, that person

is no longer able to transfer title to property titled in their name. Probate is a procedure for transferring title to the decedent's property to the persons entitled to it.

The presentation of your Will to a Probate Judge starts the Probate process. If you die owning real or personal property, your estate will end up in a county Probate Court.

Unlike with Trusts, every Will must go through the Probate process. Probate will tie up your property anywhere from 6 months to several years, and will cost approximately 2 – 10 % of your estate value. The Judge will make sure your debts are paid and your property is distributed in accordance with your Will or the laws of the State.

In many states, the Probate Court has exclusive jurisdiction over guardianships and conservatorships. The Probate Court may appoint a guardian or conservator of a minor or a guardian or conservator of an adult. A guardian is a fiduciary who makes personal decisions for an incapacitated individual. A conservator is a fiduciary who makes financial decisions for a protected individual. The Probate Court must determine whether a guardianship or conservatorship is legally appropriate and who should serve as the guardian or conservator.

CAN MY WILL BE CONTESTED?

A Will [the letter of instruction to the Probate Judge] may be contested. Acquaintances, distant relatives and others may petition the Court to share in your property.

A Will can be found to be invalid for various reasons, including improper execution, [Will not witnessed properly by proper witnesses], Testator [you] not competent, Will made under duress or undue influence, etc.

Very few Wills are ever challenged in Court. When they are, it's usually by a close relative who feels somehow cheated out of a share of *your* property. To get an entire Will invalidated, someone must go to Court and prove that it suffers from a fatal flaw. The signature was forged, you weren't of sound mind when you made the Will, or you were unduly influenced by someone.

If your Will is stricken [rejected] by the Court, your estate may be treated as if you died intestate [without a Will] and all of your assets may be distributed by the Court in accordance with the law of the State where you resided [called intestate succession laws, statutes of descent or rules of descent and distribution]. If there are no living relatives, your assets may revert to the State! This may not be what you wanted to happen.

DO I NEED A LAWYER TO DRAFT MY WILL?

No, but…

It is easy to make a serious mistake if you draft your own Will [or fail to execute it properly], and the penalty is that, after you die, the Judge will not be guided by your wishes [i.e. your Will], but will distribute your estate by the rules of the State statute of descent and distribution. Many attorneys charge a very small fee for writing simple Wills. Have an attorney write your Will.

WHAT HAPPENS IF I DIE WITHOUT A WILL?

Deciding not to have a Will is effectively the same as letting your state decide who gets your assets after your death.

Rather than leave this important issue unanswered or in dispute, each state has a default system (commonly referred to as intestate succession rules or statutes of descent) in the event one is needed.

For some, the result may be the same as they would have chosen in their Will [had they written one]. Others, perhaps most, however, may be surprised how the state decides who gets what and how much.

The bad thing about dying *intestate* is that a state's default rules may not go far enough to meet a deceased's distribution wishes. For example, although a surviving spouse is generally first in line to inherit, the spouse may end up having to share the estate with other relatives of the deceased.

WHAT DOES 'INTESTATE' MEAN?

Intestacy is the condition of having died without a valid Will. If you die owning property and without a Will [intestate], there will still be a Probate procedure that your property must undergo. But, instead of having your own personal instructions to guide the Judge [i.e. your Will]; the

Judge will give away your assets in accordance with State law.

If you don't have a Will, State law will determine what happens to your eligible property [unless *you used some alternative legal method to transfer your property before you died]*. Generally, your estate will go to your spouse and children [*not just your spouse*]. If you have neither, it will go to your other closest relatives [as set out by the law of your State].

Most married men or woman leave, in their Wills, a provision that if they die, they want **all** of their estate to go to the surviving spouse. *Yet, many states do not provide for the intestate's distributions to be that simple and straightforward.*

Here are some examples.

In Ohio, part of the provisions says "A surviving spouse is generally first in line to get any assets from the intestate estate. However, the amount a surviving spouse is entitled to varies as follows:

If there are no children of decedent or their lineal descendants, or if all of decedent's children are also children of the surviving spouse, the surviving spouse is entitled to the entire intestate estate.

If there is one child of the decedent or the child's lineal descendants survive and the surviving spouse is not the natural or adoptive parent of the decedent's child, the surviving spouse is entitled to the first $20,000 plus one-half of the balance of the intestate estate. The remainder goes to the child or the child's lineal descendants, per stirpes .

If there is a spouse and more than one child or their lineal descendants surviving, the surviving spouse gets the first $60,000 if the spouse is the natural or adoptive parent of one, but not all, of the children, or the first $20,000 if the spouse is the natural or adoptive parent of none of the children, plus one-third of the balance of the intestate estate. The remainder goes to the children equally, or to the lineal descendants of any deceased child, per stirpes."

In Virginia, part of the provisions says "A surviving spouse is generally first in line to get any assets from the intestate estate. However, the amount a surviving spouse is entitled to varies as follows:

If none of decedent's children or their descendants is alive, or if all of the decedent's surviving children are also children of the surviving spouse, the surviving spouse is entitled to the entire intestate estate.

If one or more of the decedent's surviving children are not also issue of the surviving spouse, the surviving spouse gets one-third of the intestate estate and the surviving children or their descendants get two-thirds."

In Michigan, part of the provisions says "A surviving spouse is generally first in line to get any assets from the intestate estate. However, the amount a surviving spouse is entitled to varies as follows:

If the decedent left no surviving descendants or parents, the surviving spouse is entitled to the entire intestate estate.

If all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the

decedent, the surviving spouse gets the first $150,000 plus one-half of any remaining assets in the intestate estate.

If no descendant of the decedent survives the decedent, but a parent of the decedent survives, the surviving spouse gets the first $150,000 plus three-fourths of any remaining assets in the intestate estate.

If all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has 1 or more surviving descendants who are not decedent's descendants, the surviving spouse gets the first $150,000 plus one-half of any remaining assets in the intestate estate.

If one or more, but not all, of the decedent's surviving descendants are not descendants of the surviving spouse, the surviving spouse gets the first $150,000 plus one-half of any remaining assets in the intestate estate.

If none of the decedent's surviving descendants are descendants of the surviving spouse, the surviving spouse gets the first $100,000 plus one-half of any remaining assets in the intestate estate."

In Wyoming, part of the provisions says "A surviving spouse is generally first in line to get any assets from the intestate estate. However, the amount a surviving spouse is entitled to depends on these scenarios:

If there are no surviving children or descendents of any child, the surviving spouse is entitled to the entire intestate estate.

If the intestate leaves a surviving spouse and children, or the descendents of any children surviving, one-half of the

estate descends to the surviving spouse, and the remainder goes to the surviving children and descendents of children (subject to the limitations below)."

WILL MY SAME-SEX PARTNER INHERIT MY ESTATE?

If you are part of an unmarried same-sex couple, without a Will, the survivor will not inherit anything unless you live in one of the few states that allow registered domestic partners to inherit like spouses: California, Maine, and Vermont. If no relatives can be found to inherit your property, your assets will go [*escheat*] to the State. The *remedy* is to *have a Will* and be very specific in your Will as to who gets what!

WHO DETERMINES WHO WILL CARE FOR MY CHILDREN?

In the absence of a Will, the Probate Court will determine who will care for your young children and their property if the other parent is unavailable or unfit. Make sure you nominate a guardian in your Will!

MOST FOLKS HAVE WILLS, RIGHT?

Though most people are aware that they need a Will, many Americans, as high as 66% according to Consumer Reports, don't have one.

Among the famous people who died without a valid Will are Abraham Lincoln, Andrew Johnson, Ulysses S. Grant, Howard Hughes, Martin Luther King, Jr. and Pablo Picasso.

MAY I HANDWRITE MY OWN WILL?

Handwritten, unwitnessed Wills, called "holographic" Wills, are legal in more than 25 states. To be valid, a holographic Will must be written and signed in the handwriting of the person making the Will. In some states it must also be dated.

A holographic Will is better than nothing if it is valid in your state. But a Will signed in front of proper witnesses is better. If a holographic Will goes before a Probate Court, the Court may be unusually strict when examining it to be sure it's legitimate. Many heirs have discovered that holographic Wills turn out to be ambiguous or even contrary to the wishes of the Testator.

CAN I DISINHERIT MY SPOUSE?

The law protects surviving spouses from being left with nothing. If you live in a community property state (Alaska (only if you have made a written community property agreement), Arizona, California, Idaho, Louisiana, Nevada,

New Mexico, Texas, Washington, or Wisconsin), your spouse automatically owns half of all the property and earnings (with a few exceptions) acquired by either of you during your marriage. However, you can leave your half of the community property, and your separate property, to anyone you choose.

In most other States, a surviving spouse has a legal right to claim a portion of your estate, no matter what your Will provides. But these provisions kick in only if your spouse goes to Court and claims that share. This is often referred to as the '*Statutory Share*'.

If you do not plan to leave at least half of your property to your spouse, you should consult a lawyer to see if there is a legal way to do what you want.

Be aware of the laws of your state. The Florida constitution, for example, prohibits the head of a family from leaving his residence to anyone other than a spouse or minor child if either is alive.

CAN I DISINHERIT MY CHILDREN?

Yes. Generally, children have no right to inherit anything from their parents.

It is perfectly legal to disinherit a child. Problems may arise if, in your Will, you fail to mention a particular child. It may be that you meant to include him, but forgot. It may be that you wrote your Will before he was born. In some cases, this disinherited child may have the right to claim part of your property. So, in order to disinherit a child, be

very specific in your Will that you are, in fact, disinheriting him.

It may be a good idea to have a local attorney check for you, because each State governs its own law in this area.

I DON'T HAVE MUCH PROPERTY…

Can't I just make a handwritten Will?

See ‘MAY I HANDWRITE MY OWN WILL?’, above. Holographic Wills are legal only in about half of the states.

Some states allow you to use a fill-in-the-blanks form if the rest of the Will is handwritten and the Will is properly dated and signed. If your fill-in-the-blanks form Will is written with clarity, and is unambiguous, it may work out. But, beware of the danger of the do-it-yourself Will – it may end up being contrary to what you intended.

CAN I NAME A GUARDIAN IN MY WILL?

Yes.

If both parents of a child die while the child is still a minor, another adult - called a "personal guardian" - must step in. The personal guardian will be responsible for raising your children until they become legal adults.

You and the child's other parent can use your Wills to nominate someone to fill this position. To avert conflicts,

you should each name the same person. If a guardian is needed, the Probate Judge will appoint your nominee as long as he agrees that it is in the best interest of your children. If you fail to name a guardian, the Judge will select one for you!

WHAT MAKES A WILL LEGAL?

Any adult of sound mind is entitled to make a Will. Beyond that, there are just a few technical requirements for a Will. The document must expressly state that it is your Will. It must be signed and dated. The Will must be witnessed by at least two, or in Vermont, three, witnesses. The witnesses must watch you sign the Will, though they don't need to read it.

The witnesses, in most states, must be people who won't inherit anything under the Will.

Holographic Wills, where legal, do not need to be witnessed.

Wills normally do not need to be notarized, but many Testators do have their Wills notarized and, in many states, if you and your witnesses sign an affidavit (sworn statement) before a notary public, it may simplify Court procedures required to prove the validity of the Will after you die.

Wills are governed by State law – State law may change from time to time. Check with an attorney!

CAN I LEAVE PROPERTY TO YOUNG CHILDREN IN MY WILL?

Yes.

Children under 18 can inherit property -- but if the property is valuable, an adult must manage it for them [property guardian**]**. You can use your Will to name someone to manage property left to minors, avoiding the need for a Court to appoint a guardian. The guardian of the child may also serve as the guardian of the property.

DO I NEED TO FILE OR RECORD MY WILL?

No.

But, in some states, there are provisions for you to record your Will, if you like. It may be better just to keep your Will in a safe place where your family can find it when needed.

CAN I AVOID PROBATE WITH A WILL?

No.

Many people believe that by having a Will they will avoid Probate. While a Will may make Probate easier, there still must be Probate of those items titled in the decedent's name

alone. The Will tells the Court which people should be entitled to the decedent's estate and Probate passes title to those people.

[A living trust, on the other hand, can avoid Probate if all of the decedent's assets are owned by the trust. Upon death, title to those assets pass according to the terms of the trust without need of Probate.]

WHERE WILL MY ESTATE BE PROBATED?

In your domicile state. If your principal home is in one state but you spend a lot of time traveling in other states or countries, your domicile state may determined by where you spend most of your time, by where you vote, or by the state of your driver's license, etc. Generally, your domicile is the place you consider to be your permanent place of abode.

However, beware! If you own property in more than one state, *a Probate process may be required in each state* to distribute the property in that state after your death. To avoid this, have your Trust own the real estate.

DO I NEED A NEW WILL WHEN I GET DIVORCED?

Yes, maybe.

In most states, getting divorced automatically revokes gifts made to a former spouse in your Will. But to be safe, if you get divorced, make a new Will.

CAN I BEQUEATH OR DEVISE EVERYTHING I OWN VIA MY WILL?

[Bequeath – personal property, Devise – real estate]

No.

You cannot leave property you hold in joint tenancy with someone else (or in "tenancy by the entirety" or "community property with right of survivorship with your spouse). In these cases, at your death, your share will automatically belong to the surviving co-owner. A Will provision leaving your share would have no effect unless all co-owners died simultaneously.

You also cannot leave property previously conveyed to a Trust, proceeds of a life insurance policy for which you have named a beneficiary, money in a pension plan, IRS, 401k plan, or other retirement plans.

The distribution of these assets after your death is controlled by beneficiary designations made by you before your death [appropriate forms are normally provided by the plan administrators].

You also may not leave assets for which you have made some type of Pay-on-Death provision [e.g. Bank accounts].

Don't leave funeral instructions in a Will – Wills are typically not read, or found, until long after your funeral.

You cannot leave money to pets.

You cannot leave money for something illegal.

Generally, you cannot leave a gift that is contingent on the marriage, divorce, or change of religion of a recipient.

HOW CAN I AVOID PROBATE?

Property left through a Will usually must spend several months or years tied up in Probate Court before it can be distributed to the people who inherit it. If you die owning real or personal property in your solo name, *the only way it can be distributed is through Probate!*

To avoid Probate, give away all of your assets before death, or convert ownership from solo ownership [where the asset is in your name alone] to some kind of joint ownership, or, *the best idea*, prepare a simple *Revocable Living Trust* and transfer all of your assets to it before you die!

ARE THESE DO-IT-YOURSELF WILLS OKAY?

Just as handwritten, or holographic, Wills have normally been Probated by [some] Courts, today's do-it-yourself software-produced Wills may be found legal after your death by a Probate Judge.

The real questions are, however, "Do they do the entire job?", and, "Do they do it right?". If there are any errors which would bar acceptance for Probate, nobody would be able to correct them after the death of the testator.

It is usually wise to have a professional estate attorney write your Will for you to avoid many of the pitfalls associated with Wills. For around $200, you may be able to have an attorney write your [simple] Will for you. Do it this way.

WHAT IS THE UNIFORM PROBATE CODE?

Because Probate is generally regulated by the States, each State has its own laws to set up Probate procedures, rules and laws concerning all Probate matters.

A non-governmental body, the National Conference of Commissioners on Uniform State Laws (NCUSL) was formed in 1892 upon the recommendation of the American Bar Association for the purpose of promoting "uniformity in state laws on all subjects where uniformity is deemed desirable and practicable." Made up of lawyers chosen by the states, the Conference oversees the preparation of proposed laws, "Uniform Laws" which the states are encouraged to adopt. To date, the Commissioners have approved more than two hundred uniform laws, of which more than 100 have been adopted by at least one state. A few have been widely adopted and have, as a consequence, approached the hoped for uniform national law on their subject.

The Uniform Probate Code has been adopted, at least in part, by 18 states. Each State that adopts the Uniform Probate Code does it in its own way. This means there are probably no two States that treat Probate the same way. Even in the dozen or so States that have adopted the

Uniform Probate Code in its entirety, most have made significant modifications to the Uniform Code.

NOT LEGAL ADVICE

This brochure does not attempt to give legal advice. Wills are creatures of State law. Study and research the laws of YOUR state before trying to create your own Will, or, better, see an Estate Planning Attorney.