

DO I NEED A WILL?



**“. . . being of sound mind, I do hereby make this
My
Last Will and Testament. . .”**

BE ADVISED

This is general information on the subject of Wills. It is not meant to provide legal advice or legal counseling. For answers to specific questions or legal assistance, please consult an attorney.

Q. What is a Will?

A. A person's last opportunity to legally declare how his or her property is to be divided when he/she dies.

Q. What is a Codicil?

A. An addition or supplement to a Will, which changes the Will by adding or taking something out of the Will. A codicil must be executed with the same formality as a Will.

Q. What is a Self-Proving Affidavit?

A. A legal document which when signed by the testator/testatrix at any time during their lifetime after the execution of the Will can eliminate the need for the testimony or other affidavits of the witnesses at probate.

Q. How old does one have to be in order to make a Will?

A. All persons 14 years of age and older may make a legally binding Will.

Q. What is a Joint Will?

A. A single Will executed by two or more testators and intended to represent the Will of all who sign as testator/testatrix.

Q. What is a Mutual Will?

A. Separate Wills of 2 or more testators/testatrixes that "mirror" each other and leave the same things to the other person(s).

Q. Does a Will have to be in a particular format?

A. No particular format is necessary to constitute a valid Will. The law instructs that the whole document is to be considered to determine the intent of the maker of the Will.

Q. Does a Will have to be in writing?

A. Yes. Georgia law requires that a valid Will be in writing and that it be signed by either the person making the Will or someone else in the presence of and at the express request and direction of the person making the Will.

Q. If I can't read can I still make a Will?

A. Yes. It would be necessary for someone to read the entire document to you and it is suggested that this reading be in the presence of the two witnesses who will affirm by their signatures that this was done. Individuals who suffer from hearing and speech impairments and visual impairments can also make Wills.

Q. If I am unable to write my name to sign the Will, can I still make a Will?

A. Yes. You have two options. If you sign other documents with a mark such as an (X), then you would use this mark to sign your Will. Or, if you normally let someone else sign your name, you may do this in the presence of your witnesses. A statement in the Will may reflect that this was done.

Q. What does "being of sound mind..." mean?

A. The law requires that in order for a person to make a Will he or she must have the mental capacity to understand what he or she is doing.

Just because one is elderly, intellectually challenged or eccentric, does not prohibit him or her from being able to make a Will. In addition, a diagnosis related to incapacity or insanity does not necessarily completely prohibit one from being able to make a Will if he or she has lucid periods and the necessary capacity at the time the Will is made.

Making a Will and those witnessing that signature, are by their signature giving their word that they believe the person making the Will to have the necessary mental capacity.

Q. What can a person give away in his or her Will?

A. Real property (land), Personal property (everything else).

Q. Is it possible for me to leave someone something in my Will and keep them from giving it or selling it to someone else?

A. A partial answer to this question is “Yes”. It is legal to leave something to a person only for their lifetime. This is called a life estate. You may dictate that it pass to someone else after that person dies. If you have something else in mind, such as giving something outright but controlling for evermore what that person can do with it, you need to speak with an attorney about specific details.

Q. Do I have to leave what I have to my spouse and/or my children?

A. No. A Will is legal even if it leaves everything to complete strangers and leaves out the spouse and other descendants. It is a good idea, however, to mention the spouse and /or children by name or class (spouse, child, children) and leave them at least a nominal gift of \$1.00 - \$10.00 to make it clear that they were not forgotten.

Q. Can I give all of my estate to a charity, church or school?

A. Yes. If there is something found insufficient in the attempt to gift, the court will distribute the property as close to the intent of the testator/testatrix as possible.

Q. Can I say in my Will what is to be done with the proceeds from my insurance policy?

A. Only if the beneficiary of your insurance policy is your estate or the executor or executrix of your estate. Otherwise, the money from the insurance policy belongs to the person or persons named as your beneficiary.

Q. Should I leave instructions for my burial in my Will?

A. You may do this but it is not advisable. Usually, when family members lose a loved one, the Will is not reviewed until after the person has been buried or some other final disposition has been made. In such cases, any special requests you had would be overlooked.

There are other documents, which provide an opportunity for you to detail all of your final arrangements and leave them to give guidance for your loved ones. One such document, "Details of My Final Arrangements" is available from the Division of Aging Services at the address that appears at the end of this brochure.

Q. If I want statements made to certain people, can I put them in my Will?

A. Yes. Some people leave messages in their Wills of statements they wanted made only after their deaths. Should you decide to do this however, exercise caution, as these are the last words that your loved ones will hear from you. There would be no opportunity for completion, deletion or corrections.

Q. If I decide to leave my children and or spouse out of my Will, can they still get some of what I leave?

A. Yes. You may exclude anyone you choose from your Will. In some cases however, a spouse or a minor child or minor children may ask the court for a portion of your estate to support him/them for twelve months. This may or may not apply to you. If you choose to leave a child (ren) or spouse out of your Will, you should specifically state that this is intentional.

Q. What is an executor or executrix, and do I have to have one?

A. The executor (male) or executrix (female) is the person who presents your Will for probate and sees to it that your wishes are carried out. You will need to name one in your Will or the court would have to name/appoint someone.

Q. What if my family doesn't want to probate my Will?

A. The law requires that a person having possession of a Will **file** that Will with the proper probate court upon your death. His or her failure to do so can result in a fine and a jail sentence.

The law does not require that the Will be probated but once the Will is filed, any person having an interest in the Will can apply to the court to have it probated.

Q. Will my heirs have to pay any estate or inheritance tax?

A. That depends upon the value of your estate. The estate was not subject to estate and gift tax unless its value exceeded \$5.45 million for 2016.

Check with an attorney for your specific situation because the tax laws are constantly revised.

Q. I had my Will prepared in another state, do I have to make another one just because I live in Georgia now?

A. Not necessarily. A will prepared in another state may be valid in Georgia as long as it has been executed according to requirements. You should have it reviewed by an attorney to be sure.

Q. What happens if I die here and own property in another state? Does my probated Will give my beneficiaries ownership of that property?

A. Not without taking some kind of affirmative action in that state. It is likely that your estate's representative may be required to register evidence of the probated Will with the probate court of the state of the location of the property. That state's law will determine what additional procedures have to be followed.

Q. What happens if I'm living in another state when I die but have property in Georgia?

A. A petition for "No Administration Necessary" can be filed to dispose of the property. This petition should be filed in the probate court in the county where the property is located.

Q. Can my executor legally handle my affairs now?

A. No. Your executor/executrix's job does not begin until you are dead. Being named your executor/executrix does not empower him/her to carry out duties as an agent or attorney-in-fact would do under a "Power of Attorney." There are forms for Powers of Attorney. For information or for a copy of a form, make your request to the Division of Aging Services at the address listed at the end of this brochure.

Q. My spouse has an illegitimate child. Will he/she be able to get anything from my husband's estate if my husband dies without a Will?

A. Yes, that is highly possible.

A child born out of wedlock may inherit from the mother or the mother's family line but not from the father or the father's family line unless there is clear and convincing evidence that the child is that of the father.

Such evidence may include:

- A court order declaring the child legitimate;
- A court order establishing paternity;
- A sworn statement by the father attesting to be the parent
- The father signed the birth certificate

Your husband should discuss this with an attorney as soon as possible.

Q. How long is my Will valid before I need to revise it?

A. Unless something happens to revoke your Will, you do not have to revise it unless you want to make changes to your Will.

Q. What might occur that could force me to make a new Will?

A. Generally, if either of these events occurs after your Will has been executed, your Will is automatically revoked, unless the Will states that these events should not revoke it.

1. a child is born within 10 months of the death of the testator
2. a child is adopted
3. Divorce
4. Marriage

Q. Is a "Living Will" the same as a Will?

A. No, a Living Will is a legal document instructing your doctor to withhold or withdraw life-sustaining procedures. (Georgia no longer has a Living Will law, only one for a Georgia Advance Directive for Health Care.) It is not the same as your Last Will and Testament, or Will.

Q. If I die without a Will, does my property go to the state?

A. Not as long as you have a living relative who can claim your estate. As long as you have relatives who can be found, your property will be distributed according to Georgia's intestacy law. The order in which your relatives receive your property is as follows:

1. Spouse (if there is a spouse and children, the spouse is entitled to 1/3 of the estate and the rest of the estate is divided equally among the surviving children)
2. Children (if a child is deceased, his or her children will divide that portion)
3. Father and mother share equally with brothers and sisters
4. Brothers and sisters (half brothers and sisters share equally whole-blood siblings)
5. Grandparents
6. Aunts and uncles
7. First cousins
8. Closest other relatives

Q. How Do I revoke a Will?

A. Wills, including joint Wills and Mutual Wills, can be revoked expressly or impliedly. The testator/testatrix can revoke a Will in writing or by action (i.e. tearing it up; crossing it out, etc.)

Q. What happens if the only property left is a car or a bank account or furniture?

A. It may be possible to file a petition for "No Administration Necessary" if there are no debts of the estate and all of the heirs agree upon how to divide the property. This would be filed in the probate court in the county where the person died.

Q. What happens if the person dies and did not have a Will and does have a lot of property and debts?

A. Two options are available. If there is a spouse, the spouse may wish to speak with an attorney about filing a Year's Support to provide support from the estate of the decedent. Option two is to petition for an Administration of the Estate. In such a case, the court would appoint someone to be the "administrator" to see to it that the heirs are identified, the debts are paid and the property is properly distributed according to the laws of Descent and Distribution in the State of Georgia.

Q. So, do I need a Will?

A. If you want to have a voice in how your property is to be distributed when you die, a Will is the best way to accomplish that. If you have minor children in your care or dependents for which you wish to provide, it is responsible to prepare and properly execute a Will to make those provisions.

Your property will be distributed when you die whether or not you have a Will; if you have relatives, more likely than not they will wind up with some or all of that property.

**The real question is whether
or not you want to leave a
Will.**

The choice is yours.

NOTES

This information is not intended as legal advice but community education. For legal assistance in this or other areas, please contact an attorney.

For information about this or other publications produced by the Division of Aging Services, call 1-866-55-AGING.



Prepared by
Natalie K. Thomas
Attorney at Law
State Legal Services Developer
Department of Human Services Division of Aging Services
2 Peachtree Street, NW Suite 33.384
Atlanta, Georgia 30303-3142
(404) 657-5328
www.aging.dhs.georgia.gov
Natalie.Thomas@dhs.ga.gov