

# Battered Women's Legal Advocacy Project, Inc.

## Last Will and Testaments

This technical assistance packet addresses issues of how to write a legally binding will. It is meant to help identify the requirements needed for proper execution of the will. This packet gives an overview of the terms, requirements and options in a will's drafting.

Created: January, 2007

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# **Last Will and Testaments**

## **Purpose of a will:**

A will is a legal document created to determine how property, known as an estate, is distributed after death. An estate consists of assets and property including bank accounts, homes, land, furniture, automobiles, and securities (stocks and bonds). Wills may be used to designate a guardian for any minor children, to name an executor (also called a personal representative or administrator) to handle a testator's property and affairs from the time of death until the estate is settled and to pass on property to a charity. In general anyone can distribute their property as they see fit, however there are a few exceptions. 1) Property owned in joint tenancy with a right of survivorship (i.e. a jointly owned home) automatically passes to the surviving owner. 2) A beneficiary in a life insurance policy may not be changed through a will. 3) In Minnesota, the surviving spouse may claim up to one half of the estate, even if left out of the will (disowned or disinherited). The amount of money the spouse can receive depends on the length of the marriage. The surviving spouse can decide whether or not to "force" their share of the estate. Unlike a spouse, children can be disinherited and there are no statutory provisions that allow for children to "force" their share of the estate.

## **Requirements for a Last Will and Testament:**

- The person who is making the will (testator) must be at least 18 years of age.
- The testator must be of soundmind (capable of reasoning and making decisions).
- The will must be signed by the testator, or by another person under the testator's direction and presence. A court representative, called a conservator, may also sign the will for the testator under a court order.
- At least two witnesses must sign the will, each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.
- The will must be in writing to be valid (i.e., oral wills are not valid).

## **What is in a will?**

Generally, the following basic elements are included in a will:

- Name and place of residence of the testator;
- A description of any assets the testator wishes to give to a specific person;
- Names of spouse, children, and other beneficiaries such as charities or friends;
- Alternative beneficiaries, in the event a beneficiary dies before the testator does;
- Establishment of trusts, if desired;
- Cancellation of debts owed to the testator, if desired;
- Name of a personal representative to manage the estate (see What is a Personal Representative section below for a complete description);
- Name of a guardian for minor children;
- Name of an alternative guardian, in the event your first choice is unable or unwilling to act;
- The testator's signature; and
- Witnesses' signatures.

## **What is a personal representative?**

A personal representative (also known as an executor or administrator) is the person who oversees payment of debts and distribution of the testator's assets according to his or her will. A personal representative is considered a fiduciary. This means that he or she must observe a high standard of care when dealing with the estate. The testator should identify a personal representative by name in his or her will. Most people choose their spouse, an adult child, a relative, a friend, a trust company or an attorney to fulfill this duty, but anyone can be named personal representative in a will. Since the personal representative will handle the testator's assets, the testator should always pick someone he or she trusts.

The testator may appoint more than one personal representative. When there is more than one personal representative, all representatives must agree on any decision regarding the estate unless the will provides otherwise.

If no personal representative is named in a will, a judge will appoint one for the testator to oversee the distribution of his or her assets.

Responsibilities usually undertaken by a personal representative include:

- Filing the testator's will, an inventory of his or her assets, and other documents with the court;
- Paying valid creditors;
- Paying taxes;
- Notifying Social Security and other agencies and companies of the death;
- Canceling credit cards, magazine subscriptions, and similar consumer items; and
- Distributing assets according to the testator's will.

## **What is a guardian?**

In most cases, a surviving parent assumes the role of sole guardian of the testator's minor children. However, if neither spouse survives, or if neither is willing and able to act, it is very important for the testator to name a guardian in his or her will. The guardian the testator chooses should be over 18 and willing to assume the responsibility. Prior to naming a guardian, the testator should talk to the potential guardian about what he or she is asking before naming that person in his or her will. The testator can name a couple as co-guardians, but that may not be advisable. It is always possible the guardians may choose to separate at some later date; if so, a custody battle could ensue. If you do not name a guardian to care for your children, a judge will appoint one.

## **How to prepare a will:**

The testator should outline his or her objectives, inventory of his or her assets, estimate outstanding debts and prepare a list of family members and other beneficiaries. The testator should then use this information to consider how he or she wants to distribute his or her assets. Some questions include the following:

- Is it important to pass property to heirs in the most tax-efficient manner?
- Should a trust fund be established to provide for the testator's spouse or other beneficiaries?

- How much money will grandchildren need for college?
- Does the testator need to provide for a child who has a disability?

In general it is important to have a will that is self-proved. A will is self-proved when the testator and witnesses acknowledge in affidavits that the testator signed and executed the will voluntarily, within the presence of at least two witnesses, is over 18 years old, not under undue influence, and of sound mind. A will may be made self-proved at the time it is executed or at any time thereafter. A self-proved will helps establish that your will was properly executed, should it be contested in court. Therefore having a statement before the testator's signature line which states: "I being 18 years or older, of sound mind and without any undue influence, voluntarily sign and execute this will in presence of at least two witnesses." Then include a statement before the witnesses' signature line which states: "I witnessed, (testator's name) who is 18 years or older, of sound mind and is without any undue influence, voluntarily sign and execute this will in my presence."

Assets that the testator does not specifically address in his or her will may fall into a "catch-all" clause in the will. This catch-all provision is often called a "residuary clause" since it generally states, "I give the residue of my estate to ..." Without this clause, the items the testator does not specifically mention will be distributed in accordance with state law. Therefore it is important that in every will the testator residue is given to a beneficiary. When it comes to actually writing a will, it may be helpful to contact an attorney.

### **How to update or change a will:**

The testator may want to update or change his or her will if:

- The testator's marital status changes;
- A child or grandchild is born;
- There is a death in the family;
- The testator moves to a new state;
- The value and kind of property the testator owns changes substantially;
- The testator's personal representative moves away or dies; or
- Tax laws change. Generally tax laws are only a concern if the testator's estate exceeds \$1,000,000.

Wills can be changed either by writing and executing a new one or by adding a "codicil," which is an amendment to a will. The codicil must be written, signed and witnessed the same way as the will, and should be kept with the original will.

A will cannot be changed by simply crossing out language or writing in new provisions. Crossing out language raises the question of whether the testator intended to revoke his or her whole will or just a part of it. Writing new provisions will be ineffective unless the provisions are signed by the testator and two witnesses.

The only part of a will that can be changed without being rewritten and executed is a separate personal property distribution list. If a will specifically states that the testator is distributing personal property by a separate document, the testator may simply write out a statement describing how he or she wants to distribute his or her personal property. The statement can be written after the will is signed, and it can be changed without revising the will itself. If such a statement is used, the testator

must always be sure to date and sign it. The last statement controls the disposition of the property, and all statements may be ineffective if their order cannot be determined.

A will is effective until the testator changes, revokes or cancels it, so it is a good idea for the testator to periodically review his or her will.

### **Where to keep a will:**

A will should be kept in a safe place. The original will should be placed where it can easily be found after the testator's death. Make sure the testator's personal representative, close friend or relative knows where to find it and can access it, particularly if the testator is considering a safe deposit box.

In Minnesota, the probate court or court administrator's office will accept wills for safekeeping at no charge or for a nominal fee. The testator has the right to get his or her will back at any time. If an attorney prepares the will, he or she may be willing to hold it for safekeeping. If this is done, the testator should be sure to tell his or her family that the attorney has it.

### **What is the minimum for a will:**

Every will should include a few things:

- Name and place of residence of the testator;
- A self-proving statement for the testator and the witnesses
- An assignment of the testator's residue.
- A designation of a personal representative
- A designation of a guardian if there are minor children
- The signature of the testator (unless as stated above)
- The signature of at least two witnesses

### **Do I need an attorney?**

You can get a simple will form in office stores, on the internet or from a self-help book. These forms may work for you, but talk to a lawyer to be sure the form is right for your situation. Domestic violence victims/survivors, advocates and attorneys are welcome to call BWLAP for additional guidance if needed.

