

WILLS & ESTATES



Sussex County Register of Wills Office
Courthouse Annex
5 East Pine St.
P.O. Box 743
Georgetown, DE 19947
(302) 855-7875
(302) 853-5871- Fax
www.sussexcountyde.gov
Monday-Friday: 8:30 a.m.–4:30 p.m.

WILLS AND ESTATES

Wills and Estates

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The material in this booklet is presented only as a guide. Laws pertaining to Wills and Estates continue to change. It is recommended that you contact an attorney/accountant for the most recent information on Estate matters.

WILLS AND ESTATES

WHAT IS A WILL?

A Will is a written set of legally enforceable orders directing the transfer of property to named beneficiaries effective upon the death of the maker.

SHOULD I HAVE A WILL?

There are many good reasons to have a Will. For example, you may wish to leave your estate to persons who might not otherwise receive the amounts you desire, or any property at all, under the intestate succession laws. Wills are also used to protect your minor children by naming possible guardians of their person and trustees of their inherited property. Properly drawn Wills facilitate estate planning where the goal may be avoiding death taxes.

WHAT IS REQUIRED TO MAKE A VALID WILL?

1. The maker must be at least 18 years of age and of sound and disposing mind and memory;
2. The Will must be in writing and signed by the maker or signed by a person subscribing the maker's name in his or her presence and at the maker's direction;
3. The Will must be witnessed by two or more credible witnesses who subscribe their names in the presence of the maker. (In Delaware a beneficiary to the Will may be a witness although in some states this is not allowed.)

A Will written entirely in the Testator's handwriting (a Holographic Will) is only valid in Delaware if the above requirements are met.

FILING THE WILL

After the maker dies, it is the legal duty of any person in possession of any document that might be a Will to deliver it to the Register of Wills within ten (10) days after receiving notice of the maker's death.

PROVING THE WILL

After the maker's death, the Register of Wills determines the Will's validity. A Will can be proven valid by its witnesses essentially swearing to its validity or it has a self-proving page attached with the same two credible witnesses' signatures and notarized. If a will is not proven, it is rejected and has no force or effect.

WHAT HAPPENS IF YOU DIE WITHOUT A WILL?

If you die without a Will or your Will is rejected, your estate is considered to be "intestate". Intestate estates are divided among the decedent's spouse and other heirs according to Delaware's intestate succession laws as follows:

SURVIVING SPOUSE

1. The entire intestate estate goes to the spouse if there are no surviving issue or parent(s) of the decedent;
2. If there are no surviving issue (see glossary) but the decedent is survived by a parent(s), the first \$50,000 of the intestate personal estate, plus one-half of the balance of the intestate personal estate, plus a life estate in the intestate real estate, goes to the spouse. The balance goes to the parent(s).
3. If there are surviving issue, all of whom are also the issue of the surviving spouse, the first \$50,000 of the intestate personal estate, plus one-half of the balance of the intestate personal estate, plus a life estate in the intestate real estate, goes to the spouse;
4. If there are surviving issues, one or more of whom are not the issue of the surviving spouse, one-half of the intestate personal estate, plus a life estate in the intestate real estate, goes to the spouse.

HEIRS OTHER THAN SURVIVING SPOUSE

The part not passing to the spouse as above, or the entire intestate estate if there is no surviving spouse, passes:

1. To the issue of the decedent, per stirpes, (see glossary);
2. To the decedent's parent or parents equally if there are no surviving Issue;
3. To the decedent's siblings and the issue of each deceased sibling, per stirpes, if there are no surviving issue or parent(s);
4. To the decedent's next of kin and to the issue of a deceased next of kin per stirpes, if there are no surviving issue, parent (s), or siblings.

Any heir must survive the decedent by 120 hours in order to inherit in accordance with the above schedule.

VALIDITY OF OUT OF STATE WILLS

Many states have different requirements for making a valid Will. Delaware recognizes the validity of a Will signed:

1. In a different state if executed in compliance with Delaware law; or
2. In compliance with the law in the place where executed; or
3. In compliance with the law where, at the time of execution or at the time of death, the maker is a legal resident or a national (foreign citizen).

JOINTLY HELD PROPERTY

Many people hold real estate, bank accounts, motor vehicles and other property (stocks, bonds, etc.) in joint names with the right of survivorship. Upon the death of the first joint tenant, the surviving joint tenant (co-owner) receives the property. This will happen regardless of any contrary language in any will and without the application of the intestate succession law if no Will exists. However, if a catastrophic accident occurs, resulting in the simultaneous death of both joint owners, the Will or intestate succession laws will determine the disposition of the jointly held property.

INSURANCE PROCEEDS

Life insurance proceeds are not part of an estate if paid to a named beneficiary who survives the insured. In other cases, however, the proceeds may become an estate asset.

HOW SHOULD I PREPARE TO MAKE MY WILL?

Whenever possible, a lawyer should draft your Will to avoid problems which may either invalidate the Will or cause confusion in interpreting its terms.

Once you decide to make a Will, you should also do some advance planning. Prepare a list of the value of your personal property, your money, and your real estate holdings. Locate your deed, account statements, and insurance policies. Make a list of the people to whom you wish to leave this property. Choose your executor (s) based on trustworthiness, willingness and ability to carry out your expressed intentions.

It will save time and money by doing these simple steps before you meet with the lawyer.

MEMORANDUM OF TANGIBLE PERSONAL PROPERTY

In Delaware, if you have personal belongings but are not sure to whom they should go when you draft your Will, you may distribute them by a memorandum. This saves the expense of having to redraft your Will or make a Codicil each time you change your mind about certain items of personal property. This document CANNOT include transfers of:

1. Money;
2. Mortgages;
3. Notes;
4. Bonds;
5. Certificates of Title;
6. Securities; or,
7. Property used in trade or business.

Please note that the Will itself must refer to the POSSIBLE EXISTENCE OF THE MEMORANDUM before it can have any effect.

CAN I CHANGE MY WILL AFTER ORIGINAL EXECUTION?

Yes. An entire Will can be revoked by:

1. Destroying the original document; or
2. Executing a new Will revoking the previous Will; or
3. By written direction signed by the maker and witnessed by at least two witnesses.

You may change parts of an existing Will by executing a "Codicil." (See glossary.) Whenever you make a Codicil to a Will, it must be executed with the same formalities as the original Will. (See page 1.)

Certain events modify the effect of a Will without a person having to make any actual change to the document. Subsequent divorce nullifies any clause naming the former spouse as a beneficiary or executor.

Also, absent contrary language, children not provided for in a Will who were born subsequent to the execution of the Will, may claim their intestate share as though the decedent had died without a will.

LETTER OF LAST INSTRUCTION

Many people prepare a Will and then put it in a location unknown to the executor and/or heirs. In order to avoid unnecessary confusion at the time of your death, it is suggested that you prepare a letter of last instruction to be kept in an easily accessible place to allow your heirs or executor(s) to locate this important document upon your death.

The letter might explain:

1. Where your original Will can be found;
2. The names and addresses of any persons who you wish to be informed of your death;
3. Your instructions for your funeral and burial (including arrangements you may have already made);
4. Where to find documents of title, deed, stocks, bonds, insurance policies, etc.;
5. Where to call or write regarding death benefits paid by your employer;
6. Where your safe deposit box and key can be found.

WHAT IS A TRUST?

A trust is a written document which controls the disposition of certain property which you have designated.

It requires that title to the property be transferred to the trust for a period of time, for certain purposes, and eventually distributed to certain beneficiaries.

There are two general types of trusts:

1. An "inter vivos trust" goes into effect during the life of the maker.
2. A "testamentary trust" does not go into effect until the death of the maker. This trust can be contained in a Will.

Revocable trusts may be amended before or after the making of the Will.

GIFTS

Federal and Delaware law do not tax gifts where the gift is \$11,000 or less to any person in anyone taxable year. Gifts or larger amounts require that a gift tax be paid by the person giving the gift. There is also an unlimited marital gift tax deduction allowed under both Federal and Delaware law. This allows one spouse to make gifts to the other of unlimited amounts each year without incurring any gift tax.

PROBATING AN ESTATE

DOES AN ESTATE HAVE TO BE OPENED?

The presence or absence of a valid Will after death does not determine whether an estate must be opened. An estate must be opened if:

1. The decedent has personal property in his/her name alone; over the probate exemption amount allotted for that year of death; or,
2. The decedent had an interest in Delaware real estate in his/her name alone (either solely held or as a tenant in common).

WHEN AN ESTATE NEED NOT BE OPENED

If a decedent's real and personal property are owned jointly with a surviving joint tenant other than a spouse, the surviving joint tenant need only file an inventory with the Register of Wills and an inheritance tax return with the State Division of Revenue for deaths before 1999. Effective January 1, 1989, a surviving spouse who receives real property as a surviving joint tenant may clear the title by filing an affidavit with the Register of Wills. A copy must be sent to the Division of Revenue if applicable.

If a decedent does not have solely owned real estate and has solely owned personal property, then certain persons (spouse, children, parents, brothers and sisters, grand-children, grandparents and funeral directors, in that order) may obtain possession of that personal property by executing a "small estate affidavit" at the Office of the Register of Wills. If there is a Will and the estate qualifies as a "small estate", the person obtaining possession must still comply with the terms of the Will. If there is no Will, the person obtaining possession must distribute the assets, after payment of debts; according to the interstate succession laws of Delaware (see pages 3 and 4).

HOW IS AN ESTATE OPENED?

When the maker dies, the person possessing the original Will must deliver it, within 10 days of learning of the death, to the Register of Wills in the county where the decedent resided at the time of death.

If the Will is not "self-proved" (see page 2), then two of the witnesses must appear at the Register of Wills Office and give information under oath regarding the Will. If one or more of

the witnesses has predeceased the decedent, a disinterested person must come to the Register of Wills Office to personally identify the signature (s) and sign an affidavit.

PROBATE PROCEDURES

When an estate is opened, the Register of Wills grants certain powers to the appropriate personal representative (executor or administrator) of the estate. The person(s) who petitions for letters (authority to administer the estate) determines the type of petition that must be filed. A named executor petitions for Letters Testamentary. If the Will contains no qualified or surviving executor, the person(s) who makes application to administer the estate files 12 a petition for Letters of Administration with the Will Annexed.

If there is no Will, the next of kin of the decedent, in the following order or priority, have the right to petition for Letters of Administration:

1. Spouse;
2. Children;
3. Parents;
4. Brothers and sisters (of the whole and half-blood).

Therefore, a child cannot be the administrator if the spouse is still living. The spouse may, however, renounce his/her right to any person. If the next of kin are the children, all of the children have an equal right to act. Usually, only one or two people administer an estate. It may be appropriate for the children to decide who among them should act, and the others would then renounce their right. Renunciations must be in writing and filed with the Register of Wills.

If there are no next of kin having a priority or none of those persons have applied to administer the estate within 60 days of the date of death, then the Register of Wills may, at their discretion, appoint any interested person to be the administrator.

After the personal representative is appointed, that person is required to:

1. File a certified copy of the death certificate (normally done when the Will or the petition is filed);
2. Pay the costs of opening the estate at the time of petitioning for letters. These costs are based on the value of the solely held personal property of the decedent and can be as little as \$30.00 to an average of about \$100.00;
3. Post bond if required. Purchase can be arranged through the Register of Wills Office;
4. Publish legal notice of the filing of the petition in a local newspaper, as required by law. This notice notifies creditors of the death that an estate has been opened, and that

claims against the estate must be filed within eight (8) months of the date of death. This service will be arranged through the Register of Wills Office;

5. Collect, inquire about, manage and protect all probate assets;
6. File an inventory of the assets within 90 days after the estate is opened, including all jointly held property;
7. Set aside from the assets the spouse's allowance, if requested, and the spouse's elective share, as required by law;
8. Pay the valid debts of the decedent;
9. File and pay any Federal and/or State death taxes within nine months of the date of death;
10. File an accounting with the Register of Wills within one year of opening the estate. The accounting is a report of the total probate assets received, income earned by the estate, and the debts paid (including funeral expenses and administrative expenses of the estate incurred during the first year). From these figures, the net value of the estate is determined. Subsequent accountings must be filed annually if the estate must remain open;
11. Close the estate with the Register of Wills by appearing at the Register of Wills Office to prove payment of debts and expenses with canceled checks or vouchers marked paid. Once the payment of debts and expenses is approved, the personal representative must take an oath that the estate was administered properly and pay to the Register of Wills a closure fee of the "net personal estate" (that is, probate assets minus approved expenses).

DISTRIBUTION

After the personal representative has performed the above duties and has received a State of Delaware "Certificate of Clearance," if applicable, he may make the distribution to the beneficiaries under the Will or to the intestate heirs. The personal representative should be cautious in making any distribution until more than eight months after death to make sure there are no creditors with valid claims that are previously unknown.

The title to real property devised by Will or intestacy passes immediately upon death to the beneficiaries. If the debts, estate expenses and inheritance taxes are properly paid, the title passes without further action by the personal representative. However, if the decedent's probate assets are insufficient to pay the debts, estate expenses and taxes, then the personal representative must sell the real property to raise sufficient funds to pay them.

ESTATE AND INHERITANCE TAXES

Federal law provides that a surviving spouse receives an Unlimited Marital Deduction whereby qualified property may pass, regardless of amount, without any Federal Estate Tax. For other beneficiaries, the Federal Gross Estate of a decedent currently must exceed \$2,000,000 (subject to change) before any Federal Estate Tax becomes due. This amount is scheduled to increase annually through 2009.

The Delaware Inheritance Tax has been eliminated for estates where the decedent died on or after January 1, 1999. If there is an estate where the decedent has died before January 1, 1999, contact the Delaware Division of Revenue at (302) 577-8184 for information regarding the guidelines for filing the appropriate inheritance tax forms.

GENERAL INFORMATION ABOUT DEATH BENEFITS

The Social Security Administration will pay a specific amount as a death benefit for covered individuals who were receiving benefits or are eligible survivors. This benefit is paid to the surviving spouse, or to the minor children. The Department of Veteran Affairs will also pay a benefit for a deceased veteran. In addition, the decedent may have purchased funeral insurance, or may have been a member of an organization which provides such related benefits. Although it is not directly the responsibility of the personal representative to see that these amounts are collected and paid, in order to discharge his or her duties effectively, these matters should be investigated.

SOURCES OF INFORMATION

The preceding information provides you with a general overview of the workings of the Delaware estate laws and the functions of the Register of Wills Office. The staff of the Register of Wills Office will try to answer procedural questions regarding Delaware probate law. The Delaware State Bar Association provides an Attorney Referral service, if you need assistance in selecting a lawyer who practices estate planning or probate law.

Other public and private agencies that might assist you are listed below.

- **COMMUNITY LEGAL AID SOCIETY, INC.**
302-856-0038
144 East Market Street
Georgetown, DE 19947
- **DELAWARE STATE BAR ASSOCIATION**
1-800-773-0606

P.O. Box 7306
Wilmington, DE 19803

- **DIVISION OF SERVICES FOR AGING AND ADULTS WITH PHYSICAL DISABILITIES**

1-800-223-9074 or 302-422-1386

18 N. Walnut Street
Milford, DE 19963

- **SOCIAL SECURITY SURVIVORS BENEFITS**

Kent County

302-674-5162

1-800-772-1213

300 S. New Street

Dover, DE 19904

Sussex County

302-856-9620

600 N. DuPont Hwy., Suite 202

Georgetown Professional Park

Georgetown, DE 19947

9 a.m.-4 p.m. M-F

- **DEPARTMENT OF VETERANS AFFAIRS**

1-800-827-1000 1601

Kirkwood Highway

Wilmington, DE 19808

- **VITAL STATISTICS**

302-856-5495 544

South Bedford Street

Georgetown, DE 19947

(Call for information concerning obtaining death certificates).

GLOSSARY

- **Beneficiary** - A person named to receive property or other benefits.
- **Codicil** - A supplement or an addition to a Will. It may explain, modify, add to, subtract from, qualify, alter, restrain or revoke provisions in a Will. It must be executed with the same formalities as a Will.
- **Elective Share** - The surviving spouse's right to request to take a statutory share of the decedent's estate rather than under a Will or the intestate laws.
- **Estate** - Everything a person owned at the time of the death.
- **Executor/Executrix** - Person appointed by the testator (maker) to carry out the directions and requests in his/her Will.
- **Intestate** - Where there is no valid Will at death.
- **Issue** - All of a person's lineal descendants of all generations (i.e., children, grandchildren, great-grandchildren).
- **Letters of Administration** - The order issued by the Register of Wills empowering a party to gather and distribute the assets of an estate when the decedent died without a Will or did not name an executor in a Will or where the executor dies, renounces his appointment or is not qualified.
- **Letters Testamentary** - The order issued by the Register of Wills to the executor named in the Will of the decedent to allow the executor to administer the estate.
- **Life Estate** - A right to use or occupy property for the life of the person named, which completely expires upon the death of the person named.
- **Next of Kin** - Those persons most nearly related to a decedent by blood (Le. children, parents, brothers and sisters, etc.).
- **Personal Property** - Any property which is not included in the definition of real property; tangible property such as: furniture, books, automobiles, jewelry and clothes; and, intangible property such as: money, stocks, bonds and/ or bank accounts.
- **Per Stirpes** - This denotes the method of dividing a share of an estate where a class or group of beneficiaries takes the share which their predeceased ancestor would have taken if he/she survived the testator. These members of the group take by their predeceased ancestor's, right of representation. (For example, if person P dies leaving no spouse and is survived by two children A and B and the two children of his deceased child C that is, E and F - then A and B would each receive 1/3 of the estate and E and F would equally share C's 1/3, thereby each receiving 1/ 6). 21
- **Probate - 1)** The entire system or process provided by law for transferring the property of a decedent to heirs.

- **Real Property** - Land and things attached to land; buildings, fences, walls, trees, growing crops, etc.
- **Spouse Allowance** - The surviving spouse's right to request up to \$7500 (effective 7-12-05) from the personal representative in addition to any other provisions for his/her benefit contained in a Will or by intestate law.
- **Testator/Testatrix** - Person who makes a Will (the maker).
- **Witness** - A person who is over 18, not incompetent and who witnesses the testator's original signature to a Will and who, in the presence of the testator, signs the Will attesting his presence at the time the testator signed, or acknowledged signing, the Will. A person is not disqualified from being a witness because he or she is a beneficiary of the testator.

FREQUENTLY ASKED QUESTIONS

Am I required to have a will? What happens if I die without a will?

A will is not required. However, if there is a will, the will dictates who the estate is distributed to and how it is disbursed. If a person dies without a will, the Delaware State law passes the estate to the surviving heirs according to Delaware intestate succession laws.

If everything is joint, what am I required to do?

If there is joint real estate, the joint owner needs to contact the Register of Wills Office.

Can I write my own will?

Yes, you can, as long as there are two (2) credible witnesses and the will has been notarized. An attorney can also be consulted.

Do I have to pay an estate and inheritance tax?

You do not have to pay this tax unless the estate is valued over the exemption allotted amount for that year of death.

Where should I keep my will for safe keeping?

Keep the original in a safe place and give a copy to the executor, letting the executor know where the original is located.

What services are not provided by the Register of Wills Office for Sussex County?

- Pre-registration of Wills
- Issuing death certificates.
- Attorney service
- Legal advice

What is probate?

Probating an estate is the process of passing the decedent's assets according to law.

An appointment is preferred to probate. Appointments may be arranged by calling the Register of Wills office during normal working hours.

What are the Delaware state requirements regarding wills?

If a person has a will at the time of death, the original should be filed with the Register of Wills in the County where they resided, within ten (10) days of death.

A certified death certificate is required to verify death.

Proper documents must be completed and filed for all probated estates.