Preparing Your Own Will: A Short Guide

What Your Will Does

Your Will controls your **probate estate**: which are assets in your sole name that have no beneficiary, joint owner, or trust. It also names your Executor, and can name trustees and guardians for minor children.

Your Will does **not** control:

- Accounts with a named beneficiary (IRAs, 401(k)s, life insurance, annuities)
- Accounts marked "payable on death" (POD) or "transfer on death" (TOD)
- Jointly owned property with right of survivorship, including a home owned with your spouse
- Real estate listing a co-owner or beneficiary by deed
- Anything already titled in a trust

A Will takes effect only after the Surrogate's Court admits it to probate. Your named Executor has no legal authority until the court issues Letters Testamentary.

Three Parts of a Will

1. Specific Bequests

A specific bequest leaves a particular item or amount to a particular person: "my 2019 Subaru to my grandchild Pat," or "$5,000 to my church."

- Describe the item and the person clearly.
- If you no longer own the item when you die, the gift simply fails. The person does not receive its value instead.
- Perhaps name a backup beneficiary. Say what you want to happen.

2. Tangible Personal Property

This covers physical belongings: furniture, jewelry, art, collections, household items, and vehicles.

- A separate handwritten list of who gets what is **not legally binding** in New York. Your family may honor it, but no one has to. If an item truly matters, name it in a Will or Trust.
- Say who pays to ship or store items, and what happens to anything no one wants.

3. Residuary Estate

The residuary is everything left after debts, expenses, taxes, and specific bequests. For most people, it is the largest and most important part of the Will.

- Name your primary beneficiaries and at least one level of successor beneficiaries.
- Consider whether a beneficiary needs a trust.

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- A Will without a residuary clause leaves property to pass under the intestacy statute, as if you had no Will.

Testamentary Trusts

A testamentary trust is a trust written into your Will. It comes into existence only after you die and the Will is probated. Instead of a beneficiary receiving property outright, a Trustee you choose holds and manages it for that person.

Consider one when a beneficiary is:

- **A minor:** Without a trust, a child's inheritance may require a court-appointed guardian of the property, and the child receives everything outright at 18 (or 21 for some custodial accounts).
- **A person with a disability:** A supplemental needs trust can provide for that person without disqualifying them from Medicaid or SSI.
- **Not ready to manage money**, or facing creditors, divorce, or addiction.

Tell the Trustee when to pay out income and principal, and at what age or event the trust ends. Name a backup Trustee. Keep in mind that a testamentary trust remains connected to the Surrogate's Court, and the Trustee may have to account to the court.

Will Substitutes

Will substitutes pass property directly to the people you choose, outside of probate. They override your Will. If your Will leaves everything equally to three children but your IRA names only one, that child gets the IRA.

Beneficiary Designations

Retirement accounts, life insurance, annuities, and POD/TOD bank and brokerage accounts pass to the beneficiary named on the institution's form.

- Review every designation when you sign your Will, and after any marriage, divorce, birth, or death.
- Always name a contingent (backup) beneficiary.
- Avoid naming a minor directly. Consider naming a trust for the minor instead.
- Adding a child as a joint owner "for convenience" makes that child the owner at your death, not your estate. If you do this, make your intentions clear.

Trusts

A revocable living trust works like a Will that takes effect without probate. You serve as your own Trustee during life; a successor Trustee takes over at death or incapacity.

A trust only controls assets actually titled in its name. An unfunded trust does nothing, and those assets go through probate under your Will. Most trust plans therefore include a short "pour-over" Will to catch anything left out.

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Leave Your Executor Money to Work With

The person who settles your estate needs cash. If every account passes by beneficiary designation, your Executor may inherit the bills but none of the money.

Common expenses include:

- Funeral and burial costs
- Property taxes, insurance, utilities, and upkeep on a house until it sells
- Repairs, cleanout, and staging to prepare real estate for sale
- Final income taxes and estate income taxes
- Court filing fees, legal fees, and accounting fees

A house is often the largest asset in the estate, but it produces no cash until it sells, which can take months. Meanwhile, the beneficiaries who received accounts directly may be unwilling or slow to chip in. The Executor ends up paying out of pocket and waiting to be repaid.

To avoid this:

- Leave at least one account of reasonable size to your estate, with no beneficiary designation, so it passes under your Will to your Executor. Or name your Executor as beneficiary.
- If you use a trust, fund it with enough cash for your successor Trustee to cover these costs.
- Make sure the person you name as Executor or Trustee knows where the money is and how to reach it.

Signing Your Will Properly

A Will that is not signed correctly may be thrown out, and your property will pass as if you had no Will. In New York, a handwritten or unwitnessed Will is generally not valid. Follow these steps:

1. Gather **two adult witnesses** who receive nothing under the Will. A gift to a witness can be voided.
2. Sign at the **very end** of the Will, in front of both witnesses. Anything written below your signature may be disregarded.
3. Tell the witnesses out loud that this is your Will, that it disposes of your assets according to your wishes, that you understand you can change it at any time, and that you are asking the witnesses to witness your signature.
4. Each witness signs and writes their address.
5. Have the witnesses also sign a **self-proving affidavit** before a notary. This lets the court admit the Will without tracking down your witnesses years later.

Do not add handwritten changes after signing. To change your Will, sign a new Will or a formal amendment (a codicil) with the same formalities.

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Storing the Original

After your death, the court needs your **original** signed Will, not a copy. If the original cannot be found, the law may presume you destroyed it on purpose to revoke it.

- Keep the original somewhere safe from fire and water, such as a fireproof box at home, your attorney's office, or the Surrogate's Court, which accepts Wills for safekeeping for a small fee.
- A bank safe deposit box works, but your family may need a court order to open it if no one else is on the box.
- Never unstaple, mark up, or write on the original.
- Tell your Executor where the original is. Keep a copy, marked "COPY," with your important papers.

Review your Will every few years and after any major life change.

This guide provides general information about New York law and is not legal advice. Laws change and every family is different. For help with your plan, call Lawson Hatch, PLLC at 315-500-2025, the place to call when it's personal.

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