Your Will

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This material should not be used as a substitute for seeking needed advice from attorneys and other qualified advisors.

Do not be frightened by the legal terms in this publication. Definitions of these terms are included for your reference on page 14. If you do not understand the terms, ask your legal advisor to explain them to you.

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Your Will

Almost everyone intends to make a will, but about half of the Oregon population dies without having one. This publication explores the effects of dying with and without a will in the state of Oregon. You can then decide whether or not you need a will.

A will is a legal document used to dispose of property at death. It also indicates how to administer the estate and makes plans for the care of minor children. A properly drawn will should simplify the administration of an estate, help avoid financial and legal problems, and minimize family conflict over property distribution.

Distributing Property

At your death your estate—that is, your money and property—passes to someone. To determine who would get your property, first determine which of your property is non-probate and which is probate.

Non-probate property

Non-probate property automatically passes upon the death of one person to another without going through probate court. Examples of non-probate property are real estate owned as a tenancy by the entirety, property owned as joint tenancies with rights of survivorship, an insurance policy payable to a named beneficiary, and government bonds with co-owners or beneficiaries.

After death non-probate property passes to the other owner(s) or beneficiaries. Survivorship rights of non-probate property cannot be changed by a will because a title (deed) or contract specifies ownership or beneficiaries.

For some people owning property as a joint tenancy or tenancy by the entirety may be appropriate. It is not, however, always the best way to own property. Seek advice from a lawyer and/or tax consultant before putting your assets in joint names.

Having non-probate property does not eliminate the need for a will. Usually, if you have both probate and non-probate property, you need a will to distribute the probate property. Even if all your property is non-probate, a will may still be desirable to distribute the property if both owners die.

For example, what if a husband and wife who jointly own all property and have no wills die in an accident and there is no evidence who died first? The court will distribute one-half of the property as if the husband had survived and one-half of the property as if the wife had survived. One-half passes to the husband's survivors and one-half to the wife's survivors.

If the couple had children, all property would be divided among the children. If there were no children, one-half of the property would go to the husband's relatives and one-half of the property would go to the wife's relatives. This may not be what the husband and wife intended. Perhaps the property was a farm that originally belonged to the wife's family and was to return to the wife's family.

Or consider what would happen if the husband and wife jointly own all property and have no wills, the husband dies and one week later the wife dies. On the husband's death the non-probate property would automatically pass to the wife. At her death if there were no children, the property would pass to her relatives. This may not be what the husband and wife planned. Perhaps the property was a farm that originally belonged to the husband's family and was to return to the husband's family.

Probate Property

Probate property is all that you own that does not, by the way it is titled, have survivorship rights. Examples include your share of property owned as tenants in common, your share of household goods, and property owned only by you. Your probate property is distributed at death either under the laws of Oregon (if you do not have a will) or according to the directives of your will.

If you own probate property, your estate will be distributed by the probate court. This procedure is commonly referred to as "probate."

Distributing probate property without a will (intestate)

When you die without leaving a will (intestate), your probate property passes according to Oregon law. When property passes under Oregon law, it passes only to the surviving spouse, blood relatives, relatives of half-blood, and children adopted when they were minors. In addition, the relationship between the deceased and his or her heirs must be proved in court. The more remote the relationship, the more time-consuming and costly this might be.

The following provisions represent a few of the Oregon laws which determine how a deceased person's property will be distributed when there is no valid will:

- If survivors are spouse and children: one-half goes to the surviving spouse and the other half goes to the child or children (divided equally). A grandchild receives property only if the child's parent is deceased.
- If the only survivor is spouse (no children): all property goes to the surviving spouse.
- If survivors are children (no spouse): all property goes to the children, sharing equally, or to the children of a deceased child who receive their deceased parent's share.
- If survivors are parents (no spouse, no children): all property goes to parents sharing equally. If only one parent survives, the surviving parent takes all of the property.
- If survivors are brothers and sisters (no spouse, no children, no parents): all property goes to brothers and sisters, sharing equally, with children of deceased brothers and sisters receiving their parent's share.
- If survivors are grandparents or descendants of deceased grandparents: all property goes to grandparents or descendants of deceased grandparents.
- If there are no known heirs at law: property passes to the state.

When property passes under Oregon law, it passes by mathematical formula with no attention given to special needs of family members. This is not always desirable:

- An older couple with grown children and a modest estate might want the entire estate to go to the surviving spouse and nothing to go to the children until both parents are deceased. If on the death of the first spouse, the surviving spouse gets only one-half of the estate, this may not be sufficient to support the surviving spouse.

- A young couple with small children and a modest estate might want the entire estate to go to the surviving spouse believing that the surviving spouse will provide fully for the children.
- A couple who has both grown children who are self-supporting and children who are dependent on parents for support may want more of their estate to go to the dependent children than to those who are self-supporting.

Distributing probate property with a will (testate)

When you die with a will (testate) your probate property is distributed according to your will. A will is a way to pass your property according to your wishes—you determine who is to receive how much of your estate. Property can be left to relatives, non-relatives, and institutions. A will leaving property to named individuals eliminates proving a relationship (necessary when there is *no* will).

Property given as a gift in a will is called a devise. There are three types:

- **A specific devise** leaves a person a specific item. For example, "I leave my diamond ring to Betty Fields and my piano to Harry Chart."
- **A general devise** leaves a person property that is not specifically enumerated or described. One example of a general devise is "I leave $1,000 to Marie Bancroft." Another example is to leave "all of my real estate to Peter Hogan."
- **A residuary devise** leaves a person part of all of everything that is not disposed of as a specific or general devise. An example is "I leave one-half of my residuary estate to my niece, Ruth Kilmer."

A will can have all kinds of devises. For example, "I leave my silver tea set to my niece, Patsy Mills (a specific devise); $1,000 to my nephew, Michael Mills (a general devise); and the residue to my wife, Marion Mills (a residuary devise)."

A will may have only a residuary devise but neither a specific devise nor a general devise. For example, "I leave 10 percent of everything I own at my death to my niece, Patsy Mills; 10 percent of everything I own at my death to my nephew, Michael Mills; and 80 percent of everything I own at my death to my wife, Marion Mills."

A will can indicate what happens if a person who is to receive property under your will is not living at the time of your death. For example, "I leave $50,000 to my son John

Kilmer; if John is not living at my death I leave this to my daughter-in-law, Ruth Kilmer." If the will did not provide for the alternate disposition, the property would have passed to John's children.

When writing a will you have a great deal of flexibility in choosing who is to receive your property after your death. Think carefully about what you want to happen. Later in this publication you will find suggestions that will help you organize your thoughts about a will.

Appointing a Personal Representative

A personal representative handles the business affairs of your estate. This may be a person, more than one person, or a corporate trustee such as a trust company. A personal representative probates the will if there is one, safeguards and manages the assets, has assets appraised, sees that the bills and taxes are paid, distributes the estate to the proper people, and makes reports required by the court.

When There Is No Will

When there is no will, the court appoints a personal representative. The court looks first to the surviving spouse, then to relatives of the deceased. If there is no spouse or relatives, the court may appoint a state agency. Oregon law requires that the personal representative file a surety bond.

When There Is a Will

When you write a will, you may nominate a personal representative. At your death the court reviews and appoints this person if it feels this is in your best interest and if the nominee is willing and able to perform the duties.

When you nominate a personal representative, consider competency to handle money matters. Discuss the nomination with the individual and with your family.

You may nominate a corporate trustee, such as a bank trust department, as your personal representative. While a trust company has experience in handling estates and will not

The Need for a Will Differs D

Life status	What happens with no will
Unmarried— No Children	Property passes to parents or parent. If no surviving parent, property passes to brothers and sisters or to the children of deceased brothers or sisters. A non-relative will not inherit.
Unmarried— With Children	The property of the parent passes in equal shares to children. The court appoints a conservator to handle the children's estate. The child will receive the money and property at age 18. The court appoints a guardian for minor children if there is no surviving parent. If parents have never married the property of the father passes to children only under specific circumstances—if paternity has been proven under law or the father has acknowledged paternity during his life.
Married Couple— No Children	Property passes to the surviving spouse.
Married Couple— Minor Children	Property is divided between the surviving spouse and children A conservator is appointed to handle the children's estate.
Married Couple— Grown Children	Property is divided between the surviving spouse and children.

ɔending on Family Situation

Considerations that may indicate the need for a will

Passing property to parents may make their estate planning more difficult. If parents would need financial help for their old age, a will could set up a trust for their benefit and indicate who is to get whatever is left in the trust at the parent's death. A will is necessary if property is to go to anyone other than the closest relative.

The financial needs of children may not be equal.
A conservator may be nominated in a will or alternate plans (such as a trust) made for the management of the children's estate. A divorced person may want to plan so that the former spouse will not have control over the children's money. A parent may want to specify that children do not receive money and property until they are older than 18.
A will can indicate who the parents would like to care for minor children in the event that there is no surviving parent.
A father and mother who have never been married to each other need to pay particular attention to estate planning.

Plans should provide for what should happen to property if both die at or about the same time.

In some situations it may be desirable for all property to pass to the surviving spouse rather than dividing it. Passing it all to the surviving spouse gives that person freedom in the use of the money. It also assumes that the surviving spouse will look after the best interest of the children. Think about how the spouse would care for the children and the possible effects of a remarriage.
A conservator may be nominated in a will or alternate plans (such as a trust) made for the management of the children's estate.

The division between spouse and children can leave the spouse, particularly when there is a small or modest estate, with inadequate money for support. Plans can be made for the entire estate to pass outright to the spouse or for part of the estate to pass in trust for the benefit of the spouse and then to children at the death of the surviving spouse.

die or become incompetent, it might not give the same personal interest as a friend or relative. It also may not be economically feasible for small estates.

Your will can provide directions for the personal representative, making it possible for your wishes to be known and followed after your death. If you wish, your will can also waive the requirement for a surety bond and save your estate that cost.

Appointing A Guardian or Conservator

A guardian takes the place of a deceased parent in caring for a minor child. A conservator takes care of the money and property of a minor child. The same person may serve as guardian and as conservator, or one person may be guardian and someone else, conservator.

Guardian

If a minor child has no surviving parents, the court appoints a guardian. The guardian has the powers and responsibilities of a parent. In making the guardianship appointment the court appoints the person most suitable and willing to serve. The court considers the person nominated by the child (if the child is at least 14 years of age), the person nominated in the parent's will, and the blood relationship of the proposed guardian to the child.

The nomination of the guardian in the will does not guarantee that this person will be appointed. However, it lets the court know the wishes of the deceased parent increasing the likelihood that the person will be appointed.

In nominating a guardian consider values, lifestyle, and attitudes toward child-rearing of the potential guardian. Talk to that person as well as to your family members.

Make provisions in your will for appointing another guardian in case the one nominated cannot accept the responsibility.

Conservator

If property of any kind passes to a minor child, the court must appoint a conservator to manage the property. The court appoints the person most suitable and who is willing to serve. Preference is given to a person nominated by the child (if the child is at least 14 years old), the person nominated in the will of the deceased parents, and a relative with whom the child has been living.

If you have not nominated a conservator in a will, the court will choose a person without any input. A parent may eliminate the need for a conservator by arranging a testamentary trust in the will.

At death, the estate is passed to a trust managed for the benefit of the child. The will can set up the trust, name the trustee, and provide instructions for the trustee. A trustee may be an individual or a trust company.

A conservatorship, by law, terminates on the child's eighteenth birthday and the child then has the property to manage. With a trust, distribution of the property to the child can be postponed until the child is older and presumably more competent to manage the property. Leaving the property in trust for the child usually allows more flexible arrangements than leaving the property outright to the child.

Now's the Time to Write

Anyone who is at least 18 years old or is married and who is of sound mind may make a will. You may write your own will but it is not recommended since a will is a legal document. Legal advice insures that your plans will accomplish your objectives. No matter how simple your will the help of an attorney is desirable.

If you have an attorney for other business purposes, consult that attorney about a will. If your attorney does not do estate planning he or she may suggest another attorney.

If you do not have an attorney, a friend may be able to suggest one. The Lawyer Referral Service also can refer you to an attorney. The toll free phone number in Oregon is 1-800-452-7636.

Before seeing an attorney, compile this information:

- A list of people to be included in your will.
- A list of your closest relatives.
- A list of all property owned both probate and non-probate. Include the value of the property and any indebtedness against the property.
- Ideas about what specific property you want to go to specific people.
- Ideas about who ought to be the children's guardian, if you have minor children.
- Ideas about management of property being left to a minor child.
- Ideas about the financial needs of those people you are planning to provide for.

The worksheet on the back page will help you compile this information.

After Completing A Will

After you have a will you need to decide where to store it. A secure place is your safe deposit box. In the past some authorities advised against this because the box could not be opened until a State Treasurer's representative was present. This procedure is no longer followed so a safe deposit box is a reasonable storage place.

Some people prefer to store their will with their attorney. The important things to remember are to store you will where it is easy to locate when needed and where it will not be lost or accidentally destroyed.

Periodically review your will to insure that it meets changing conditions and continues to serve your best interests. Review your will whenever your family situation changes—marriage, divorce, death of family members, birth of additional children, children reaching adulthood, and changes in the size of your estate.

You may change your will anytime before death but you must change it correctly. In some cases this is by adding a codicil. In some cases a will is replaced with a new will. Never attempt to change a will by crossing out or changing any part of the original document.

You may revoke your will anytime before death. It is revoked when you destroy the will—burn or tear it up—with the intent to revoke it. It is also revoked by executing a new will that expressly revokes any prior will. Portions of a will affecting your spouse are revoked by divorce or remarriage.

The chart on pages 8 and 9 shows different family situations and considerations that may indicate the need for a will. Consider your own situation and decide if you need a will. In order to have a will when it is needed, you must write it now.

Related Publications

Survivor's Handbook—Tells about inheritance tax and estate, property and income taxes of a person who died. Available from Oregon Department of Revenue—Publications, State Office Building, Room 14B, Salem, OR 97310.

A Guide to Federal Estate and Gift Taxation (Publication 448) Department of the Treasury. Internal Revenue Service. Available from your local Internal Revenue Service office.

Death—A Family Crisis (PNW 88)—available from county offices of the OSU Extension Service.

When Death Comes (EB 809)—available in 1982 from county offices of the OSU Extension Service.

Definitions

Codicil—An addition to a will or a change executed with the same formalities as required in the will itself.

Conservator—A person who takes care of money and property of a minor child or an incompetent adult.

Decedent—A deceased person.

Devise—A term that applies to the giving of property. The gift itself is called a devise.

Estate—All you own, both your real and personal property.

Guardian—A person who takes the place of deceased parents in caring for a minor child or a person who cares for an incompetent adult.

Half-blood—A term denoting the degree of relationship which exists between those who have the same father or the same mother, but not both parents in common.

Intestate—A person who dies without leaving a valid will.

Joint tenancy—In real property this is created expressly by the use of specific words in the deed: "A and B, not as tenants in common, but with the right of survivorship, their assigns and the heirs of the survivors of said grantees." In personal property (such as a bank account) it may be created by the use of the words "payable to either or the survivor." At the death of one joint owner, the property (real or personal) passes to the surviving joint owner(s).

Personal property—All property which is not real estate.

Personal representative—The person or institution named in the will or appointed by the court to administer the estate.

Probate—The name of the court which has jurisdiction over wills. The word is also used to apply to the procedure of the court in taking proof of the validity of the will. "Probating a will" means presenting proof to the court after your death of the legality of your last will and testament, whereupon the court grants authority to the personal representative to carry out your intentions as expressed in the will.

Real property—Real estate; land and things attached to land.

Spouse—Husband or wife.

Surety bond—A bond to protect the estate from loss by improper actions of the personal representative.

Tenancy by the entirety—Applies only to real property owned by husbands and wives. If at the time the property is transferred to a married couple and both husband and wife are named in the deed and no different intention (such as joint tenancy or tenants-in-common) is expressed, a tenancy by the entirety is created. At the death of one spouse this property automatically passes to the surviving spouse.

Tenants-in-common—This is a form of joint ownership which has no survivorship rights. At death the share owned by the decedent passes either according to the will or state law if there is no will.

Testate—A person leaving a valid will.

Testator—A person making a will. For a woman the word **testatrix** is used.

Trust—An arrangement transferring property to one party (trustee) for the benefit of another (beneficiary).

Trustee—One who holds legal title to property for the benefit of another (beneficiary).

Testamentary trust—A trust created within a will. A trust which does not take effect until the death of another person setting it up (settlor).

Will—The written instrument, legally executed, by which a person disposes of property to take effect after death.

Property	How it is titled?	Value of property (less indebtedness)	Who will get if I die now?	Whom would I like to get it?