Drafting A Will

A will is a document that determines who will take legal ownership of your property upon your death. In drafting a will, you can leave your property to any person or other legal entity you want, and you can leave individual pieces of property to whomever you choose.

In almost every state, certain formalities have to be followed, or a will might not be valid, despite the clear intent of the testator (the person drafting the will). Some of these formalities seem silly and antiquated, but they exist for a very good reason: when a will is drafted that follows all the required formalities, the resulting document usually makes it very difficult to mistake it for something other than a will. This is important, since, when a will takes legal effect (upon the death of the testator), you can't exactly ask the testator what they meant.

Required Formalities in Drafting a Will

When drafting a will, certain formalities must be followed.

Typically, there must be a clear statement at the beginning of the will that the document is, in fact, your last will and testament. The reasons for this are fairly obvious, and the statement does not need to follow any particular form. It simply must be clear and unambiguous. Something like "I, (name), being of sound mind hereby create my Last Will and Testament. (Date)" will almost always suffice.

The will should then lay out, point-by-point, the exact gifts you wish to make, clearly identifying the individual pieces of property, and the person who is to receive it. This is where the help of an experienced wills and trusts lawyer can be extremely valuable. Because avoiding ambiguity is essential to ensure that the process of distributing property under a will goes smoothly, you should have a lawyer draft your will. Experienced lawyers are very good at spotting potential sticking points in documents, and may be able to identify potential problems in a will that a layperson would not notice.

Wills have a second important, (usually) non-negotiable prerequisite for validity: they must be witnessed. In most states, two witnesses must be present when the will is signed by the testator, and they must sign an affirmation stating that they personally witnessed the event.

When choosing who is going to witness the signing of your will, you should always use third parties who have no direct interest in it. This basically means that the witnesses should be people who are not named in the will, and would not inherit under your state's laws of intestacy if the will is found to be invalid.

All of these procedures are designed to make it more difficult for someone to draft a fake will, or for a will to be drafted when the testator is not of sound mind, under the influence of drugs or alcohol, or under duress.

Holographic Wills

In some (though certainly not all) states, a person can avoid the formalities mentioned above by drafting what is known as a "holographic will." A holographic will is a will handwritten by the testator. As long as it can be proven that the will was actually written by the testator and the writing is legible enough to actually read, a holographic will can be given legal effect, even if it is not witnessed, or signed by witnesses.

This is because a will written in the testator's own handwriting carries its own indication of authenticity, to the point that requiring witnesses and signatures would be redundant. Of course, if you want to hand-write your will, there's nothing stopping you from having it witnessed, as an added layer of certainty.

However, writing a holographic will is rarely a good idea, and is usually done as a last resort (a situation arises where someone thinks they might die soon, and won't have time to make a proper will). There's really no good reason to let a holographic will stand in for one drafted by an attorney, and witnessed, if you have a choice between those options.

Capacity to Make a Will

In order to draft a will, the testator must have reached the age of majority for his or her state, and have the requisite mental capacity.

This means that, at the time the will was drafted and signed, the testator must have knowledge and understanding of the nature and extent of his or her property, the "natural object of his bounty" (typically a spouse and children – people who one would reasonably expect a person to leave their property to), and they must be capable of relating these requirements to each other and actually forming a desire or plan to dispose of their property.

One of the main purposes of witnesses is to see if the testator appears to be of sound mind when the will is signed.

If a person lacks the mental capacity to understand what they're doing when they make a will, the entire thing will be invalid. However, a person making a will might be of at least average intelligence, and perfectly sane in almost every regard, but hold an "insane delusion" about a particular person or thing. If this delusion influences a provision in a will, that provision can be invalidated (though if it doesn't affect anything else, the rest of the will can stand).

For example, suppose a person is perfectly sane in every regard (wakes up, gets dressed, goes to work, pays taxes, etc.), but he believes, for no good reason, that everyone in his family has been replaced by space aliens. Because of this belief, he chooses to leave all of his property to an organization that promotes outlandish conspiracy theories having to do with space aliens. In a case like this, anything in the will having to do with this insane

delusion would be invalid. If some provisions in the will don't appear to have been influenced by the testator's delusion, they can remain valid.

It's important to note that an insane delusion must concern a matter of fact. So, if someone has extreme and uncommon political beliefs, or subscribes to a strange religion or philosophy, and those beliefs influence their will, it will probably remain valid.

Finally, the will must be a product of the testator's own free will, meaning that it can't be made under duress.

Taking Care of Pets

First things first: you cannot leave money or property to your pets. Legally, animals can't hold title to property. In fact, the law (for almost every purpose) treats animals as property themselves. While some disagree with this arrangement, it's currently the one we have. If you want to ensure that your pets are taken care of after your death, you'll have to work within the confines of the legal system.

So, if you can't leave property to your pets, what can you do? Remember that, legally, pets are property. Therefore, you should leave your pets to a trusted friend or associate, with instructions for their care, along with some money to cover at least some of the expenses associated with caring for the pets. Of course, you should discuss this with the person to whom you plan to leave your pets, to make sure that they are willing and able to assume responsibility for them, if needed.

If you are concerned that nobody you know will be willing or able to take care of your pets, you should probably leave them (along with a monetary donation, if possible) to a local humane society that maintains a "no-kill" animal shelter which will put them up for adoption. That way, they'll have a good chance of finding a home.

Conditional Gifts

Some people want to influence the behavior of their children or grandchildren through testamentary gifts.

It's important to note that you cannot use your will to force anyone to do something they don't want you to do. All you can do in a will is give your property away. However, you can place certain conditions on gifts.

For example, suppose you want one of your children to become a doctor. You could leave them a sizeable piece of your estate, but only on the condition that he or she enters medical school before they reach a certain age.

Obviously, this doesn't mean that your child *has* to go to medical school. They're still free to pursue whatever career they like. It does, however, mean that failing to attend medical school will mean foregoing the conditional gift.

Some conditions will not be given legal effect, however. A gift conditioned on the recipient doing something illegal is not valid. Likewise, a condition requiring the recipient to marry a particular person is not valid, though a condition requiring that they get married, without getting more specific, probably is valid.

If a condition is found to be invalid, the property will usually be distributed under the rules of intestacy.

Conclusion

When making a will, it's entirely possible that you'll only have one chance to get it right. While issues of death and dying aren't pleasant topics of discussion, let alone planning, making a will is essential if you care about how your property will be distributed after your death.

Some pretty complicated legal issues can come up when you're making a will. For that reason, it's important to speak with a lawyer, to minimize problems that might come up in the future. This will help you in life, by providing you with the peace of mind that comes with knowing that your loved ones will be taken care of to the greatest extent possible after your death.