



DO I NEED A WILL?

Advantages of a Last Will and Testament



There is no law requiring you to have a will to transfer your property at death.
Creating a Will is a personal choice.

If you do not want your property to be transferred according to state law upon your death, you will need to leave your own instructions in a Will.

What happens to my property if I do not have a Will?

If you were to die without a Will, your property would be distributed under the intestacy rules of the Maine Probate Code. Under these rules, your family members are entitled to specific shares of your estate. If you have any surviving descendants or a surviving parent, those relatives may receive a share of your estate, even if you have a surviving spouse.

Relatives of half-blood inherit under the Probate Code the same as if they were of whole blood, and any person you have adopted will inherit from you as though you were his or her natural parent. (An adoption decree may provide that the adopted child is to inherit not only from his or her adoptive parents, but also from his or her natural parents.)

If you do not have a surviving spouse or any relatives who are entitled to your estate under the intestacy rules in the Probate Code, your property will become property of the state.

Some property is not subject to the laws regarding Wills and intestacy. Property that you own jointly with others cannot be disposed of by a Will and is not subject to the intestacy rules under the Maine Probate Code. When two or more individuals own property jointly—for example, funds in a joint bank account—and one of the owners passes away, the property is automatically transferred to the surviving owner or owners and does not go through the probate process. Similarly, any assets for which a beneficiary designation has been made, such as some life insurance policies or retirement plans, will pass “outside of probate” and will therefore not be subject to a Will or the intestacy statutes.

What are the advantages of having a Will?

Creating a Will is a simple way to ensure that your wishes regarding your property are followed after your death. With a Will, you can direct the distribution of your real estate, family heirlooms, stocks and bonds, automobiles, guns, farming equipment, and any other property that you own. In this way, you can determine who will receive your property, as well as how and when they will receive it. If the individuals you have chosen as beneficiaries to receive property under your Will do not survive you, you have the ability to direct your estate to a charity of your choice.

Another advantage of creating a Will is the ability to designate the individual or individuals that you wish to serve as the personal representative of your estate—the person or entity that will administer your estate and carry out your intentions as you have declared them in your Will. You can also designate an individual or individuals to serve as guardians for your minor children or any other person for whom you serve as a guardian.

The ability to protect your assets is another important advantage that comes from creating a Will. A Will is a particularly valuable asset protection tool when one spouse needs long-term care and has become eligible for Maine Medicaid (MaineCare) benefits. If it is important to the couple to preserve assets for the next generation or for other beneficiaries, the spouse who is not receiving benefits can create a Will that contemplates that he or she may die before his or her spouse who is receiving long-term care and benefits. Such a Will would include a supplemental needs trust (also called a special needs trust) that would only become effective in the event that the spouse not receiving benefits dies before the spouse receiving MaineCare benefits. Instead of the probate assets being distributed directly to the surviving spouse, the Will would direct those assets to the trust for the benefit of the surviving spouse. In this way, the trust assets would not actually be owned by the surviving spouse, and therefore would not have to be spent down on the surviving spouse's long-term care expenses.

How can I create a Will?

There are several ways that you can create a Will in Maine. It is possible to write a Will by hand and execute it in such a way that it is a valid and enforceable legal document. It is also possible to obtain from various publishers standard forms for drafting your own Will, although these options may not be specific to Maine law and may lack some of the provisions that an attorney would typically recommend. Similarly, Title 18-C, Section 2-517 of the Maine Revised Statutes provides a statutory Will form along with instructions. Finally, you can hire an attorney to draft a Will for you, who can ensure not only that your Will is complete and enforceable, but also that it is appropriate for your particular circumstances.

Attorneys associated with Rudman Winchell and the Maine Elder Law Firm frequently work with individuals and couples to review their particular family and financial circumstances and create an estate plan that meets their goals.

This article is intended to provide information of a general nature only. It does not provide or replace professional legal advice, and it does not establish an attorney-client relationship with the Maine Elder Law Firm or Rudman Winchell. Please consult an attorney for advice regarding your specific circumstances.

