

Chapter 3

MAKING A WILL

A **will** is a revocable transfer to take effect on death. Wills have been with us since the first days of recorded history. Archaeologists have found 4500-year-old hieroglyphics leaving property to others in Egyptian tombs. Bible readers recall that Jacob left Joseph a larger inheritance than his brothers received, and the trouble that caused.

Whether in ancient Egypt or modern America, all wills are different. What you put in yours depends on what property you have, whom you want it to go to, the dynamics of your family, and so on. This chapter sets out some of the factors you might want to consider in making your will (for what to do if you later decide to change or revoke it, see [chapter ten, Changing Your Mind](#)).

THE SEVEN ESSENTIALS OF A VALID WILL

To be valid, your will doesn't have to conform to a specific formula. For example, in states that recognize handwritten wills, some wills scrawled on the back of an envelope have stood up in court. However, there are certain elements that usually must be present.

1. You must be of **legal age to make a will**. This is 18 in most states, but may be several years older or younger in some places--check with a lawyer if you need to know.
2. You must be of **sound mind**, which means that you should know you're executing a will, know the general nature and extent of your property, and know the objects of your bounty, i.e. your spouse,

descendants and other relatives that would ordinarily be expected to share in your estate. Although you do not have to be found mentally incompetent by a court for your will to be challenged on the grounds of incompetence, the law presumes that a testator was of sound mind, and the standard for proving otherwise is very high--much more than mere absent-mindedness or forgetfulness.

Because disgruntled relatives who want to challenge a will occasionally use this sound-mind requirement to attack the testator's mental capacity, in special cases the execution of a will is sometimes videotaped and kept on file, so if someone raises a question after the testator dies, the videotape can be good evidence of **testamentary capacity**.

3. The will must have a substantive provision that disposes of property, and it must indicate your intent to make the document your final word on what happens to your property--that is, that you really intended it to be a will.

4. The will must be voluntarily signed by the testator, unless illness or accident or illiteracy prevents it, in which case you can direct that your lawyer or one of the witnesses sign for you. This requires a lawyer's guidance, or at least knowledge of your state's law, since an invalid signature could void a will.

5. Although **oral wills** are permitted in limited circumstances in some states, wills must usually be written and witnessed. The will scrawled on an envelope won't work in these states. To be safe, don't handwrite a will if you can avoid it.

6. Though some states do allow informal oral and written wills in certain circumstances, all states have standards for formal wills. Writing a **formal will** and following these standards helps assure that your

wishes will be followed after your death. In almost all states, the signing of a formal will must be witnessed by at least two adults who understand what they are witnessing and are competent to testify in court. There have to be three in Vermont and New Hampshire, three plus a notary in Puerto Rico. In most states the witnesses have to be **disinterested** (i.e., not getting anything in your will). If they aren't, you run the risk of voiding certain provisions in the will, opening it to challenge, or invalidating the entire will.

7. A formal will must be properly **executed**, which means that it contains a statement at the end attesting that it is your will, the date and place of signing, and the fact that you signed it before witnesses, who then also signed it in your presence--and watched each other signing it. Most states allow so-called **self-proving affidavits**, which eliminate the necessity of having the witnesses testify that they witnessed the signing; the affidavit is proof enough. In other states, if the witnesses are dead or unavailable, the court may have to get someone else to verify the legitimacy of their signatures.

If your will doesn't meet these conditions, it might be disallowed by a court, and your estate would then be distributed according to a previous will or under your state's intestacy laws.

WHO CAN WRITE A WILL

Legally, you don't have use a lawyer to write your will. If it meets the legal requirements in your state, it is valid whether or not you wrote it with a lawyer's help.

Nonetheless, studies show that more than 85% of Americans who have wills used a lawyer's help in preparing them.

Below are your alternatives and considerations to take into account in deciding which to use.

Doing it yourself

Several alternatives are absolutely free but not often used. For example, **oral wills** are permissible in less than half the states, sometimes under very limited circumstances, such as when they are uttered in your final illness. Also, oral wills often apply only to personal property.

Handwritten, unwitnessed wills are valid in about half the states and effective to dispose of more kinds of property. Nonetheless, they're not recommended. Since they rarely follow legal formalities, it's sometimes hard to prove that they are intended to be wills, or intended to be your last will, and they are vulnerable to fraud and they often don't cover all the testator's assets.

Soldiers' and seamen's wills are permitted by about half the states. They allow people actually serving in the armed forces to dispose of their wages and personal property orally or in an informal written document. Often they're only valid during wartime, when the willmaker is in a hostile zone, and they usually cease to be valid after a certain time that varies by state.

Statutory wills are another free alternative available in a few states. A statutory will is a form that has been created by a state statute. Since the statutory will includes all the formalities, all you have to do is get a copy at a stationery store, fill it out, have it witnessed, and you have a valid will. Unfortunately, these wills are very limited. They assume you want to leave everything to your spouse and children and provide for few other gifts. And you must follow the form--they can't legally be changed.

In recent years, a number of books and computerized will kits have come on the market which claim to enable you to make your own will. The cost of a book may run \$20 or more, the cost of a kit \$70 or more. For simple estates--involving little money and other assets, and in which everything is to

go to few people--they might be a viable alternative. However, make sure that a given book or kit is up-to-date and thorough, especially since probate laws vary from state to state. The kits are easier than the books to fit into your estate plan--they typically take you through a will with computer prompts that enable you to alter the document to fill typical needs.

Doing it this way may not be easy. Do-it-yourself books and kits, some lawyers say, have caused more work for lawyers (and bills for clients) than they have avoided. There's a famous case about one man who thought he'd get two wills for the price of one will kit. He made a form will for himself, then took that and substituted his wife's name for his own in the signature clause and the introductory clause. But he failed to change the name of the beneficiaries--meaning that when his wife died, she left all her property to herself! This one, of course, ended up in court, at a substantial cost to the surviving husband.

Once you begin totalling up all your assets, you may be surprised to find that your estate is larger than you thought. At the same time, family relationships are becoming more complicated. Today, a do-it-yourself will might not do the job.

Using a lawyer

The cost of having a will drawn up professionally depends on the size and complexity of your estate, the going rates for lawyers in your area, your lawyer's experience, and so on.

About 74 million Americans belong to **group legal service plans**. These plans enable members to get legal services either free or at reduced cost. In many programs simple wills are either free or cost far less than the going rate. More comprehensive estate planning and preparation of other documents are available from lawyers at a reduced hourly rate. About 90% of plans are available to members of certain organizations (like AARP, the military or a union), or to workers in certain industries

as a result of collective bargaining agreements. Some of these plans have no fee at all to the participant; others may have a modest fee. About 10% of plans are available to individuals, including one through the Signature Group of Montgomery Ward's.

Legal clinics are another low-cost alternative. They can prepare your will for modest amounts because legal assistants do much of the work under a lawyer's guidance. That work often consists of adapting standard computerized forms to fit the needs of the client. If you have a small, simple estate, the cost may be modest, and you may have the benefit of professional advice and reassurance that your will meets the standards for validity in your state.

If you want to use a private lawyer, many will give you the first consultation free. Ask one to give you a price or range of prices for preparing a will or estate plan; it might be cheaper than you think. Often, lawyers have a written fee schedule for various kinds of wills. If yours doesn't, before you give the final go-ahead to draw up your will, ask the estimated cost (or at least a range of likely costs).

You should most certainly use a lawyer if you own a business, if your estate exceeds \$1 million (making tax planning a factor under current law), or if you anticipate a challenge to the will from a disgruntled relative or anyone else.

As noted in chapter one, a skillfully drawn will generally saves you money in the long run. By giving the executor (the person you choose to administer your estate after you die) authority to act efficiently, by saying that a surety bond will not be required and by directing that the involvement of the probate court be kept to a minimum, you can save your family money.

WRITING A WILL

Freedom of disposition

After your lawyer has a good idea of what you want and what your assets are, he or she will probably suggest various options to help you achieve those objectives. In general, you can pick whom you want your property to go to and leave it in whatever proportions you want.

There are exceptions, however. For example, a surviving husband or wife may be entitled to a **statutory share** of the estate regardless of the will. This is a percentage set by state law. (You or your spouse can voluntarily give up this legal protection in a prenuptial agreement.) Otherwise, you can disinherit anyone, but if you're disinheriting a family member, you should do so specifically, not by omission. (See [chapters six](#) and [seven](#) for details.) In some states surviving spouses are entitled by law to the family home as a **homestead right**. Though your spouse can try to give it to someone else in the will, you have to approve or the property is yours.

And some states limit how much you can leave to a charity if you have a surviving spouse or children, or if you died soon after making the provision (under the assumption someone exerted undue influence on you).

Most states impose some restrictions on conditions listed in wills that are bizarre, illegal or against public policy of the state. For example, if you wanted to set up an institute to promote terrorism and violent overthrow of the government, the probate court would probably throw out the bequest.

Some people try to make their influence felt beyond the grave by attaching conditions to a gift made in the will (as opposed to the purely advisory language in a letter of intent). Most lawyers advise against this; courts don't like such conditions, and you're inviting a will contest if you try to tie them to a gift. You can't require your daughter to divorce her no-account husband to claim her inheritance from you; nor can your husband make your inheritance contingent on a promise you'll never remarry; nor can you force that secular humanist son-in-law to go to church every Sunday. For the most part, though, it's your call.

CLAUSE-BY-CLAUSE

There's no set formula for what goes into a will. There are some things you might want to think about if you fall into certain categories--younger couples, older couples, single people, divorced people, and so on. Chapters six and seven discuss some of the needs and options different people might have in planning their estates.

Below are the more common clauses of a basic will, following the order of clauses of the sample will in this chapter, to illustrate some typical will contents.

Funeral expenses and payment of debts

Your debts don't die with you; your estate is still liable for them, and your executor needs no authority to pay them off.

If your debts exceed your assets, your state law will prescribe the order in which the debts must be paid by category. Funeral expenses and expenses of administration usually get first priority. Family allowances, taxes, and last illness expenses will also appear near the top of the list. If you want certain creditors to be paid off first, ask your lawyer how to ensure this will happen in light of your state's particular law.

As for funeral directions, while you can put them in your will, be aware that the will might not be found until after you're buried. It's best to put these in a separate document. ([See chapter eleven.](#))

You can also forgive any debts someone owes you by saying so in your will.

Gifts of personal property

It's important to carefully identify all recipients of your largesse, including their address and relationship to you. There are too many cases of people leaving property to "my cousin John," not realizing that more than one person might fit that description. Or you leave something to "my sister's husband," and she later divorces him and remarries--who gets the gift? A court might have to decide.

If you have several children or other relatives in the same category (cousins, siblings, etc.), and you want them to divide your estate or some portion of it equally, you should state that you are giving the gift to the class ("my cousins") not to them as individuals ("Mutt and Jeff"). That way, if one of them dies, the others would take the whole gift. Otherwise, the dead cousin's heirs would take his share of the gift. On the other hand, if you definitely do want a beneficiary's children to take a gift if he predeceases you, you would use language that indicates this, typically "to my cousins, A, B, and C and their issue, per stirpes." This is technical territory, but the main thing to remember about gifts to a class is this: if you have several beneficiaries, use language that will account for the possibility of one of the class members dying before you do.

For similar reasons, you should usually be specific about the gifts you are making. Don't just leave "household property" to someone, because that category is vague enough to spark a dispute in court, or at least in the family. Spell out the items ("stereo equipment, clothing, books, cash"), or just omit any mention at all and let them pass through the **residuary clause** (discussed below).

On the other hand, in cases where the specific item of property might change between the time you write the will and the time you die, you might want to be more general in your phrasing--leaving your son not "my 1986 Yugo" but "the car I own when I die." The same applies to stocks or bank accounts; the bank may be taken over by another bank; the stock may be sold. Better to include a general description or leave a dollar amount or fractional share.

Make sure the language you use in giving the gift is unambiguous: "I give..." "I direct that...."

and so on. Wishy-washy terms like "It is my wish that..." might be taken to be merely an expression of hope, not an order. At the very least, such **precatory language** could invite a court challenge.

In general, it's simpler for your executor if you leave your property to people in broad but specific categories ("all my furniture") rather than passing it on it piece-by-piece ("my kitchen table") to many different people. If you want specific gifts of sentimental value to go to certain people, consider giving them to those people before you die, so you can witness their pleasure (and, if your estate is large, lower estate taxes). Or, some attorneys advise leaving most items to one or two people, and then writing a **letter of intent** that advises those people about how you want them to spend that money or distribute those items. Some states have laws providing for these letters but some do not. That means **LETTERS OF INTENT MAY NOT BE LEGALLY BINDING**. Use them only with people you can trust. (One way to handle specific bequests of personal property is through a **tangible personal property memorandum**, or TPPM. [See chapter nine for details](#)).

Remember also that personal property can include intangible assets like insurance policies (for instance, if you own a policy on your spouse's life, that policy and cash value of the premiums paid into it can be passed on through your will), bank accounts, certain employee benefits, and stock options.

Finally, if you have multiple beneficiaries you want to share in a gift, be careful to specify what percentage of ownership each will have. If you don't, the court will probably presume that you intended the beneficiaries to share equally. Most lawyers counsel against shared gifts, because it means several people have to agree on use of the property, and one co-owner may be able to force a sale. But there are some indivisible assets--a house, typically--where you may have little choice but to let more than one person share in the gift. If so, talk to the beneficiaries first and make sure they agree on how they'll jointly use and manage the gift. And be sure to designate alternative beneficiaries (usually the others who will share in the gift) in case one of them dies before you do.

You can save on taxes by using gifts wisely. This section of your will can be used to give gifts to institutions and charities as well as to people.

Gifts of real estate

Most people prefer that their spouses receive the family home. If the home isn't held in **joint tenancy (survivorship)**, you should have instructions about what will happen to it in your will.

It is possible to give what lawyers call a **life estate**. This is giving something to a person, to use for as long as he or she lives but that reverts to your estate or passes to someone else after he or she dies (see chapter two for more on this). It's a way of assuring, for example, that your husband will have the use of your house while he lives, but that it will pass to the children of your first marriage after he dies. The rules governing such transfers, or any transfers different from a **fee simple** outright transfer of ownership, are so complicated that you must use a lawyer to make such a gift properly.

If you die before you've paid off the mortgage on your house, your estate will normally have to pay it off. If you're afraid this will drain the estate too much, or if you want the recipient of the house to keep paying on the mortgage, you must specify that in your will. If you haven't paid off the family house, and you're afraid your survivors can't afford to, you may be able to buy mortgage-canceling insurance to pay it off.

Executors

It helps to spell out certain powers the **executor** (or, as he or she is called under the laws of some states, the **personal representative**) can have in dealing with your estate: to buy, lease, sell and mortgage real estate; to borrow and lend money; to exercise various tax options. Giving the executor this kind of flexibility can save months of delay and many dollars by allowing him or her to cope with

unanticipated situations. If you run a business, be sure to give your executor specific power to continue the business--or enter into new business arrangements. If you don't, the law may require that the business be liquidated or sold.

Residuary clause

This is one of the most crucial parts of a will, covering all assets not specifically disposed of by the will. You will probably accumulate assets after you write your will, and if you haven't specifically given an asset to someone, it won't pass through the will--unless you have a **residuary clause** that, as Lyndon Johnson used to say of grandmother's nightdress, covers everything. (If your will omits a residuary clause, the assets not left specifically to anyone would pass on through the intestate succession laws, after long delays and extensive court involvement.) No matter how small your residuary estate seems at the time you write your will, you should almost always leave it to the person you most care about.

The residuary clause distributes assets that you mightn't have anticipated owning. For example, normally anything you own in joint tenancy would pass automatically to the other tenant at your death, and so you wouldn't include it in your will. But what if the joint tenant has died before you? Your estate now probably owns the entire asset, and your residuary clause would ensure that it goes to someone you care about.

Testamentary trusts

As we'll see in the next chapter, you can set up a **testamentary trust** in your will, or have your will direct funds from your estate into a trust you had previously established (your will would then be a **pourover will**). You would normally do so in a separate clause in your will.

What if?

You should always play the "what if?" game, and try to figure out where a gift would go if something unexpected happened--then account for that possibility in your will. What if one of your beneficiaries dies before your do? In that event, the gift you made to the dead person is said to **lapse**, and the gift goes back into your residuary estate, to be distributed to whomever you made the residuary beneficiary. Most states, however, have **anti-lapse** statutes that provide that, if a beneficiary predeceases you, that beneficiary's heirs would receive the gift. So if you left your shoe collection to your daughter Imelda, and she died before you did, in a state with an anti-lapse statute the footwear would go to Imelda's descendants. In a state without an anti-lapse statute, it would go to whomever you had named to receive your residuary estate. You can also name a **contingent beneficiary** who will get a gift if the primary recipient should die first.

A general tip

Be sure to carefully proofread your will, whether you write it yourself or your lawyer does. Does page nine follow page eight? If you are leaving percentages of your estate to different people, do the percentages add up to 100?

SAMPLE BASIC WILL (ANNOTATED)

There is no standard, legally foolproof will. State laws vary, as do the needs of people making wills. This sample is designed to give you an idea what a will might look like and why certain language is in it.

I, Tess Tatrix, residing at 1 Wilthereza Way, any town, any state, declare this to be my Will, and I revoke any and all wills and codicils I previously made.

The opening sentence should make it clear that this document is intended to be your will, give your name, place of residence and revoke any previous wills and **codicils** (amendments to previous wills). This can help avoid a court battle if someone should produce an earlier will.

ARTICLE I: Funeral expenses & payment of debts

I direct my executors to pay my enforceable unsecured debts and funeral expenses, the expenses of my last illness, and the expenses of administering my estate.

By law, debts must be paid before other assets are distributed. This clause gives your executor authority to pay the funeral home, court costs, and hospital expenses. Using the term "enforceable" prevents creditors from reviving debts you are no longer obliged to pay, usually those discharged in bankruptcy. And the term "unsecured" prevents a court from interpreting this clause to mean that your estate must pay off your mortgage or other secured debts that you probably don't want immediately paid off.

Note: in some states, the executor is required by law to pay enforceable unsecured debts. In these states, this clause is unnecessary and may create problems.

ARTICLE II: Money & Personal Property

I give all my tangible personal property and all policies and proceeds of insurance covering such property, to my husband, Tex. If he does not survive me, I give that property to those of my children who survive me, in equal shares, to be divided among them by my executors in their absolute discretion after consultation with my children. My executors may pay out of my estate the expenses of delivering tangible personal property to beneficiaries.

This gives your personal property to your spouse. If there are particular items that you want to go to other people (such as heirlooms, jewelry, professional equipment, and so on) you should enumerate them and the person you want them to go to in a separate clause (e.g., "I give my Beatles albums to my friend William Shears"), and note that Article II excludes those items. Some people will use separate clauses for **legacies** (disposition of money) and **bequests** (disposition of tangible personal property). Note the important clause that accounts for the possibility that your spouse will die first. The clause on insurance means that if some property you owned was destroyed (perhaps in the event that caused your death, like a car wreck), your heirs will receive the insurance proceeds, not the mangled car.

ARTICLE III: Real Estate

I give all my residences, subject to any mortgages or encumbrances thereon, and all policies and proceeds of insurance covering such property, to my husband, Tex. If he does not survive me, I give that property to _____.

Most people want their spouse to keep the family home. In some states, particularly community property states, it's sometimes preferable to leave your residence to your spouse in a marital trust.

ARTICLE IV: Residuary Clause

I give the rest of my estate (called my residuary estate) to my husband, Tex. If he does not survive me, I give my residuary estate to those of my children who survive me, in equal shares, to be divided among them and the descendants of a deceased child of mine, to take their ancestor's share per stirpes.

Usually, the residuary clause begins "I give all the rest, residue, and remainder of my estate..." because lawyers are afraid to change tried-and-true formulas, and for decades, legal documents never used one word when a half-dozen would do. However, this plain-English form will also work. This clause covers any property you own or are entitled to that somehow wasn't covered by the preceding clauses.

ARTICLE V: Taxes

I direct my executors, without apportionment against any beneficiary or other person, to pay all estate, inheritance and succession taxes (including any interest and penalties thereon) payable by reason of my death.

One common mistake by people who use a living trust as well as a will is to make the beneficiary of the estate different from the people benefiting from the trust. The same problem exists when there are significant specific gifts and the residuary beneficiaries are different from the recipients of the specific gifts. In such cases those paying the taxes are not those who receive the most property, an arrangement that can unfairly saddle some beneficiaries with the whole tax bill, and at worst can even bankrupt the estate. The goal should be to see that the taxes are paid by those who benefit from gifts. Often, a provision apportioning taxes to taxable transfers is used to make sure that each recipient of a taxable gift pays his or her fair share. Additional language is sometimes used to apportion credits.

ARTICLE VI: Minors

If under this will any property shall be payable outright to a person who is a minor, my executors may, without court approval, pay all or part of such property to a parent or guardian of that minor, to a custodian under the Uniform Transfers to Minors act, or may defer payment of such property until the minor reaches the age of majority, as defined by his or her state of residence. No bond shall be required for such payments.

This clause gives your executors discretion to make sure any gift to a minor will be given in a way that's appropriate to his or her age. The "no-bond" language is intended to save the estate money.

ARTICLE VII: Fiduciaries

I appoint my spouse, Tex, as Executor of this will. If he is unable or unwilling to act, or resigns, I appoint my daughter, Ellie Mae, and my son, Jethro, as successor co-executors.

If either co-executor also predeceases me or is unable or unwilling to act, the survivor shall serve as executor. My executor shall have all the powers allowable to executors under the laws of this state. I direct that no bond or security of any kind shall be required of any executor.

If you set up a trust in the will, you could name the trustees in this clause as well. The "bond or security" clause is designed to save the estate money.

ARTICLE VIII: Simultaneous Death Clause

If my spouse and I shall die under such circumstances that the order of our deaths cannot be readily ascertained, my spouse shall be deemed to have predeceased me. No person, other than my spouse, shall be deemed to have survived me if such person dies within 30 days after my death. This article modifies all provisions of this will accordingly.

This clause helps avoid the sometimes time-consuming problems that occur if you and your spouse die together in an accident. Your spouse's will should contain an identical clause; even though it seems contradictory to have two wills each directing that the other spouse died first, since each will is probated by itself, this allows the estate plan set up in each will to go forward as you planned. The second sentence exists to prevent the awkward legal complications that can ensue if someone dies between the time you die and the time the estate is divided up. Instead of passing through two probate processes, your gift to a beneficiary who dies shortly after you do would go to whomever you would have wanted it to go had the intended beneficiary died before you did. Most such gifts go into the

residuary estate.

ARTICLE IX: Guardian

If my husband does not survive me and I leave minor children surviving me, I appoint as guardian of the person and property of my minor children my uncle Ernest Entwistle. He shall have custody of my minor children, and shall serve without bond. If he does not qualify or for any reason ceases to serve as guardian, I appoint as successor guardian my cousin Kevin Moon.

I have signed this will this ___ day of ___, 19__.

(legal signature)

SIGNED AND DECLARED by Tess Tatrix on _____ to be her will, in our presence, who at her request, in her presence and in the presence of each other, all being present at the same time, have signed our names as witnesses.

(signature)

Blair Witness

Address

Each of us was acquainted with Tess Tatrix when the will was executed and makes this affidavit at her request.

(signature)

Blair Witness

Address

(signature)

I. Witness

Address

Sworn to before me this _____ day of _____, 19__.

(signature and official seal)

Notary Public

AFTER THE WILL IS WRITTEN

Executing the will

After you've drawn up your will, there remains one step: the formal legal procedure called **executing the will**. This requires witnesses to your signing the will. In all states, the testimony of at least two witnesses is needed as proof of the will's validity. In some states, the witnesses must actually show up in court to attest to this, but in a growing number of states, a will which is formally executed with the

signatures notarized (and a self-proving affidavit attached) is considered to be **self-proved** and may be used without testimony of witnesses or other proof.

Who should you pick to be your witnesses? The witnesses should have no potential conflict of interest--which means they should absolutely not be people who receive any gifts under the will, or who might benefit from your death. You needn't bring them with you to your lawyer's office; typically, some employees of your lawyer will witness the signing. You should sign every page of the original. The witnesses will watch you sign the will and then sign a statement attesting to this.

Where to keep your will

It's not a bad idea to make a few unsigned copies of your will and have them available for ready reference, but to avoid confusion, you should sign only one original. This--and only this--is your legally valid will. Keep it in a safe place, such as your safe deposit box or your lawyer's office. Some jurisdictions will permit you to lodge the will with the probate court for a nominal fee, but in some places, that makes the will a public record. If privacy is paramount for you, you should ask your lawyer or the probate office how best to accomplish this.

You should also keep a record of other estate planning documents with your will, such as a trust agreement, IRAs, insurance policies, income savings plans such as 401(k) plans, government savings bonds (if payable to another person), and retirement plans.

What if you lose your will? Have your lawyer draw up a new will as soon as possible, and execute it with all the necessary formalities. If your family situation, state of residence, or income hasn't changed, your lawyer should be able to use copies of your lost will as a guide.

While many people keep their wills in their safe deposit boxes at a bank, in some jurisdictions the law requires those boxes to be sealed immediately after death, until the estate is sorted out.

Needless to say, if your will is inside that box--or your cemetery deeds and burial instructions--sorting things out might get pretty complicated. If you do keep it in a safe deposit box, make sure to provide that someone else (and certainly the executor you name) can get at the will when you die. Tell your executor and your beneficiaries where the will is located, and make sure your executor, or someone you trust, has authority (and a key!) to open the box after your death. Many estates have gone through long probate delays because the bank didn't have permission to let anyone open the safe deposit box except the person who had just died. If you name a bank as executor or co-executor, deliver the original will to the bank for safekeeping.

It's OK to store copies of the will in your home. Personal papers such as your birth certificate, citizenship records, marriage certificate, coin collections, jewelry, heirlooms, medals and so on may be kept in your safe deposit box. Financial records, like securities, mortgage documents, contracts, leases and deeds are also safe to store.

What about a trust agreement? Unlike a will, a trust may have more than one original, in which case, there will be language saying something like, "This trust is executed in four counterparts, each of which has the force of an original." Your trustee, successor trustee, and lawyer should each have a copy. And every time you amend the trust, be sure to have the amendment in a separate copy so indicated and signed by you. Unless the amendment is a **complete restatement of the trust** (i.e., a complete reworking of the trust), attach an executed copy to each signed copy of the trust, if possible.

Sidebar

KINDS OF WILLS

Here's a brief glossary of terms used in the law for various kinds of wills:

Simple will. A will that just provides for the outright distribution of assets for an uncomplicated estate.

Testamentary trust will. A will that sets up one or more trusts for some of your estate assets to go to after you die.

Pourover will. A will that leaves some of your assets in a trust that you had already established before your death.

Holographic will. A will that is unwitnessed and in the testator's handwriting. About 20 states recognize the validity of such wills.

Oral will (also called **nuncupative will**). A will that is spoken, not written down. A few states permit these.

Joint will. One document that covers both a husband and wife (or any two people). These are often a big mistake and are especially inadvisable for estates larger than \$675,000.

Living will. Not really a will at all--since it has force while you are still alive and doesn't dispose of property--but often executed at the same time you make your will. Tells doctors and hospitals whether you wish life support in the event you are terminally ill or, as a result of accident or illness, cannot be restored to consciousness. [See chapter twelve.](#)

Sidebar

LIVING TRUSTS AND WILLS

Some people think that in order to avoid probate, they should avoid a will and instead use a living trust to transfer property between generations. A living trust can be a very useful part of estate planning--see chapter five for details. However, it alone can't accomplish many of the most important goals of estate planning. For example, you may have to have a will to name a personal guardian for your children, even if you have a trust. And even with a living trust, you'll need a simple will to dispose of property that you didn't put into the trust. In addition, many trusts are funded at death by property bequeathed by a **pourover will**. Probate is also no longer the costly, time-consuming demon it used to be. So preparing at least a simple, auxiliary will is recommended for just about everyone.

Sidebar

WHICH LAW APPLIES?

The laws of the state where your primary home is located determines what happens to your personal property--car, stocks, cash. Distribution of your real property is governed by the laws of the state in which the property is located. If you do own homes or property in different states, it's a good idea to make sure that the provisions comply with the laws of the appropriate state. You can't rely on a will drafted by a lawyer for your brother in Oregon if your primary home is located in, say, Louisiana. Especially in Louisiana, which follows the Napoleonic Code and is legally unique in the United States.

Sidebar

WHY A JOINT WILL IS A BAD IDEA

Both spouses should execute separate wills. A **joint will** generally provides that each spouse's property will go to the other one, and then spells out what will happen to the property when the second person dies. Because both parties have to agree to modify such wills, they often aren't revised as frequently as they should be, whether because of family disagreements or just the double dose of inertia. Joint wills can keep the survivor from using the property as he or she wishes, don't allow for circumstances that change after the will was made, and may be impossible to revoke.

Sidebar

CAREFUL, CAREFUL...

Be precise in the language of your will. One British soldier received from his wife's family an **inter vivos gift** (as we would term it today) that gave him an annual payment that would continue as long as she was "above ground." When she died, his lawyer successfully argued that the literal meaning should prevail over the colloquial, and much to his in-laws' consternation, the widower had her coffin encased in glass and kept above ground until he died, thirty years later, receiving the annuity all the while.

Sidebar

LITERARY WILLS

Dr. Jekyll's will left everything to Mr. Hyde.

E. M. Forster's great novel, Howard's End, turns on a hand-scrawled deathbed will that leaves a family castle to a kind woman who befriended the testator in her last years and showed the same reverence for the old place that the testator herself did.

In his will, a man who'd been gas lighter for a Philadelphia theater for 44 years ordered his head removed and prepared so that it could serve as the skull of Yorick in performances of Hamlet there.

Sidebar

THE GREATEST WILL OF ALL

Shakespeare, a Will himself, also recognized the dramatic power of wills. In Julius Caesar, Antony delivers a funeral oration to "friends, Romans, countrymen" after the dictator's assassination. While claiming that he came not to praise Caesar, by reciting the clause in Caesar's will that left every Roman 75 drachmas and his "arbours and ... orchards" as parkland, the wily Antony managed to turn the public against the democratic assassins and inherit Caesar's political power.

In the climactic scene in The Merchant of Venice, Portia's father's will instructs potential suitors for her that they must choose correctly between the gold, silver and lead caskets on stage in order to win her hand.

Sidebar

THE MEDIUM IS THE MESSAGE

Margaret Lacey wrote a will on a roll of wallpaper 15 feet long.

Agnes Burley, a waitress, wrote her last will on two paper napkins. The estate exceeded \$30,000--including the tip.

Sidebar

TENDING THE FAMILY TREE

Sylvia Wilks of New York died in 1951 leaving almost \$100 million, most of it to charity. But she also hired a genealogist to find ten distant relatives, and they received \$100,000 each--a total surprise, as she'd never called them before her death.

Sidebar

FOWL PLAY?

More than a century ago, when the law smiled more kindly on bequests to animals, one woman left hundreds of thousands of dollars to her two canaries. One died shortly after the will was read, and the other was suspected of maneuvering to double his share of the inheritance. The birdy beneficiary was exonerated by an autopsy on his unfortunate feathered friend.

Sidebar

TARNISHED LEGACIES

While the rich or infamous often use their bequests to craft a posthumous public image that's nobler than their real lives (robber baron-turned-philanthropist J. P. Morgan is a good example), sometimes it works the other way. That great and irascible curmudgeon, columnist H. L. Mencken, left his papers to the New York public library (30,000 documents) and his diary to a library in his beloved Baltimore, both with the provision that they not be made public until years after his death. Of course, when his private writings appeared a few years ago, they revealed a troubling streak of anti-Semitism that tarnished the great writer's reputation.

President Franklin Roosevelt's infidelity was revealed to the public by a bequest to "my friend, Marguerite A. LeHand," of reasonable expenses (as determined by the trustees) for Missy's health care. Cruelly, the money was to be paid out of Eleanor's trust account.

Lon Chaney's will revealed the existence of a heretofore unknown first wife who was actually the mother of his son--though the actor had concealed that fact for decades. The first wife was finally found, working in a field, and her situation wasn't much eased by the \$1 Chaney left her, presumably to disinherit her.

Sidebar

WILL O' THE WISP

Hitler's will, written in his bunker in April 19, 1945, allowed for all the contingencies.

"My possessions, insofar as they are worth anything, belong to the party, or if this no longer exists, to the state....If the state, too, is destroyed, there is no need for any further instruction on my part." Named as executor: Martin Bormann.

Sidebar

CONSISTENT TO THE END

P.T. Barnum, always loquacious, wrote a 53-page will, benefiting a whole range of favorites.

"Silent Cal" Calvin Coolidge, ever-succinct, spent only 25 words.

Sidebar

ONE LAST ROUND--ON THE ESTATE

Dancer/director Bob Fosse left money in his will for a huge party for his friends.

A New Yorker named Douglas McKelvy inherited millions, but died a few years later in 1973 at age 41. After providing for his children, he left \$12,000 to two of his favorite pubs, so that his drinking buddies could imbibe for free after his death. Not surprisingly, the cause of McKelvy's untimely demise was liver disease--brought on by heavy drinking.

[Click here to go to Chapter 4](#)