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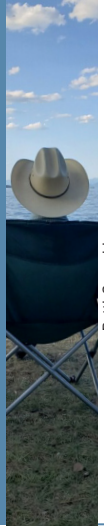

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FAMILY FINANCIAL MANAGEMENT

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Wills

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Answers common questions about Wills, including costs, restrictions, and changes after completion.

What is a Will?

A Will is a written document that describes how its maker wants property distributed after death. By making a Will, an individual can decide who shall receive property, how much each shall receive, when they shall own it, and, to some degree, what they can do with it. A Will has no effect during the person's lifetime. Only upon death does a Will disposing of property become effective in carrying out the plans and wishes detailed in the Will. This MontGuide defines some legal terms used in Wills and answers questions often asked about Wills.

Definitions

The language of Wills may seem complicated to a person who has never had one. Being familiar with legal terms makes a Will easier to understand. A person who dies is called a **decedent**. A person who makes a Will is called a **testator**. When a person dies leaving a Will the person is said to have died **testate**. A **devisee** is a person designated in a Will to receive real or personal property. A **devise**, when used as a noun, is real or personal property given to another by Will. When **devise** is used as a verb, it means to dispose of real or personal property by a written Will.

A **personal representative** is the person named in a Will to carry out settlement of the estate (in some other states, the term **executor** is used instead). Any qualified person (competent, age of majority) can be nominated as personal representative. A **testator** nominates the personal representative in a Will. The District Court confirms the nomination by issuing a letter of appointment.

An individual need not be a resident of Montana to qualify as personal representative, although it may be more convenient to use a resident. A personal representative can reside in another state or even in another country.

Who can write a Will?

A person eighteen (18) or more years of age who is of sound mind, not under duress or undue influence, may make a written Will. Verbal or videotaped Wills are not legally recognized by Montana law. However, some attorneys record the signing and witnessing of a Will to help demonstrate the testator was of sound mind and not under duress or undue influence.

Can a Will be changed?

A Will can be changed or revoked during the maker's lifetime if they remain competent. One way to change the whole Will is to revoke the will and make an entirely new one. An attorney can provide advice about how to properly revoke a Will. Another way to change part of a Will is to make a **codicil** (a supplement or amendment) that must be executed (signed and witnessed) just like the original Will. Marking out or adding words to a Will is not an effective way to change it.

A Will should be reviewed periodically, especially when there are changes in family or financial situations. Such circumstances include, but are not limited to, the following:

- marriage, remarriage or divorce since the Will was written
- birth of a child
- death of a devisee (beneficiary)
- naming different devisees (beneficiaries)
- naming a different personal representative
- moving to another state
- acquiring additional real and personal property
- changes in the title of property ownership
- passage of new Montana laws or federal estate tax laws
- increase in the value of property

May a person hand write a Will?

Yes, a person can make their own Will without the assistance of an attorney, but it must be in the testator's own handwriting. This type of Will is called a **holographic** Will. Such a Will is valid if the signature and the key provisions are in the testator's handwriting.

Self-made Wills, however, frequently increase costs and trouble for heirs. A handwritten Will, just as any other, can be denied probate because of errors. Words used may not be interpreted by the District Court as intended by the testator.

In most cases, an attorney can advise and assist a person in drafting a Will that best suits their needs and one that avoids the legal pitfalls that can result from a "do-it-yourself" Will. One should not rely on the advice of untrained relatives or friends who are not current on Montana laws about Wills.

Do I need to name someone to care for my children?

Yes! Your Will is an appropriate place to nominate a guardian for the care of children and a conservator to manage the children's assets.

Guardianship provides for the children's care until they reach the age of 18 years. Selecting the right person may be the most difficult part of setting up guardianship. Consider choosing someone whose values, lifestyle and child-rearing beliefs are similar to yours. If you choose a couple and they should later divorce, be sure to review your guardianship preference. If you favor a single person with a close relationship with your children and you feel comfortable with their lifestyle, this could be an excellent choice, too. Older children should be consulted because those 14 and over can legally ask the District Court to appoint someone other than whom you nominated.

Conservatorship provides for the management and distribution of the money and property left to children until they reach the age of 18 years. One person can perform both functions, or you may name one individual as the guardian and another as the conservator. (See MSU Extension MontGuide, *Custodial Accounts for Children Under Age 21: Montana Uniform Transfers to Minor Act*, MT199910HR or request a copy from your local MSU Extension office).

Montana law requires that every guardian and conservator complete a form "Acknowledgement of Fiduciary Relationship and Obligations." The form is available online at montana.edu/estateplanning/acknowledgementoffiduciaryrelationship.pdf.

Some parents choose to leave the money and property to the children in a **trust**. The parents may establish such a trust during life in a separate trust document or under the terms of their Wills, to take effect upon their death. The first type is known as a revocable trust. (See MSU Extension MontGuide, *Revocable Living Trusts*, MT199612HR or request a copy from your local MSU Extension office. The second type is known as a **testamentary trust** (See MSU Extension MontGuide, *Testamentary Trusts in Montana*, MT20113HR or request a copy from your local MSU Extension office).

The terms of a trust for children are that you can state how you wish the money to be spent, who should be the trustee, and when the trust should be terminated. One advantage of a trust is that it can terminate at any age you indicate in the trust document. That age could well exceed the age of majority, which is currently 18 in Montana. The **trustee**, named in a trust document, is responsible for writing out the checks for the children's living expenses, education, and other costs.

You could nominate a trusted family friend or relative with money management experience, a bank, or a trust company as trustee. You could also nominate co-trustees. The trustee or co-trustees can make distributions to the children without court approval up to the limits outlined in the trust. Whether it's the guardian, conservator or trustee, attorneys recommend that you name a backup if circumstances prevent your first choice from performing the duties after your death.

Once you make the decision, take time to discuss freely all financial and childcare arrangements with the guardian or conservator you have chosen. Asking someone to raise your children may be an overwhelming request. Don't expect an immediate answer. Some people may not feel they can accept the added responsibility. You may have to ask someone else.

Don't hesitate to reevaluate the choice periodically, especially if personal and financial situations change for you or the designated guardian or conservator. If you decide to change to another person for either role, inform the current nominee and prepare a new Will or add a codicil (amendment) to your present Will.

Is a Will made out of state valid in Montana?

A written Will is valid in Montana if executed (signed and witnesses) in a way that compiles with Montana law, the law of the state where the Will was executed or the law of the place where the testator was a resident (or citizen for international Wills) at the time of the death.

How may personal possessions be included in a Will?

Nearly everyone has personal or heirloom possessions they want to hand down to friends or relatives. The Montana Uniform Probate Code contains a provision allowing a person to refer their Will to a separate listing that disposes of tangible personal property. Examples of tangible personal property include rings, quilts, firearms and so on. The list cannot be used to dispose of cash, certificates of deposit, or securities.

The list is not a part of the Will but separate from it. The list must identify the items and the persons to receive them with reasonable certainty. The separate listing can be changed as new possessions are added without the formalities required for new Wills or codicil. The list should be dated and signed each time a change is made. (See MSU Extension MontGuide, *Who Gets Grandma's Yellow Pie Plate? Transferring Non-Titled Property*, MT199701HR or request a copy from your local MSU Extension office).

What property cannot be disposed of by a Will?

Property owned by two or more persons in joint tenancy with right of survivorship will be owned, after the death of one, solely by the survivor(s) or the named beneficiaries if the primary and contingent beneficiaries fail to survive you. Proceeds from insurance policies, pension funds, U.S. Savings Bonds, P.O.D. (payable-on-death) deposits or T.O.D. (transfer-on-death) registration deposits, transfer on death deeds, or other assets where a beneficiary is named, cannot be disposed of by a Will unless the estate is named as a beneficiary.

Are there restrictions on disposing of property by a Will?

The right to pass property to anyone after death is a privilege granted by legislative action. Therefore, Wills must be made within the limitations set by Montana law.

One important restriction prevents a testator from depriving a surviving spouse of a share of the property. A surviving spouse may elect to take a percentage of the augmented estate. An **augmented estate** is the value of the estate, reduced by certain expenses, exemptions and allowances, and increased by the value of certain gifts made by the decedent. It is a complex calculation for which the guidance of an attorney should be sought.

For example, if a husband dies leaving his widow with nothing, she may be able to claim a percentage (based on the length of the marriage) of the value of the joint tenancy property that their son received after his father's death. (See MontGuide, *Probate in Montana*, MT199006HR or request a copy from your local MSU Extension office).

Should a non-earner spouse have a Will?

After the death of one spouse, the survivor has individually owned property and usually all or part of the deceased spouse's estate. Therefore, it is just as important for a non-earner spouse to have a Will as it is for the primary breadwinner, and for many of the same reasons. Wills of spouses should be coordinated according to how title to property is held (see MontGuide, *Property Ownership: Estate Planning*, MT198907HR or request a copy from your local MSU Extension office), as well as for tax planning.

Must a parent leave his children anything?

No. Children have no vested interest in their parent's property. If you have children, any or all may be disinherited. Parents do not have to leave a small sum such as a dollar to a child to show they are not forgotten. Attorneys follow the practice of naming the children to show that the testator knew the "natural objects to their bounty" and had not forgotten any of them. Otherwise, a child could contest a Will claiming a parent was of unsound mind.

If a testator fails to provide in his Will for any children born or adopted after the execution of a Will, the omitted child may claim, under certain conditions, a share in the estate equal in value to that which the child would have received if the testator had died without writing a Will.

Must a Will be witnessed?

A holographic (handwritten) Will does not have to be signed by witnesses. Other Wills must be signed by two persons who witnessed either the signing of, or the testator's acknowledgment of the signature or of the Will. In all cases, the testator must sign the Will.

What is a self-proved Will?

To make a Will self-proved, an additional statement is added which states, in effect, the testator and witnesses signed and acknowledged this was the Will. The testator and witnesses sign this statement before a notary who then signs and uses their official seal. This makes the Will self-proved. When the Will is submitted for probate, witnesses do not have to be present to testify about the execution of the Will.

What are the differences between joint, mutual, and contract Wills?

A **joint Will** is one in which two persons express their testamentary dispositions in a single document. The intended result is the same as if each had made a Will by a separate document. Unfortunately, as has been witnessed by several cases that have found their way to the courts, the actual outcome in a joint Will too often is not the same as was intended. A Will is a sufficiently important document to merit the small amount of extra paper, effort and cost necessary to make a separate one for each testator involved.

Mutual Wills are the separate Wills of two persons who have made reciprocal provisions for one another. For example, if a husband leaves all his property to his wife by a Will and she, in turn, leaves all her property in her Will to him, their Wills are said to be mutual.

According to the Probate Code, a **contract** to make a Will or devise, or not to revoke a Will, can be established only by: 1) provisions of a Will stating the material provisions of the contract; 2) an express reference in a Will to a contract and evidence proving the terms of the contract; or, 3) a writing signed by the decedent acknowledging the contract.

What is the effect of divorce, annulment, or separation on a Will?

Divorce or annulment revokes the disposition of property made by the Will to the former spouse. A separation decree that does not terminate the status of husband and wife is not considered as a divorce under the Montana Uniform Probate Code. Any distribution made in a Will to spouses who are legally separated pending a divorce is still effective.

Is life insurance a substitute for a Will?

No. Life insurance is simply one kind of property that may be owned. If insurance is payable to an individual named as a primary beneficiary or a secondary beneficiary, a Will has no effect on who receives the proceeds. However, if life insurance is payable to the estate, the Will governs the distribution of the proceeds to the heirs.

Is joint tenancy a substitute for a Will?

No. Since the order of death and the time between joint tenants' deaths will affect whose heirs receive the estate, joint tenancy is not a substitute for a Will.

In some cases, and for certain types of property, such as residence shared by spouses, joint ownership may be useful as a legal tool in addition to a Will. It results in the property so owned "passing" directly to the surviving joint tenant upon the death of one or more of the other joint owners.

Where should a Will be kept?

After a Will is executed, it should be stored in a fire-safe place where it can be found by the survivors. If a bank or trust company is named as personal representative, the Will may be left with the institution for safekeeping.

Sometimes the attorney who drew the Will can store it in the office safe. Simply because the Will is stored with the attorney who drafted it does not mean this individual has to be selected by the personal representative as the attorney to handle the legal affairs of the estate. A personal representative can select any attorney for this function.

The original copy of the Will should not be left in a desk drawer or other storage place around the home. It could be stolen or destroyed by fire. The Will could be found and destroyed by an heir who would receive more under the Montana law of intestate succession than under the Will.

Although many people store Wills in a jointly owned safe deposit box, careful consideration should be given to this choice. The joint tenant would have access to the box and could destroy the Will if they received more under the Montana law of intestate succession.

Montana law also provides for the storage of a Will with the district court. Contact the Clerk of the Court in the county where you live for the correct procedure for storing Wills. The Will can be obtained by a testator or by a person authorized in writing to pick it up for the purpose of changing or destroying it.

What is the cost of having a Will prepared?

Federal and state laws affecting taxation and estate planning have grown increasingly complex. The services of professionals fully competent in these fields are important. Attorney fees for legal assistance in making a Will vary, depending on the size of the estate and the complexity of the Will.

Most law firms do not have a set fee for the preparation of a Will. Attorneys usually base their fees on the length of conference time with the testator and the amount of time it takes to draft the Will. Do not hesitate to ask an attorney for a fee estimate for preparing a Will, preferably at the first meeting. (See MontGuide, *Selecting an Attorney in Montana to Develop an Estate Plan or Administer an Estate (Probate)*, MT202107HR or request a copy from your local MSU Extension office).

Is a Will for you?

A Will is a written document that describes how you want your property distributed after your death. However, a Will should not be constructed separate from the titles involved and the information on them. By making a Will, you can decide who shall receive your property, how much each shall receive, when they shall own it and, to some degree, what they can do with it.

The drafting of a Will or the related broader matter of estate planning involves decisions requiring professional skill and judgment, which can be obtained only through years of training, study and experience. An attorney is an appropriate professional to consult to draft legal documents such as Wills, trusts, or contracts that are suited for your individual situation.

Disclaimer

This publication is not intended to be a substitute for legal advice. Rather, it is designed to help families become better acquainted with some of the devices used in estate planning and to create an awareness of the need for such planning. Future changes in laws cannot be predicted, and statements in this MontGuide are based solely upon those laws in force on the date of publication.

Acknowledgment

The Business, Estates, Trusts, Tax and Real Property Section, State Bar of Montana has approved this MontGuide and recommends its reading by all Montanans who want to learn more about wills.

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FAMILY FINANCIAL MANAGEMENT (ESTATE PLANNING)

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