

Oh What a Will Can Do (and What it Can't!)

What is a Will? We all make donations from time to time for charitable causes, to our Parish churches and to our kids. Every time you put money in the basket or hand a \$20 bill to your child you are making a gift—that is known as a “manual gift.” Other gifts require special documentation to be effective, such as a donation of a vehicle or land to a charity, child or grandchild. These donations must be in the form of an “authentic act”—a document signed before two witnesses and a notary, with everyone being present at the same time. A last Will and testament is just another type of donation and has its own form requirements very similar to an authentic act (unless it’s an olographic Will that has its own requirements discussed below).

Mechanically, a Will is quite similar to an *inter vivos* (during lifetime) donation—it’s just a donation *mortis causa* (at death). With any gift, you own the asset immediately prior to the donation and someone else owns it after—it’s a transfer of title/ownership and its gratuitous meaning without consideration (payment). A Will is a gift that is held in suspense until your death. The ownership transfer occurs at the moment of your death automatically, but is evidenced through a very simple estate administration process (succession) for the vast majority of estates. A Will is your chance to direct who gets what and how. If you don’t have a Will, Louisiana law has default rules which are quite reasonable (contrary to rumor).

There are two types of Wills in Louisiana: The notarial testament and the olographic Will. An olographic Will must be *entirely written, dated and signed by you in your own handwriting*. Your signature must appear at the end of the Will and the date should include the day, month and year. Olographic Wills should not be used if you intend to include any type of trust (an arrangement where one person administers assets for another) in your Will or do anything “fancy” where you give one person the use of property (“You can live in my house, but at your death my daughter will get the house.”) but dictate that the ownership ultimately go to another. You must keep the Will in a safe place where your spouse or heirs will find it—we will need the original. Copies are *not* sufficient. If all we can find is a copy, we have to overcome the legal presumption that you revoked the Will by destroying it.

The other type of Will is a notarial testament. A notarial testament must be in writing and dated and must be signed in the presence of two witnesses and a notary, after a declaration by the testator that it is his or her Will. The notary and witness must also sign at the same time and must be physically present in the room with the testator. You can’t “add” a witness later or “get it notarized” later. A special attestation clause must be included to verify that this process was followed to the letter of the law.

So you are ready to write a Will? There are a few ground rules and other issues you need to consider first:

Forced Heirship: These rules may tie your hands and limit how much you can give away to someone such as a spouse. Under Louisiana law, a portion of a decedent’s estate is reserved for certain children. This required children’s portion is referred to as the “forced portion,” with the balance being the “disposable portion” (the portion you can leave to someone else such as a spouse). Children age 23 or younger and those who are disabled are forced heirs. Disabled children are children who, because of mental incapacity or physical infirmity, are permanently incapable of either managing their affairs or taking care of their persons. Children who have an inherited, incurable disease or condition that may render them incapable of caring for their persons or administering their estates in the future will also be forced heirs. Disabled grandchildren may also be or become forced heirs of a grandparent if their parent predeceases the grandparent. For example, recent cases suggest that children with bi-polar disorder may be considered forced heirs. The forced portion is one-fourth of the estate for one forced heir and one-half where there

are two or more forced heirs. However, in no event can a forced heir's share exceed what the forced heir would have inherited had there been no Will. For example, if the decedent had five children, two of whom are "forced heirs," each of these forced heirs will receive only one-fifth of the estate, rather than one-quarter each.

Community Property: Louisiana law creates a community property regime between married couples, and all assets are either community, separate or a combination. Each spouse owns an undivided one-half interest in community property, while separate property belongs to that spouse exclusively. Assets are presumed to be community so it is important to maintain the separate nature of an asset if you want to keep it that way. Commingling may occur when separate property (example: cash in the joint checking account) is combined with community property.

Community property generally consists of all property acquired during the marriage through the effort, skill, or industry of either spouse, regardless of whose name appears on the title. All revenues (interest and dividends) from separate property will also be considered community property unless this revenue is reserved by the owner in a properly drafted written declaration, with notice to the other spouse. Separate property includes property acquired before marriage, property received through a gift or inheritance to the spouse individually, personal injury awards for pain and suffering, and property acquired with separate funds.

Who gets what if you die domiciled in Louisiana without a Will? The answer is not as disturbing as some assume. Different rules will apply depending on whether property is community or separate. For community property: If a decedent is survived by children and a spouse, the children will inherit the "naked ownership" of the community property subject to a "legal" usufruct in favor of the surviving spouse. This usufruct will not apply to any separate property owned by the decedent, and will terminate if the surviving spouse remarries.

If the decedent has no surviving spouse, the children will inherit in full ownership. If a child has predeceased the decedent, that child's children will inherit the predeceased child's portion through representation. If a decedent leaves no children or other direct descendants, his interest in the community will pass to the surviving spouse.

For separate property: Children or other descendants will inherit the decedent's separate property in full ownership. If he leaves no descendants, the decedent's brothers and sisters, or their children, will inherit the "naked ownership" subject to a usufruct in favor of the decedent's parents. If no parents are left, then the brothers and sisters will take in full ownership. The surviving spouse will inherit the decedent's separate property only in the event the decedent leaves no children or other direct descendants, no siblings or their direct descendants and no parents. As described above, the decedent has very little control over how his property is distributed if he leaves no Will but the rules are quite logical and fair.

What can you do with a Will?

With a Will, you can control the disposition of your estate within certain limits. A properly drafted Will can provide numerous estate planning opportunities, including the following (this is a non-exclusive list):

1. Leave the disposable portion (which would be the entire estate if there is no "forced portion") to anyone you desire, such as a surviving spouse, specified family members, friends or charities;
2. Make special bequests of cash, personal property, business interests, etc. to certain people or charities. You do not have to list every asset you own in your Will—those assets will change over

time creating ambiguity in your Will. Instead, you can provide “I leave my entire estate to my children in equal shares”—that way neither one can get the short end of the stick so to speak. Don’t feel compelled to handle the division of assets—your kids will figure it out;

3. Provide that the usufruct in favor of the surviving spouse will apply to both community and separate property, even if forced heirs of a prior marriage are present, and that this usufruct will be for the spouse's lifetime as opposed to ending at remarriage. Or you might provide that not only will the usufruct end at remarriage, it will end with co-habitation;
4. Provide for the care of disabled children or parents, preserving governmental benefits with a testamentary special needs trust built in;
5. Trusts may be established for children who need or might benefit from the protection of a trust (which, in this blogger’s opinion, often means all children regardless of age or financial circumstances—I would much rather receive an inheritance in a spendthrift trust than outright) and which will eliminate the need for court supervision of a minor child's estate;
6. Provide for the disposition of the ownership of life insurance policies on the life of another.
7. Conserve estate assets by proper tax planning to utilize the "unified credit" against federal estate taxes discussed briefly below, the marital deduction, generation skipping transfers, and charitable bequests;
8. Provide for the sale of the family business;
9. Designate a tutor (guardian) to care for minor children;
10. Specify how debts, expenses and taxes are paid or allocated;
11. Name an attorney to represent the estate although this will not be binding on your executor or heirs;
12. Provide for alternate legatees should the primary legatees predecease you;
13. Provide for the disposition of property located in other states (you can use an LLC to avoid “ancillary” probate and protect yourself from liability);
14. Provide that a legatee must survive for up to 6 months and if not, leave that portion to some other legatee;
15. Avoid inherent problems in the blended family situation—this is a particularly complex topic when the husband and wife want to treat all kids equally on the condition that both spouses treat all the kids equally. Wills are often changed after the first spouse dies, perhaps leaving all assets only to the surviving spouse’s children causing an inequity;
16. Provide for some or all of a person's children, grandchildren, nieces, nephews, etc., who are born *after* the testator's death through the use of a “class” trust; and
17. Eliminate, reduce or defer death taxes.

I need to avoid probate at all cost, right?

No offense to those of you who believe that, but in my view it’s disingenuous—consider the source of that advice—is it someone who happens to be offering their services to prepare a revocable trust for you? All estate planning lawyers are familiar with both Wills and trusts and can prepare either document. Most of my Wills have trusts built into them (known as a testamentary trust). A revocable trust is an alternative to a Will—they are no better or worse when you get down to it. Each carries out a gift at death. If you want a trust to protect your heirs from their creditors (existing or future), you can include one in your Will. A revocable trust cannot accomplish anything from a tax or asset protection standpoint that a Will cannot and there are no asset protection features for you the testator at all. You really can’t avoid lawyers if there are any assets to distribute and as for avoiding “Will contests,” your beneficiaries can just as easily wind up with a “revocable trust contest” instead. A revocable trust does have some real utility if we are dealing with a single person (or a widow/widower) with no trustworthy family to look after him or her. In that case, a bank or other professional trustee can step in to assist the person if they become disabled

(i.e. Alzheimer's).

In Louisiana we refer to a probate proceeding as a succession—it's the process of making sure your heirs or legatees get what the law leaves them (if you did not have a Will) or get what you directed they receive through your Will. Most successions cost just a few thousand dollars and take just a few weeks to complete. You can name an independent administrator who will not need court authority to act, and information concerning your assets can be kept confidential.

Taxes anyone?

Again, misconceptions abound. There is no longer a Louisiana gift or inheritance tax so forget about it. Similarly, the bar for being subjected to federal estate tax is so high that less than one-tenth of 1% of the people who die this year will experience how it works. The tax does not apply to the rest of us. You can die with \$11,200,000 and not pay any federal estate taxes (unless you have already used up some or all that credit during your lifetime¹--gifts at death and gifts during life are treated the same—they are both transfers of wealth). A married couple can leave \$22,400,000—yes, twenty-two million! So take it off your list of things to worry about if you are not that well off.

What can't you do with a Will?

The law does not reward originality and a Will is no place for creativity. Much of the litigation we encounter involves poorly drafted Wills, handwritten Wills, and/or ambiguous or inconsistent language. The best way to avoid litigation is to spend some time and money on a lawyer to get it right the first time and on the front end. Sometimes a well-meaning testator intends one thing but the way it is written has a different legal effect. There are many things you just can't do—an example is a "prohibited substitution," where you direct that one person shall receive an asset following the death of the first person you left the item to. Some things just can't be carried out from a legal standpoint and you can only educate yourself to a degree.

Important: For anyone with a life insurance policy, annuity or retirement plan, note that these are contracts—we refer to them as "non-probate" assets. The balances or proceeds will go to whoever the last named beneficiary is on file at the plan custodian's or insurance company's office, even if everyone (including the beneficiary) knows it's a mistake—think ex-wife or ex-husband. If the named beneficiary is deceased, the contract usually includes default rules as to who will receive the asset that may not be in line with what you want—you can name a contingent beneficiary instead. There is no language you can include in your Will to change this result. The only way to be sure of who you named is to request a copy—memories fade after 20, 30 or 50 years.... Do note that you *can* intentionally cause these assets to pass through your estate (or into a testamentary or revocable trust) by simply naming your estate or the trust as the beneficiary.



Patrick K. Reso is a Board Certified Tax Law Specialist and Board Certified Estate Planning and Administration Specialist at Chehardy Sherman Williams law firm. He is a member of the Catholic Foundation's Professional Advisors Council.

¹ Annual exclusion gifts (up to \$15,000 per person per year) do not count against that credit, nor would paying qualified educational or medical expenses. Gifts to your spouse won't use up your credit either.