

Tools for Preparing a Will

Many of us avoid talking about death. But we all know that death touches our lives eventually and that there's no reason to put off creating a will. A will is a key component in your life planning arsenal and often the only way to make sure the people you love are protected after your death. Lambda Legal client Keith Bradkowski found this out the hard way after he lost his partner in the September 11th attacks on the World Trade Center. Keith's partner had no will, so on top of his grief Keith was forced to endure the anxiety of hostile negotiations with his partner's family and employer over benefits and basic possessions. Most of this could have been avoided with a will. Take the power now to protect the people you love from added grief after your death by writing a will.

Please Note: This document offers general information only and is not intended to provide guidance or legal advice regarding anyone's specific situation.

FIRST STEPS

1. Start at the beginning: who's the right person to be your "executor" if you die, to go through all your belongings and make all the necessary arrangements.
2. Consult the following resources for legal help:
 - Lambda Legal's Help Desk at 212-809-8585 (toll-free: 866-542-8336) or legalthelpdesk@lambdalegal.org
 - www.lawhelp.org (for help determining whether there is an affordable attorney in your area)
 - www.abanet.org/legalservices/findlegalhelp/home.cfm (to find attorneys in your area who may reduce charges)



Martha Stark, Finance Commissioner for New York City, took the power and prepared a will. Martha says, “My mother died at 46. She didn’t have a will. I want to make sure my family is provided for if I die or become ill.”

A WILL

Take the Power! Create a will so you can decide what happens to your personal belongings after your death, including your home, cash, bank accounts and pets.

Why do I need this power tool?

When you don’t have a will, you die “intestate,” which means state law dictates how your property will be distributed. Depending on circumstances like where you live and whether you were married, the state may automatically hand over your possessions to a relative you haven’t seen in years, ignoring the people you care about and who care about you. While everyone should have a will, it is essential for LGBT people and people with HIV who often come up against discriminatory laws.

How it works: Create a legal document called a will, which governs the distribution of your possessions, unless you have taken steps to put assets beyond the reach of the will (those steps could be something like naming beneficiaries to a life insurance policy or jointly owning property with the right of survivorship — see separate insert in this toolkit, “Protecting Your Assets After You’re Gone”). In the will, you choose “beneficiaries,” people who receive things under the will; beneficiaries can be individuals or organizations. You also name an “executor,” the person who makes sure the directions in your will

are followed. The legal process of settling a deceased person’s affairs is called “probate.” All the property that will be distributed to beneficiaries becomes part of what is called an “estate.” Before any money goes to beneficiaries, the estate must pay any applicable taxes and other fees, which reduce the size of the estate. Here are some things to think about before writing a will.

- If you are concerned that a biological relative may challenge your will, it is important to evaluate the concern with an attorney. Attorneys have developed ways of dealing with people who might challenge your will — for instance, giving them a small amount of money on the condition that they’ll lose it if they challenge the will. Or mentioning the names of worrisome people in the will and clarifying that they were left out in favor of someone who was closer to your heart. Attorneys may also have advice about how big a role a life partner should or should not play in creating the will, to avoid charges of “undue influence.”
- Consider whether to provide instructions for the estate to pay your funeral and burial expenses in your will. Doing so helps ensure that your wishes are fulfilled — and that your loved ones will not have to pay for these expenses out of their own pockets. You may want to also instruct that funeral

TIPS TO CONSIDER BEFORE YOU TALK TO AN ATTORNEY

- Name an executor: someone you trust and who is willing to take on the job. Have the name of a second person for executor, too, in case the first person dies before you or dies before your estate is settled.
- People you leave money to may die before you, even if they are children, so consider naming “secondary” or “contingent” beneficiaries, which can be individuals or organizations.
- An attorney will want to know details about all of your assets, like the amount of money in your bank and retirement accounts, because the amounts will determine how your attorney handles certain issues in your will, especially taxes. The attorney may also ask about other things in your life, including who might object to your will if you leave them nothing, because that can change how the will is drafted. Attorneys are bound by rules of confidentiality, and attorneys with integrity take those rules very seriously (to help evaluate an attorney’s integrity, see the separate insert in this toolkit, “Tools for Selecting an Attorney”).
- Think in advance about two ways you can include beneficiaries in your will. One is to make a specific bequest, like giving \$10,000 to someone. Another is to make a “residuary” bequest, which is usually a percentage of the estate after all taxes, debts, funeral expenses and specific bequests have been paid.

expenses not be paid by the estate unless your wishes for funeral arrangements are respected (see separate insert in this toolkit, “Tools for Protecting Your Wishes for Your Funeral”).

- Some of your property and insurance proceeds may go automatically to individuals outside of your will (see separate insert, “Protecting Your Assets After You’re Gone”). But the value of the property and proceeds is often included in the estate for tax purposes. That can increase the taxes owed by the estate and lower the amount left for beneficiaries in the will.
- If you have children, there are very important things to consider, like providing for a guardian to avoid your child becoming a ward of the state (see separate insert in this kit, “Tools for Protecting Your Children”).
- There are some do-it-yourself guides for writing a will, and many attorneys agree that a self-made will may be better than no will at all. But at least two groups of people have additional disadvantages in not using a lawyer. People with large assets, for example, should be able to afford a lawyer and may lose vastly larger sums than lawyer’s fees if they fail to get good advice. Also, LGBT people or those living with HIV are more exposed to discrimination, and that can make life planning trickier.

A LIVING TRUST

Take the Power! In addition to a will, which you always need, create a living trust to avoid some disadvantages of the probate process.

Why do I need this power tool? A living trust allows you to remove some of your assets from the probate process, while still providing for your beneficiaries. This has several advantages. The assets can be distributed more quickly to beneficiaries after you die, because the process is less time-consuming than probate. A trust is harder to contest than a will. Also, a trust document can provide for a financial trustee if you become incapacitated, which can be of special significance to same-sex couples whose relationships are not legally recognized.

How it works: Create a document that establishes a living trust, and then transfer as many assets as you’d like into that trust. With this trust, you are the “grantor” (who puts assets into the trust), the “trustee” (who decides what goes in and out of the trust and whether to make any changes to the assets in the trust) and the “beneficiary” during your lifetime (who gets money from the trust). In addition, because the trust is revocable, you can change or eliminate the trust at any time, just as you would do with a will. But you should still have a will, in part to make sure your wishes are honored

for any assets that are not covered by the trust. Lastly, the trust document provides for the appointment of a successor trustee, if you become disabled or die. Here are some things to think about before creating a living trust.

- Don’t forget to make the necessary changes to the paperwork on the assets you will put in the trust, like property or bank accounts; otherwise you may wind up with an empty trust. An attorney can explain how this is done.
- This may be a good vehicle if you own property in more than one state, because you could avoid probate proceedings in two different states.
- Just like jointly owned property and life insurance, the assets placed in the trust during your life are outside the process of probate but they are still considered part of your estate for tax purposes.
- Putting assets in a revocable living trust does not shield them from creditors.
- There are other trusts you can explore with an attorney to meet unique needs, such as the wish to provide for a beneficiary but have someone else in charge of spending the money for that beneficiary, or the wish to maximize your giving to charity while still providing for yourself (see separate insert in this toolkit, “Leaving a Legacy for Equality”).

TIPS TO THINK ABOUT AFTER THE WILL IS DONE, SIGNED AND LEGALLY BINDING

- Review your will every two to three years, or when something significant in your life changes, like a purchase or sale of property, the failure of a relationship or the beginning of a new one, or the death of a beneficiary. This will help you make sure that your will continues to represent your wishes and benefits the people and organizations you care about most.
- Keep your will in a secure place like a fireproof, waterproof safe in your home, or with your lawyer’s office if it has a safe, and make sure that selected people know where it is and have access in the event that something happens to you. It doesn’t help to have a plan in place if your loved ones cannot implement it.
- For assets left to people outside of a will and the probate process, like life insurance and some retirement benefits, make sure you keep your beneficiaries up to date. Too often people lose out on their partner’s retirement benefits because their partner had originally chosen an ex-partner or someone else as a beneficiary long ago and never changed the paperwork. You should also include contingent beneficiaries in the event that your primary beneficiary dies before you.

