

WHAT IS A WILL AND HOW DOES IT WORK IN NORTHERN CALIFORNIA?

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If you ask people to name a type of legal document, they'll probably answer with "contract" or "will." A will, also called a last will and testament, is a specific type of legal documents whereby you can make a number of choices that you cannot make otherwise. While you are never under any legal obligation to create a will, choosing to take the time to sit down with an estate planning attorney so you can create a document that meets your needs and reflects your choices is one of the best things you can do.

Wills are helpful for folks with modest estates, but they generally aren't enough for those in California who own real estate or have estates larger than \$150,000. A good estate plan for a modest estate uses a will as a keystone element, even though other elements might be included such as powers of attorney and health care directives.



You should always talk to an experienced and qualified estate planning attorney when creating an estate plan because the choices you make should reflect the other estate planning tools you create. Your will is something that operates as a member of a team of documents and tools that make up a comprehensive estate plan.

Here's what you need to know about wills in the state of California.

CREATING A WILL



Not everyone can create a will, but the vast majority of people can. In order to become a testator—a person who makes a will—you have to meet two very minimal requirements.

- **Adulthood.** You can make a will if you are 18 years or older.
- **Mentally Sound.** A testator must be of sound mind. This means that at the time you make your will, you have to be able to understand what you own and what affect your choices will have. Most people are presumed to be of sound mind. However, if you are suffering from a mind-altering disease, such as Alzheimer's disease or dementia, or have been deemed by a court to be incapacitated, you are not capable of making your own choices.

As long as you meet the above requirements, you can create a will. In California, there are two basic kinds of wills: the attested, or printed, will and the handwritten will. In almost all cases, you should create an attested will instead of handwritten will. An estate planning attorney can tell you the requirements for

each document, but essentially they boil down to stating your choices in writing, signing the document, and having it signed in the presence of two capable adult witnesses. However, there is no witnessing requirement if you create a will entirely in your own handwriting.

WHAT THEY DO



Through your will you state choices and instructions that you want followed after you die. There are three main choices you get to address when you create a will.

- **Inheritances.** You can choose how you want to pass on your property. In general, you can make any inheritance choice you like. Whether you want

to leave an inheritance to your children or want to leave everything to a charity, your inheritance choices are entirely up to you. There are some limitations, such as you cannot disinherit a spouse, but otherwise you are free to leave the inheritances you wish.

- **Guardian.** If you are the parent of a minor, you can use your will to nominate your choice of replacement guardian should you die before the child becomes an adult. If the child's other parent remains alive after you die, that parent will still maintain parental control. However, if the child's other parent is already dead or both parents die at the same time, the guardian will have the legal responsibility of caring for the child. The guardian will need to get court approval of his or her appointment.

- **Executor.** Someone has to make sure your choices are followed after you die. This person is known as an executor, and has a legal responsibility to



manage your estate and ensure your choices are honored.

If you don't make a will, state law makes your choices for you. All states have laws that will determine who becomes your executor, who becomes the child's guardian, and who inherits her property if you fail to make a will.

WILL PROPERTY AND PROBATE

When you create a will it's important to understand that your document is not a contract. A will only becomes effective after you die. In order for it to become effective for probate estates in excess of \$150,000 your executor, or someone else, will have to commence probate proceedings in a California Superior Court. That court will determine if the will meets all relevant legal requirements. If so,



the executor can then begin the task of taking an inventory of your property, notifying potential beneficiaries, and distributing the property to new owners.

The property you get to distribute through your will is known as probate property. It's important to understand

that not all of the property you own will be considered probate property after you die. In general, property you own in your name alone becomes part of your

probate estate. Other property, such as property that passes directly to a beneficiary upon your death, will not be included as a part of your probate estate.

MODIFICATION



Making a will is not like making a contract between two or more people. The choices you express through your will are entirely your own. Because your will does not become effective until you die and because you are able to change your mind

whenever you like, you can also change your will whenever you like.

If you want to make any changes about inheritances, your executor, or any other choice you can make through your will, you can do this at any time.

To change your will you will have to ensure that you make your choices known in a legally enforceable manner. This typically means creating a new will or creating a will amendment, called a codicil. An attorney can provide you with details on how you can do this, but what you need to remember is that you can change your mind whenever you like.

About the Author



Timothy P. Murphy

Timothy P. Murphy is an estate planning and elder law attorney whose practice emphasizes helping people to build, preserve and pass on their wealth. He works with his clients to accomplish their goals while avoiding unnecessary court proceedings and minimizing or eliminating exposure to death taxes. Mr. Murphy also assists families facing the myriad of problems associated with dealing with a loved one's declining health and rising needs for care. He has practiced law in the Sacramento area for 29 years, first with a large firm, and then with his own firm since 1987.

Tim has written a regular column on legal issues for Senior Magazine. He also was a regular featured guest on the Money Experts radio program heard locally on KFBK (AM 1530). Tim has been featured in the Sacramento Bee, Sacramento Business Journal, Sacramento Magazine, Comstock's Magazine and other publications on estate planning and related topics. He also assisted local Channel 3 (KCRA) in an investigative report on the trust mill problem in the Sacramento area and was featured on Channel 10 (KXTV) in its series on personal financial planning.

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