

MAKING A WILL

The Virginia Code states that a will is "the legal declaration of a person's mind as to the manner in which he would have property or estate disposed of after his death; the written instrument legally executed, by which a man makes disposition of his estate, to take effect after his death." (Va Code, 1980, p. 175). Any person who is 18 years old or older and who is of sound mind may make a will.

YOU SHOULD MAKE A WILL BECAUSE . . .

- A will gives greater assurance that your property will be distributed as you desire. A lawyer should help you phrase it in the appropriate legal terms so that it will be read by the probate court as you intended it to be interpreted.
- A will can provide equitable treatment for children.
- You can nominate a guardian for minor children. (Note: The court must appoint the guardian, you may only nominate someone.)
- You can nominate a personal representative (executor or executrix. Again, only the court may appoint this person.)
- You can specify that your personal representative serve without bond or surety. (In 1980, this was approximately \$5 bond for every \$1,000 worth of personal property in the estate.) If bond does not have to be paid, the administrative costs of settling your estate can be considerably reduced.
- You can provide for the distribution of your assets in case of simultaneous death of you and your family through a common accident. If your will does not specifically outline this distribution, and it cannot be determined who died first, your estate will be split 50-50 between your parents and your spouse's parents.
- A will should simplify the distribution of property and thus shorten the time required to settle your estate.

IF YOU FAIL TO MAKE A WILL ...

Virginia law provides for disposition of your property. This is shown in the table below.

Table 1. Disposition of Real and Personal

Husband is survived by:

Wife	Children ¹	Parents ²	Brothers and Sisters ³
X	X	0	0
X	-	0	0
-	X	0	0
-	-	X	0
-	-	-	X

X Indicates a surviving party.

- Indicates that the party does not exist.

- Insofar as distribution is concerned, it makes no difference whether or not persons in this class survive the deceased in this particular situation.

¹ The word "children" includes one or more children of the deceased, or the descendants of any deceased child or children.

² The word "parents" includes either or both parents, surviving the deceased.

³ The phrase "brothers and sisters" includes the descendants of any deceased brothers and sisters.

⁴ The real property, except for the widow's dower interest, is subject to payment of any debts of the estate which remain after personal property has been expended.

⁵ Surplus personal property is that property which remains after funeral expenses, cost administration, and debts of the deceased have been paid.

In every case, the words "husband and wife" can be interchanged, and the word "curtesy" can be substituted for dower.

Table taken from "What will become of your estate?" (Publication 680) by G. Wayne Burkhardt and J.W. Looney, 1978 p. 12.

Property of Person Dying Intestate in Virginia

Disposition of Real Property ⁴	Disposition of Surplus Personal Property ⁵
To children, subject to dower interest of wife and any unpaid debts.	1/3 to wife 2/3 to children
To wife	All to wife
To children	All to children
To parents	All to parents
To brothers and sisters	All to brothers and sisters

STEPS IN MAKING A WILL

1. List all real and personal property that you own.
2. Decide how you want the property distributed at your death.
3. Get your lawyer to draw up a will so that it is written in the appropriate legal terms so that the probate court will interpret your desires as you intended.
4. Have 2 or 3 copies of the will made.
5. Sign one copy of the will in the presence of at least two, preferably three witnesses who then also sign it.
6. Keep the will in a safe place. Put the signed copy in a safe deposit box and be sure to give the bank permission to open the box and remove the will at your death. You may also give your lawyer a copy and keep a copy at home.
7. Periodically review the will to see if changes are needed; if they are, make them.

MAKE A VALID WILL

A lawyer's help is recommended in writing a will so that it meets the requirements for transferring property according to Virginia law. There are three primary requirements:

1. The provisions of the will must express testamentary intent (your intent to make a will) and the contents only become effective at the testator's (your) death.
2. The will must be in writing (no verbal wills are valid), dated, and properly signed by the testator (you).
3. The testator's signature must be witnessed by at least two, preferably three competent witnesses. These should be people who will not benefit from the will. They must sign the will at the testator's specific request and should also sign the will in each other's presence. This will prevent the necessity of proving that their signatures are valid when the will is probated.

OTHER IMPORTANT FACTORS AFFECTING PROVISIONS IN A WILL

If testamentary intent is not provable, the instrument is not valid.

If the testator or testatrix fails to have his or her signature witnessed by at least two persons who then also sign the will, his or her signature must be proved to actually be valid when the will is probated.

Likewise, if the witnesses do not sign the will in each other's presence, their signatures must each be verified by two persons during the probation process.

A will may be added to or sections may be changed by a codicil which is executed in the same manner in which a will is executed.

Execution of a subsequent will voids all previously made wills.

Children born after execution of a will which contains no provisions for them can claim the same share which they would have been entitled to by law if the parent had died without a will.

Only the dower or curtesy right take precedence over debts against the estate.

A will is defeated if the testator or testatrix disposes of the property prior to his or her death.

The way that title is held on property takes precedence over a will.

Administrator: The person appointed by a court to settle an estate, handle the affairs of a person who has died intestate. When it is a woman, the word "administratrix" is used.

Beneficiary: The person named in a will or trust to receive property.

Bequeath: The giving of personal property by will.

Chattel: An item of personal property as distinguished from real estate.

Codicil: A document, executed with all the formality of a will, used to amend the provisions of an existing will.

Curtesy right: The husband's outright interest in one third of the value of his deceased wife's real property.

Decedent: Deceased person.

Descent: The inheritance of real property when the owner dies without a will.

Devise: The giving of real property under a will.

Disclaimer: A denial or repudiation of a person's claim or right to a thing.

Devisee: A person who is given real property under a will.

Dower right: The wife's outright interest in one third of the value of all of her deceased husband's real property.

Estate: All property, real or personal, tangible or intangible, in which the deceased owned or controlled, usually referring to the total property a person has at death.

Executor: The person nominated in a will to carry out its terms. When it is a woman, the word executrix is used.

Fiduciary: A person holding property in a trust capacity for the benefit of another. Executors, guardians, and trustees are fiduciaries.

Holographic will: A will written, signed, and dated by the testator in his or her own handwriting.

Joint tenancy with right of survivorship: A co-ownership interest in which the co-owners each hold an equal interest in the same property, all of which passes to the survivor.

Legacy: A provision in a will which leaves certain personal property to a named individual. Also known as a bequest.

Legatee: A person who is given personal property under a will.

Life estate: A granted or retained lifetime interest in property. This interest terminates upon the death of the individual.

Life tenant: A person who holds a granted or retained lifetime interest in property.

Personal property: All property that is not real property, (cars, household goods, bonds, cash, mineral rights, etc.)

Per stirpes: The process by which a group takes and divides among themselves the share their ancestor, such as a parent, would have received.

Probate: The judicial procedure to determine that a certain document claimed to be a will of the decedent is in fact valid and property executed and to supervise administration and distribution of the estate.

Real property: Land and all that is attached thereto, growing thereon, or contained therein, (buildings, trees, minerals, etc.).

Residuary estate: The portion of a decedent's estate that is left after the payment of specific legacies, debts, and estate administration expenses.

Revocation of a will: An act by a person who has made a will indicating his intention that the will shall no longer be effective.

Taking against the will: If one spouse wills away more than two thirds of his or her property without written consent of the other spouse, the disinherited spouse may "elect to take against" the will. He or she would take the one third share of the property provided by law.

Testator: The person making the will. When it is a woman, the word "testatrix" is used.

Trust: The holding of property by one person for the benefit of another.

Will or testament: A legal document in which a person (testator) directs the disposal of his or her real and personal property upon his or her death.

Witness: One who sees the signing of an instrument such as a will and signs his or her name as testimony that he or she saw it.

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