General Information and FAQs on Wills - Learn the Who, What, When, Where, and Why!

General Information - Wills

The same individual fulfills multiple roles.

Power of Attorney, Executor, and Agent. Let's look at why this is standard practice and is automated within Encore's software and some considerations for those requesting an alternative.

Why would the same individual fulfill so many roles?

A Successor Trustee/Executor/Power of Attorney is the person who would control your finances and the administration of your estate if you cannot due to your death, mental incapacity, or voluntary resignation. Generally, you will use the same individual to maintain consistency and avoid unnecessary complications.

Referring to a Will-Based Estate Plan

Who

Testator- the creator of the will.
Executor- the individual managing your personal assets.
Successor- next in line to fulfill a specific role within your estate plan.
Guardian- the person who will care for dependents, such as children and pets.

What and When

- The Testator is in charge of their personal assets during their lifetime.
- The Executor is in charge of any personal assets after your death.
- The Power of Attorney is in charge of your personal assets during your lifetime. Their authority ends when you pass. Some states differ, and this power is immediate vs springing.
    - The Guardian cares for your children and pets after both spouses have passed or cannot do so themselves.

Asking multiple people to fulfill these roles can be a nightmare.

Imagine this- You have a will-based estate plan, your brother is your power of attorney-financial, and your sister is your successor executor.
Unfortunately, you were in an accident last month and are currently incapacitated. Your brother is currently serving as your financial power of attorney and just finished deciphering and organizing what bills and policies need to be paid. He also just finished providing the documentation these companies required for him to access your accounts. Sadly, you passed away today. Now, your sister steps in to act as the executor. She will now need to repeat the process your brother just completed. Uh-oh, she and your brother also have different investment philosophies. She is unhappy with some of his decisions and has some ideas of her own!
The list of possible complications compounds further as you involve more and more people. Unless you have specific circumstances warranting the need for multiple individuals to fulfill these roles, it is generally best for the same person to fill them.

Potential Complications for Married Couples

What if you're married/in a domestic partnership, and you want different people fulfilling the roles within your estate plan?

Several common complications arise with this decision. We're not saying this isn't the best choice for you and your spouse. We're simply saying is usually NOT the best option FOR MOST married couples.

Imagine this: your spouse is incapacitated, and their sibling is acting as their financial power of attorney while you are living. If you were not selected as their initial Power of Attorney, what assets are they supposed to manage? What bills are they supposed to pay? Why go through the hassle when someone familiar with the family finances is still capable of doing so?

Now, the inevitable curve ball. You and your spouse have both passed away. You now have two separate executors trying to manage assets. Which, if there are minor children, may require them to work together for a long period of time. Possibly several decades. Will beneficiaries need to visit two executors with requests, questions, and concerns? Will the executors use separate financial advisors with differing custodians?

The list of possible complications compounds further as you involve more and more people. Unless you have specific circumstances warranting the need for individual trusts and differing individuals to fulfill these roles, it is generally best for the same person to fill the roles within a couple's estate plan.
Some examples that might warrant a need for differing individuals.

- You will or have received a significant inheritance.
- Your spouse has addiction or spendthrift issues.
- You have individual assets of moderate to significant value and have children from a previous marriage.
- You have a real need for individual wills and different individuals to fulfill these roles.

Who would be a good executor/power of attorney?

Most people ask someone who is financially responsible, would handle finances similarly to them, and is generally a good decision-maker.

FAQs - Wills

A will is a written direction controlling the disposition of property at death. The laws of each state set the formal requirements for a legal will.
Most states require:

- You, the maker of the will (called the testator), must be at least 18 years old.
- You must be of sound mind at the time you sign your will.
- Your will must be written.
- Your will must be witnessed and notarized in the special manner provided by law for wills.
- It is necessary to follow exactly the formalities required by your state for the execution of a will.
- To be effective, your will must be proved valid in and allowed by the probate court.

No will becomes final until the death of the testator, and it may be changed or added to by the testator by drawing a new will or by a “codicil,” which is simply a separately written addition or amendment executed with the same formalities as a will. A will’s terms cannot be changed by writing something in or crossing something out after the will is executed. In fact, writing on the will after its execution may invalidate part of the will or all of it.

What Can be Accomplished by a Will?

- Through a will, you decide who gets your property instead of the law making the choice for you.
- You may name the personal representative (executor) of your will as you choose, provided the one named can qualify under your states laws. A personal

representative is one who manages an estate, and it may be either an individual or a bank or trust company, subject to certain limitations.
- Real estate and other assets may be sold without court proceedings, if your will adequately authorizes it.
- You may make gifts, effective at or after your death, to charity.
- You decide who bears any tax burden, rather than the law making that decision.
- A guardian may be named for minor children.

What Happens When There is No Will?

If you die without a will (this is called dying "intestate"), your property will be distributed to your heirs according to a formula fixed by law. Usually, your property does not go to the state unless there are absolutely no heirs at law, which is very unlikely. In other words, if you fail to make a will, your state inheritance statute determines who gets your property. The inheritance statute generally contains a rigid formula and makes no exception for those in unusual need.
When there is no will, the court appoints a personal representative, known or unknown to you, to manage your estate. The cost of probate may be greater than if you had completed your estate plan, and the administration of your estate may be subject to greater court supervision.

May You Dispose of Your Property in Any Way You Wish By a Will?

While any sort of property may be transferred by will, there are some particular interests in property that cannot be willed because the right of the owner terminates automatically upon death, or others have been granted rights in the property by state law. Some examples of these types of property rights or interests are:
- Except in certain very specific circumstances, a homestead.
- A life estate: property owned only for the life of the owner.
- Any property owned jointly with another person or persons with the right of survivorship (for example, a tenancy by the entireties, which is limited to joint ownership between a husband and wife, would be a property that automatically passes to the joint owner).

Can I disinherit my spouse?

Most states will not allow you to intentionally disinherit your spouse without a properly executed marital agreement. Usually, state laws give a surviving spouse a choice to take either the share provided under the will or a portion of your property determined under the state "elective share" statute. This statute uses a formula to calculate the size of the surviving spouse's elective share, which includes amounts stemming from your jointly held and trust property, life insurance and other non-probate assets. Because this formula is very complicated, it is usually necessary to refer this matter to an attorney with extensive experience in this area of law. Also, if your will was made before the marriage and the will does not either provide for your spouse or show your intention not to provide for your spouse, then generally your spouse would receive the same share of your estate as if you had died without a will, unless provision for the spouse was made or waived in a marital agreement. Encore does not allow for the intentional

disinheritance of a spouse. These plans will be disqualified and you will not be able to complete them.

Must You Leave Each Child at Least One Dollar?

This question is referring to a natural-born adopted child known to you.
No. This is not necessary and can actually cause considerable added expense to the estate. Beneficiaries have certain automatic legal rights in the estate administration process. A bequest of even $1 will give a disgruntled child the opportunity to insert himself into the process, create roadblocks, cause delays, and prevent your other beneficiaries from receiving their distributions promptly.
Encore DOES NOT allow for the intentional disinheritance of a naturally born or adopted child. We do this to protect all parties involved from litigation. You may have this done elsewhere however it is important to note that the chances of litigation after your passing skyrocket if you have disinherited a child. Therefor these plans will be disqualified from using Encore's services.
One solution is to make them the beneficiary of a specific account upon your passing. This allows you to provide for the child but prevents them from interfering in the administration of your estate and inconveniencing your other beneficiaries.

How Long is a Valid?

It is valid until it is changed or revoked in the manner required by law. Your will may be changed as often as you desire while you are sane and not under undue influence, duress or fraud, provided it is changed in the required manner. Changes in circumstances after the execution of the will, such as tax law amendments, birth of children, deaths, marriage, divorce or even a substantial change in the nature or amount of your assets, may raise questions as to the adequacy of your will. All changes require a careful analysis and reconsideration of all the provisions of your will and may make it advisable to change the will to conform to the new situation.

Does a Will Increase Probate Expenses?

No. If there is property to be administered or taxes to be paid or both, the existence of a will does not increase probate expenses. A will frequently reduces expenses and eliminates uncertainties. However, for most people with a modest amount of savings, a fully funded trust is widely considered to be the best way to eliminate or avoid probate proceedings altogether.
If there is real or personal property to be transferred at your death, the probate court will have jurisdiction to ensure that it is transferred properly, either according to your will or, if there is no will, in accordance with the inheritance (“intestacy”) statute. Thus, even if you have no will, your heirs must go to court to administer your estate, obtain an order determining your legal heirs, or obtain a determination that administration is unnecessary. These procedures are often more expensive than administering your will, since a properly drawn will names the beneficiaries and delineates procedures to simplify the administration process.

Are Estates by Entireties or Joint Tenancy With Right of Survivorship Substitutes for a Will?

Joint tenancies with rights of survivorship can be established when you and one or more people title bank accounts and other assets in multiple names with the intent to have ownership pass directly to the surviving named owners when you die. A “tenancy by the entireties” is much the same but involves only married people. These forms of joint ownership can avoid probate of the account or other asset when you die. While this can be very efficient in some cases, use of joint ownership can be fraught with problems at death and cause more problems than it solves.

Among other unforeseen problems, indiscriminate use of joint ownership can cause an increase in estate taxes over the joint lives of married people, force double probates in the event of simultaneous deaths, create unfairness as to who pays for funeral expenses and claims against you, raise undesired exposure during life to the debts of co-owners, and cause a shortage of funds for payment of estate taxes, which can cause litigation with the taxing authorities.

Is a Life Insurance Program a Substitute for a Will?

No. Life insurance is only one kind of property that you may own, and a will is necessary to dispose of other assets that you own at death. If a life insurance policy is payable to an individual, your will has no effect on the proceeds. If the policy is payable to your estate, the disposition of the proceeds may be directed by the will. Life insurance can be useful in providing cash at death for payment of taxes and expenses, but like most strategies for insurance, the careful person will consult a lawyer, a life insurance counselor and a financial adviser. Mistakes in ownership and beneficiary designations in these policies can cause great increases in estate taxes owed.

Is a Trust a Substitute For a Will?

A trust may be used *in addition* to a will. This is because a trust can handle only the property that has been put into it. Any property of yours that is not placed in the trust either during life or at death in most instances escapes the control of the trust. It is the will that controls *all* property in your name at the time of death if the will is drafted properly.

Trusts can be helpful to speed administration and save taxes if they are drafted properly and funded during life with the property intended to be transferred by the trust. Often, however, unfunded or out of date trusts can *add* to the cost of settling estates, not lower it. It is best practice to regularly review any executed estate plan on a regular basis to ensure it reflects your current wishes and situation.

Some Considerations Concerning Wills

- Marriage does not cancel a will and in some states a spouse acquired after the execution of your will may receive the same portion of your estate that he or she would have received had you died without a will
- If you have moved from another state, it is wise to have your will reviewed to be sure that it is properly executed according to the laws of your current domicile,

that the witnesses are readily available to prove your will, and that your personal representative is qualified to serve in that state

- Before your will is effective to dispose of your property, it must be proved in the probate court. If the will is self-proving and otherwise valid, it may be admitted to probate without further proof. If the will is not self-proving, it generally must be proved by the oath of one of the witnesses. The oath must be given before a circuit judge, clerk of court or a commissioner specially appointed by the court for that purpose. (Under certain circumstances, the court may permit the will to be proved by other means permitted by law.) In some states a will can be made self-proving either at the time of its execution or later, which saves the time and expense of locating a witness and obtaining the witness' oath after your death. The self-proving procedure is in addition to the normal execution and witnessing of the will, not in place of it.
- No matter how perfect a will may be prepared for you, unless it is properly executed in strict compliance with the current state laws, the will may be entirely void. Be sure that you execute your will according to any specific instructions you are provided.
- Every person owning property who wishes to exercise control in the disposition of that property after death should have a will, regardless of the value of the property. Of course, the larger the estate the greater the tax consequences.
