A Simplified Guide to Creating a Personal Will

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R. B.

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1 Why You Need a Will

ARE YOU TOO YOUNG TO HAVE A WILL?

More than 65 percent of the people of the United States do not have a will. For many of us, even the idea of it is too threatening. After all, a will confirms the reality that we are getting older. For baby boomers and post-baby boomers, it gives us a sense of overwhelming responsibility—it is a concrete reflection of our need to grow up. It is frightening. If we look too far into the future, we lose the ability to live for today. We did not live through the depression or World War II. Many of us can't believe that we are now the people we used to consider to be so old and out of touch.

We can color our hair, botox our wrinkles, and work out until the burn, but the truth is that no one can ultimately cheat death. We see that death is not the exclusive domain of the elderly. We are a generation who knows all too well that we can unexpectedly lose loved ones through events completely out of our control. No generation has ever witnessed such an extreme act of terrorism on American soil as the events of September 11, 2001. After many years of peace, we are now a generation experienced in the uncertainty of war. The need for this book is a reflection of those events. We can't ignore the facts. Any one of us can be taken from this earth at any age. Terrorism and war don't discriminate.

Americans had the horrendous experience of watching people who epitomized success in the world's financial center lose their lives within seconds. We can't help but put ourselves in the shoes of those who went to work that day, only to have it be their last.

With new technology, we can witness war and devastation in real time. We have a heightened awareness of the precious value of life while realizing its precariousness. Although we do not want to live in fear, we will never be able to have the comfort level of believing that nothing could ever happen to us.

Even if you think you are too young to have a will, making a will can give you control over your life. It allows you to look at the big picture. It helps you create a template of organization for your day-to-day concerns. A will can also help you work through your fears of "what if?" by considering how the world would be without you. This is a very dramatic and important exercise. We can do nothing to change the events of the world. But we can look at our own lives and evaluate them in terms of our loved ones and those who depend on us.

A will is not a sign that you are over the hill and that your fun times are over. Writing a will is a simple procedure that can give you a peaceful sense of reassurance that your life affairs are in order no matter what the future holds for you.

HOW LARGE IS YOUR ESTATE?

Making a will is not about how to dispose of your "stuff" after you pass on. Even if you have a sizeable estate, there is more to a will on a personal, emotional, and spiritual level than you will ever be able to capture in a legal document. A will is a final memorialization of your life. What you say in your will is your last opportunity to communicate with those you leave behind.

Everything you own, whether you think it has value, becomes part of your estate. You may actually have more than you think you do. Take a mental snapshot of your life as it is right now. Now take yourself out of the picture. What material items are left? Whatever remains behind is your estate right down to the boxes of cereal in your kitchen cabinet. Everything you own must be processed in one way or another. Anything of value in your estate must be accounted for and distributed to your heirs. Your bills are also a part of your estate. Someone will have to tie up all of your loose ends. If you do not have someone designated for this task, its administration will fall into the hands of the court, a highly impersonal process, which is unlikely to reflect your wishes.

If you die without leaving a will, you are said to be *intestate.* This means you did not make a testament of how you want to transfer ownership of your property up on your death. Each state has statutes specifying how to distribute your estate through the laws of what is called *intestate succession.* In simple terms, the courts will determine to whom you might have distributed your remaining estate had you taken the time to make a will. This process is determined by the closeness of blood relation rather than by whom you might have held to be most dear. You have both lineal descendents, who follow the same bloodline, and collateral descendents, people with a common ancestor. *Probate,* as we discuss in further detail later in the book, is the legal process whereby the bills of the estate, including taxes incurred the year before death, are paid and the assets are distributed accordingly. The laws of succession under the Uniform Probate Code determine who is closest to you in bloodline.

To find your next of kin, your estate typically looks to your spouse, then your children, then your parents, then your brother or sister, and then their lineal descendents. If you have no living blood relatives, the entire estate, including your cereal boxes, "escheat," or pass to the state.

You might think that you do not have enough to care about what happens to it, but you should consider your heirs. Even if you do not have much in the way of material wealth in the standard sense, you can make specific bequests of your belongings. What you might find meaningless might mean the world to an heir, who would value its sentimental connection to you. You would be surprised how many families have been divided over small items such as mother's sewing basket. Death and inheritance extend far beyond the tangible value of the specific items. Inheritance is a way for your loved ones to hold onto a fragment of you while being able to move on in their grief. By planning, you can show a thoughtfulness and connection that can be far more valuable than money.

IS YOUR ESTATE SIZEABLE?

Your heirs will likely not turn away money if you have it to leave to them. If you have managed to accumulate a few things during your life, you do not want it eaten away by the government. You can't take your wealth with you, but there is something distasteful in working very hard all of your life, becoming prosperous, and then having it all disappear into a puff of IRS smoke.

The more assets you have at the time of your death, the more your estate will pay in estate taxes. The amount of estate taxes is based on a percentage of your overall estate. If you plan ahead, you can ensure that your ultimate estate is lower than the amount that would trigger a high liability for estate taxes. If you die without a will, you can be sure that a great deal of your estate will go to taxes. Your heirs will not receive nearly as much as they would if you had died with a will and with a little attention to the planning of your estate.

There are other matters to consider. You may be living an opulent lifestyle and have a lovely relationship with your spouse, but if you die without a will, you might be surprised at some of the repercussions. You can't assume, for example, that your spouse will receive the majority of your assets if you have not provided so in a will. Marriage is a legal relationship. Inheritance is based on blood relation. If you live in a community property state, the statutes provide for your spouse to inherit what has been accumulated by the two of you during the marriage. States with some kind of community property law include:

- California.
- Idaho.
- Louisiana.
- New Mexico.
- Nevada.
- Texas.
- Washington.

Essentially, the property accumulated by both of you during the marriage passes through death to the surviving spouse. However, if you live in a community property state and your spouse has an insurance policy that was purchased before the date of the marriage, the proceeds of the insurance go to your spouse's separate estate. If one spouse dies intestate, that separate estate will go to his or her lineal heirs.

If you have a sizeable estate, there are many factors to consider. These factors are more extensively treated in our discussion of trusts and estate planning. The more you have, the more complicated your planning becomes. Inheritance tax affects estates over a certain amount. While most people do not fall into this category, if you think you do, seek help from a lawyer and a financial expert who specialize in estate planning.

One of the goals for people with sizeable estates is to arrange their estate plan so that most of their assets will pass to their heirs without going through the process of probate. The process of probate can take a long time, and the estate can be diminished by lawyer's fees and other costs associated with the administration of the will. If you plan ahead and structure your estate plan to avoid probate, your assets can be distributed to your heirs without being held up by the process.

If you have a large gross estate that brings you within the realm of estate tax obligations, you can plan so that a sizeable portion of your estate will fall below the line. You will avoid having your assets immediately given to the IRS before being distributed to your beneficiaries. While you do not want to evade the IRS, you should use the opportunities afforded to you to avoid paying more than your share.

Accrued costs can be avoided if the estate is put through the process expeditiously. Your beneficiaries are also referred to as *devisees* and *legatees.* If you die with a will (called *testate,* with you as the *testator,* or one who makes the will), the person to whom you make a *devise* (gift) is the beneficiary under your will or trust. Your heirs are the persons to whom your assets will pass as a matter of state law if you die *intestate.*

INTESTATE SUCCESSION (DYING WITHOUT A WILL)

Intestate succession refers to the law of your state that determines the order of familial relationship and the amount of your assets your heirs will inherit. For example, assume Dan Daman dies *intestate* survived by his mother, Helen; his wife, Carol; and their four adult children, Jackie, Pete, Rob, and Joe. Joe has two children; Jackie has one. In some states, Dan's wife, Carol, would get Dan's entire estate; in some, the estate would be split between Carol and the four children. In other states, Carol would get a specific dollar amount plus 50 percent of the remaining estate with the rest going to the children. In all states, Dan's mother and his grandchildren would get nothing. Consider your family and whether this is the result you would choose.

If Dan dies intestate survived by his second wife, Ann, and children from his first marriage, the various outcomes among the states include the second wife getting only one-third of the estate or less than half, with the children sharing the remainder. And, if Dan owns the family home in his name alone, in some states, Ann, as the second wife, will get only the right to live in the home for life, with the children splitting the remainder of the estate. If Ann wants to stay in the home, she may be forced to pay the children rent for their interest in the house; and if she wants to move, she will abandon her life estate in the home. She has no right to sell a home in which she has only a life estate interest without the consent of all of the children. And if the house is sold, it is questionable as to whether she would be entitled to any of the proceeds unless she cuts a deal with the children.

If one of Dan's children *predeceases* (dies before) Dan, leaving grandchildren, only then would grandchildren get the deceased child's share of Dan's estate. The only way that Dan's mother would receive anything would be if Dan died unmarried and without children. If Dan were single and childless, his estate would pass to his surviving parent(s) in some states and to his parents and siblings in others. If Dan were not survived by his parents and siblings, his estate would go to his aunts, uncles, and cousins. Only if no blood relatives can be found for Dan would his estate go to the state.

Minor Children

If you die without a will and your spouse survives you, assuming he or she is the legal parent (through birth or adoption), your spouse is the natural guardian of your children. If you are not survived by your spouse or the natural parent of your child, and you fail to legally designate whom you want to take care of your children on your death (usually done in your will), the state will appoint a guardian. This might be a grandparent or other relative and often not the one you would prefer to raise your children. Even if the natural parent of your child survives you, you may wish to appoint a guardian if that parent is estranged from the child or is otherwise unfit to serve as guardian.

Who's in Charge of Your Assets?

If you die without a will, the court will appoint a personal representative (often called the administrator) for your estate, who will be charged with the duty of gathering and protecting your assets, paying your debts and taxes, and distributing the remainder to your heirs. The court may appoint whoever it decides is appropriate, often a relative or an attorney, and both will be entitled to be paid from your estate for their services. If you have a will, you choose your personal representative (also called the executor) to fulfill the important role of carrying out your last wishes.

A NEW PERSPECTIVE

If you have come to the conclusion that a will is a good thing to have, this book will show you the basics for carefully and calculatedly disposing of your assets on your death. If you have minor children, you will see how to best plan for their future in case you meet with untimely demise. You will also learn about matters such as how to choose a personal representative to take care of your wishes after you die. You will learn how to take care of the future of your pets and to plan for your estate even if you are in a nontraditional relationship such as a domestic partnership.

It is hoped that you get a new perspective about planning for your death. Although there are many differing views of what happens after we die, it is indisputable that there is a separation between the ethereal and the material worlds as we know them. And your belief system does have an influence over how you approach your will and estate plan. Your will is a statement of how your *will* is to be carried out so that you can leave a part of yourself with your loved ones.

Your estate—the amount of assets, property, or things that survive you—will go to your heirs and not your beneficiaries if you do not leave a will. In the absence of a will, the law provides a determination of who is in line to inherit after all of your debts and taxes have been paid. It is perfectly fine to handle your estate in this way. However, your will is the last time you will have a say over anything.

ISSUES TO ADDRESS IN YOUR WILL

Even if you do not have a sizeable estate, many issues need to be addressed in your will:

- Who inherits your real estate.
- Who inherits your personal property.
- Who inherits your financial assets.
- Care and guardianship of minor children.
- Distribution of personal items such as heirlooms.
- The kind of funeral you want.
- Provision for your pets.
- How to ensure inheritance in the circumstance of domestic partnership.
- How you wish to be treated in a circumstance of incompetence or complete disability.

These are all very personal decisions. If you had one day to live and were given a list of these decisions, aside from the other ways you might want to spend the day, you could most likely make very clear decisions of how you would like your wishes carried out. Even if you have not dwelled on these issues, you would be surprised how many opinions you actually hold:

- You don't want the court or disinterested parties to determine who will care for and raise your children.
- You don't want grandma's salt and pepper shaker collection she painstakingly dusted, shaker by shaker, to go to strangers.
- You may not want to be cremated. Or you may want to be cremated and distributed over a pasture of wildflowers.

If you are concerned about illness or what would happen in the event of an accident, you might want a living will. A *living will* indicates whether you want to be kept alive at all costs and by whatever means available or you do not want to be kept alive by artificial means. You can also indicate your wish to be kept comfortable through hydration and pain management even if you do not want to be kept alive by artificial means.

It is not uncommon for people in life-threatening situations to be unable to speak directly for themselves. You hope that someone you love or who loves you would take care of matters in this situation. However, without your direct authority, there may be no way to act on your wishes. On one hand, you are protected from not having the care you need to prolong your life if there is any chance of doing so; on the other hand, you are not able to make the choice of how you want to die. If you were in a vegetative state with no hope of recovery, you would want someone you love to have the authority to pull the plug. We discuss this further in the section on living wills in Chapter 8.

WRITING A WILL IS SOMETHING TO BE PROUD OF

Marge suffered from a rare and untreatable blood cancer. Her disease was unpredictable and progressive but gave her time to think about her life and also her death. In many ways, she considered it a blessing to have the time to think through all of the issues that do not seem real to a person who is simply saying "what if?" When you put yourself in the frame of mind that this is a real and important process, you can focus on how you would like to put closure on your life. You may not have a terminal disease that sets the clock ticking in an orderly fashion, but you are going to die. Our culture is strongly based on the fear of death. We see so many horrific images of how people die violently and unnecessarily that we do not focus on the natural course of our lives as being finite. Most people do not die violently or suffer greatly. We do not need to fear death.

Marge knows that death is a fact, and she has made her peace with it. For her, the planning has been a form of solace and completion. Even though most of us are not facing a known time limit, we are in the same situation. Planning for our death as if it were a rebirth is a celebration of our lives. Our lives are entrenched in material things. By using our material belongings as a catalyst for focus on our death, we are given a wonderful opportunity to come to terms with our fears.

Be proud that you are taking charge of your future. What you leave behind is still your future. People always live on in the memory of their loved ones. Though you do not want to spend your days obsessing about funeral plots and burial costs as some elderly people are prone to do, planning is necessary. We live in an age when death is discussed openly, and television dramas regularly confront issues of life or death. Dignity is the key. What you leave for your beneficiaries is a blessing. The gift you give yourself is choice.

After the destruction of the World Trade Center Twin Towers, we saw up close the impact on those left behind. We were able to glimpse into the lives of the spouses and families of the victims—mostly young families with children. We saw how a sudden loss impacts a family and its basic survival. We need to plan for an uncertain future as a security measure. Then we can put our fears and concerns away, along with our will, in a file or box for safekeeping.

Is Thinking so Much about Death Bad Luck?

Certain traditions consider thinking about or planning for death as bad luck. Many of us hold the view that somehow by not thinking about it, it will never happen to us. We consider death our ultimate enemy. We know it will happen to us as it happens to everyone. There is a cycle to everything. We are born, we grow, we age, and we ultimately die. Some of us leave before our time, and some of us reach our full lifespan and die in our sleep.

Why Haven't You Written a Will before Now?

When you write a will, you have the chance to think about how you feel about death. Does the idea of it frighten you? Would you rather not think about it at all? Has your fear or denial of mortality prevented your writing a will? If you are able to get past this hurdle, this process will be meaningful and growth promoting. While this process focuses on financial considerations, you know it is much more than a business transaction.

Laziness and procrastination are factors in not writing a will. The entire concept of a will is that time is finite. How long are you going to wait? We hope to make it easy for you by explaining the process in a simplified manner so that you are not lost in the mystique of the language of the trade. Financial planners and attorneys are notorious for making you feel confused, even if unintentional. You are making the ultimate decisions. The execution of a will is far less complicated than it might seem.

When you do write your will, you can use our suggestions and forms, but you have to make the ultimate decisions. You can always change your will as your perspectives, heirs, or assets change. However, your first will is the best opportunity to connect with your life and see what it actually means to you. Where have you been, where are you now, and where are you going? You will see your life as more precious if you consider your death.

A side advantage to writing a will is the opportunity to look at all the relationships in your life. If you look closely at what you own and what items matter to you, you can look at the people who also matter to you. Are there special items you would like to bequest to people who would appreciate them as a reminder of you? Maybe there is nothing you want to leave to a specific person, but writing your will gives you the opportunity to think about those special relationships.

Writing a will is a wonderful opportunity for you to take a physical inventory of what you have accumulated in tangible ways, and it is a time for you to take a personal inventory of your contributions to those whose lives you might have touched. If you write your will when you are young, you can look ahead at what you might want to do or become. If you write your will later in your life, you can look back at all of your experiences to see if your life met your expectations or if you would have changed anything if you could. As long as you are alive enough to write a will, there is always a chance for change. It is never too late.

Writing a will is simple. In the following pages, we show you exactly how simple it is and how you can design it to your best advantage. As with any book that purports to describe something of a legal nature, you should take this material, absorb it, and use it to formulate questions that you ultimately take to a legal professional. We do not claim to have all the answers for your particular situation. Every estate is different just as every life is different. Every state has its own statutes that influence wills and laws of inheritance. Do your research. Plan carefully how you want to write your will and what you want to include. You have to be in charge now because there will be no further chance to have an influence after the reading of your last will and testament.

While most wills are simple, you may need to seek the advice of a lawyer to make sure that everything you include reflects your wishes and will be enforceable after you die. Don't let the fact that you have relatively few assets deceive you into thinking you do not need advice. There are many opportunities to file your own forms, and highly reputable materials are available to assist you in doing this. However, if you decide to go it alone, remember to carefully check the laws in your particular state because they can vary enough to have an impact on your estate plan.

The language in your will must be very precise. Don't use unclear statements such as "I hope my son gets my car." Make clear statements such as "I give my car to my son." Think in terms of precision so that nothing can be misconstrued—even if something seems so obvious that it should be assumed. Do not take chances. Your personal representative and heirs will be very happy if you are conscientious about the language you use in your bequests. They are the ones who will have difficulty if you have a will with ambiguities. We do not advise that you write your own will without showing it to someone who can evaluate it. Before you sign on the dotted line, you want to make sure what you say is what you mean.

WHAT IS A WILL?

A *will* originally referred to a document created for the legal disposition of real property after a person's death. *Real property* means homes, land, or interests in land. A *testament* refers to the disposition of personal items. In modern times, these terms are combined or included in the general term *will.* Many people use the term *last will and testament* because it is the matter of course and it makes the document appear more formal and official. As you know, if you are the person making the will, you are the *testator.* If you were to die without a will, you would be termed *intestate,* and the statutes of your state would apply to determine the distribution of your estate as well as your heirs. The determination of heirs is made according to closeness in blood relationship.

A will is a legal document that truly reflects your "last will." Keep in mind, it can be changed at any time up to the moment of your death as long as you are of sound mind, of an appropriate age (i.e., over 18 in most jurisdictions), and can execute the will according to the requirements to make it valid.

ARE YOU OF SOUND MIND?

The concept of sound mind has many components. For example, a person needs to know what he or she owns—at least an approximation. In addition, that person needs to know that by writing a will, he or she is planning for disposition of that property. In other words, the person needs to have a sense of why he or she is writing a will.