



Wills and Health Care Directives

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Introduction

Wills are the most common way for people to state their preferences about how their estates should be handled after their deaths. Many people use their wills to express their deepest sentiments toward their loved ones. A well-written will eases the transition for survivors by naming the representative who reports to the probate court and making the probate process more certain. By some estimates, at least seventy percent of Americans do not have valid wills. If a person does not have a valid will, state intestacy laws will control who receives his or her property after death, which may not correspond to the person's wishes. While it is difficult to contemplate mortality, many people find that great peace of mind results from putting their affairs in order.

Wills vary from extremely simple single-page documents to elaborate volumes, depending on the estate size and preferences of the person making the will (the "testator"). Wills describe the estate, the people who will receive specific property (the "devisees"), and even special instructions about care of minor children, gifts to charity, and formation of posthumous trusts. For all these examples, the testator must follow the legal rules for wills in order to make the document effective. In addition to wills, various types of trusts, a discussion of which is beyond the scope of this handbook, can be written and used to implement a person's estate plan.

Will Limitations – Certain Property Not Distributed Under a Will

Some legal restrictions prevent a testator from giving full effect to his or her wishes. Some laws prohibit disinheritance of spouses or dependent children. A married person cannot completely disinherit a spouse without the spouse's consent usually in a pre-nuptial agreement. In most jurisdictions, a surviving spouse has a right of election, which allows the spouse to take a legally-determined percentage (up to one-half) of the estate when he or she is dissatisfied with the will. Non-dependent children may be disinherited, but this preference should be clearly stated in the will in order to avoid confusion and possible legal challenges.

Certain types of property are not distributed under a will or under the intestacy laws. For example, if an individual holds life insurance policies, annuities, or retirement benefits payable to named beneficiaries, these pass directly to the beneficiaries at the person's death. Sometimes real property or bank accounts are held jointly by two or more people with a right of survivorship. This means that, when one owner dies, her share of the property is automatically given to the surviving owner or owners. Property owned in joint tenancy may only go to the surviving joint tenant. Also, pensions, bank accounts, insurance policies and similar contracts that name a beneficiary must go to the named party.

Appointing a Representative

A will usually appoints a personal representative (or "executor") to perform the specific wishes of the testator after he or she passes on. The personal representative need not be a relative, although testators typically choose a family member or close friend, as well as an alternate

choice. The chosen representative should be advised of his or her responsibilities before the testator dies, in order to ensure that he or she is willing to undertake these duties. The personal representative consolidates and manages the testator's assets, collects any debts owed to the testator at death, sells property necessary to pay estate taxes or expenses, and files all necessary court and tax documents for the estate.

Choosing a Guardian

Testators who have minor or dependent children may use a will to name a guardian to care for their children if there is no surviving parent to do so. If a will does not name a guardian, a court may appoint someone who is not necessarily the person whom the testator would have chosen. Again, a testator usually chooses a family member or friend to perform this function, and often names an alternate. Potential guardians should know they have been chosen, and should fully understand what may be required of them. The choice of guardian often affects other will provisions, because the testator may want to provide financial support to the guardian in raising surviving children.

Making a Will

A person's estate includes all the property she holds at her death in her own name. An individual may write a will describing how she wants her estate divided. Writing a will may be complicated and should be done with an attorney's supervision. After a will is written, it should occasionally be reviewed – especially after marriages, births, adoptions, deaths, or divorces. Any person *of legal age* and sound mind may make a will and dispose of all of her property by will except what is sufficient to pay her debts, and subject to the rights of the surviving spouse and children. **W.S. 2-6-101.**

A will is construed to pass all property which the testator owns at her death, including property acquired after the execution of the will, unless a contrary intention is indicated by the will. "Property", as used in this section, includes both real and personal property, or any interest therein, and means anything that may be the subject of ownership. **W.S. 2-6-102.**

Once a will is made, it remains in effect unless the testator revokes it in a lawful manner. Revocation can be done by making a new will that specifically revokes any earlier wills or disposes of all the property or by adding a codicil (an amendment to the will) that only voids certain parts of the will. The testator may also revoke her will by intentionally, physically destroying it with the purpose of voiding it. This method has drawbacks, however, because it may be difficult to prove the intent to revoke the will at a later time. The mental capacity required to make a will is also required to revoke a will.

Elective Share

Typically, people may dispose of property in a will however they choose, but there are some exceptions. For instance, if a testator leaves a major portion of his estate to someone other than his spouse, the spouse may be able to claim an "elective share" of the estate as follows:

- One half (1/2) if there are no surviving issue of the decedent, or if the surviving spouse is also a parent of any of the surviving issue of the decedent; or
- One fourth (1/4), if the surviving spouse is not the parent of any surviving issue of the decedent. **W.S. 2-5-101.**

Time Limit

If the surviving spouse or his personal representative or guardian fails to exercise the right of election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within three (3) months after the admission of the will to probate or within thirty (30) days after being advised of the right of election, whichever limitation last expires, the will governs and controls the distribution of the estate. **W.S. 2-5-105.**

Valid Will in Wyoming

To be valid, all wills, other than holographic wills (see below), shall be in writing, or typewritten, witnessed by two (2) competent witnesses and signed by the testator or by some person in his presence and by his express direction. If the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency shall not prevent the probate and allowance of the will. No subscribing witness to a will can derive any benefit from the will unless there are two (2) disinterested and competent witnesses to the same, but if without a will the witness would be entitled to any portion of the testator's estate, the witness may still receive the portion to the extent and value of the amount devised. **W.S. 2-6-112.**

Self-Proving Wills

Wyoming law provides that any will may be simultaneously executed, attested and made self-proven, by the acknowledgement of the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths (i.e. Notary Public)> Sample language can be found in W.S. 2060114 (<http://legisweb.state.wy.us/statutes/titles/title02/chapter06.htm>)

Holographic Will

A holographic will is one which is entirely in the handwriting of the testator (sometimes referred to as "testatrix" if person making the will is a woman) and signed by the hand of the testator herself. A holographic will does not have to be witnessed to be valid. A form will that has both handwritten and typewritten language will not qualify as a holographic will. **W.S. 2-6-113.**

When No Valid Will Exists/Intestacy

If a person dies without a valid will, the property will be passed on as follows:

If the intestate leaves husband or wife **and** children, or the descendants of any children surviving, one-half (1/2) of the estate shall descend to the surviving spouse, and the remainder to the surviving children and descendants of children;

If any of his children have predeceased him, the descendants of a deceased child collectively will take the share which their parents would have taken if living;

If there are no children, nor their descendants, then to his father, mother, brothers and sisters, and to the descendants of brothers and sisters who are dead, the descendants collectively taking the share which their parents would have taken if living, in equal parts;

If there are no children nor their descendants, nor father, mother, mothers, sisters, nor descendants of deceased brothers and sisters, nor husband nor wife, living, then to the grandfather, grandmother, uncles, aunts and their descendants, the descendants taking collectively, the share of their immediate ancestors, in equal parts.

If the intestate leaves husband or wife **and no child nor descendants of any child**, then the real and personal estate of the intestate shall descend and vest in the surviving husband or wife;

A person who has surviving children and a surviving spouse may prefer the property be distributed to the surviving spouse, so the surviving spouse will be able to support himself or herself for his or her remaining life. This plan cannot be easily accomplished without the consent of the surviving children if a person dies intestate, and under some circumstances, the consent by the surviving children may be considered a gift from the children to the surviving spouse.

Wyoming law also addressed the intestate succession of an “illegitimate” person. For more information, see **W.S. 2-4-102**. The distribution is basically the same as above; however, there is assumed to be no father for purposes of distribution.

If a child is conceived before the decedent’s death but born after the death, he or she inherits as if born in the lifetime of the decedent. **W.S. 2-4-103**.

Need for Advance Planning for Health Care and End of Life Issues

Without a living will or durable power of attorney for health care (advance health care directive), family members may end up arguing over what treatments should or should not be provided. Doctors will only consult family members on health care decisions and not friends or unmarried partners. If a person prefers that a friend or unmarried partner participate in his or her health care decisions, a living will and/or durable power of attorney advance health care directive is necessary. Health care advance planning, if done right, accomplishes four things:

- It helps ensure that the person you want to speak for you has the legal authority to do so;
- It helps ensure your wishes about your health care are known and respected;
- It avoids unnecessary, intrusive, and costly medical treatment at the point you no longer want it;

- It reduces the suffering experienced by your loved ones, because they will have your guidance. Making serious medical decisions on a loved one's behalf without their guidance can be an agonizing experience.

Living Wills

Living wills are not really wills at all. Instead, a living will (which also may be known as a *healthcare directive* or *directive to physicians*) is a document that expresses a person's desires and preferences about medical treatment in case he or she becomes unable to communicate these instructions during terminal illness or permanent unconsciousness. The first living wills helped people who wanted a natural death unattended by artificial life support and other advanced medical techniques. As these documents became more popular and widely available under local laws, they came to include other health care concerns such as tube feeding, resuscitation, and organ donation.

Wyoming's Living Will Statute was repealed in 2005 and replaced with the Wyoming Health Care Decision Act. **W.S. 35-22-401.**

Wyoming Health Care Decisions Act

Advance Health Care Directive or Durable Power of Attorney for Health Care

This document gives an "attorney-in-fact" legal power to make health care decisions for someone who cannot make those decisions him or herself. **W.S. 35-22-403(b).** A durable power of attorney for health care may be used whenever the individual granting the power cannot make his or her own health care decisions; it does not depend on terminal illness or permanent unconsciousness to become effective.

Revocation

Advance health care directives may be revoked in writing. Also, a decree of annulment, divorce, dissolution of marriage or legal separation revokes a previous designation of a spouse as agent unless otherwise specified in the decree or in a power of attorney for health care. **W.S. 35-22-404.**

What Can an Advance Health Care Directive Cover?

Many people believe that living wills and advance health care directives only direct health care providers to withhold treatment. While many choose to issue that type of instruction, a health care directive also allows a person to ask for all available treatment options and medical techniques, or to choose some medical options and reject others. Because health care directives and living wills involve complicated medical issues, consultation with a doctor may help clarify different treatment types and assist the patient in making advance health care and living will decisions. Some people do not complete living wills and health care directives because they worry doctors could let them die when there is still a chance for recovery.

Unless the form you sign limits the authority of the person(s) you authorize (your agent), your agent may make all health care decisions for you. You may also limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

- (a) Consent or refuse consent to any care, treatment, service or procedure to maintain, diagnose or otherwise affect a physical or mental condition;
- (b) Select or discharge health care providers and institutions;
- (c) Approve or disapprove diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate; and
- (d) Direct the provision, withholding or withdrawal of artificial nutrition and hydration and all other forms of health care.

W.S. 35-22-405 Optional Form

This optional form allows a person to appoint an agent for health care decisions; give specific instructions for health care, including the choice to receive or refuse specific life support treatments; give specific instruction for anatomical donations; and designate a physician who will have primary responsibility for his or her health care.

Choosing an Attorney-In-Fact

The person chosen as the attorney-on-fact or agent for health care decisions should be a trusted individual who is comfortable discussing health care issues. Because this person may need to argue the patient's case with doctors or family members, or even go to court, an assertive and diplomatic individual may be preferred. The representative should be well aware of the choices made in the relevant documents, and should support those instructions. It is also useful to enlist the cooperation of friends, relatives, and health care providers by giving them executed copies of the document for their reference, should the need arise.

Under Wyoming law, none of the following shall be used as a witness for a power of attorney for health care:

- (i) A treating health care provider or employee of the provider;
 - (ii) The attorney-in-fact nominated in the writing;
 - (iii) The operator of a community care facility or employee of the operator or facility;
 - (iv) The operator of a residential care facility or employee of the operator or facility.
- W.S. 35-22-403(c).

What to Do With Your Will or Directive

1. Keep the originals some place they can be easily found. A safe deposit box is not advised because there may be delay in obtaining the original documents.

2. Give your chosen agent or personal representative (executor) a copy of the will or directive and any attachments. Make sure your agent knows where to find the original.
3. Give your doctors a copy of your directive. Make certain it is put in your medical record. Make sure your doctor will support your wishes. If your doctor has objections, you need to work them out or find another doctor.
4. If entering a hospital or nursing home, take a copy of your directive with you and ask that it be placed in your medical records.
5. Some organizations offer to register advance directives electronically and enable health care institutions to access them electronically. Some churches and synagogues keep advance directives on file for members. You may wish to consider such a service.

For More Information

For more information and wills, probate court, rights of spouses and children, contact an attorney.

Information regarding these topics can also be found in Title 2, Chapters 1 through 6 of the Wyoming Statutes. An optional advanced health care directive form can be found at <http://legisweb.state.wy.us/statutes/titles/title35/c22204.htm>.

Some other information and organizations:

Americans for Better Care of the Dying (ABDC), 3720 Upton St., N.W., Rm. B147, Washington, DC 20016 (Tel. 202-895-2660), is a non-profit public charity dedicated to social, professional, and policy reform aimed to improve the care system for patients with serious illness, and their families. Web page: www.abcd-caring.org.

Center for Practical Bioethics (formerly the Midwest Bioethics Center), Town Pavilion, 1100 Walnut St., Ste. 2900, Kansas City, MO 64106-2791 (Tel. 816-221-1100). A non-profit ethics resource center dedicated to a health care delivery system anchored in respect for patients and their families and guided by ethical discourse. They publish the *Caring Conversations Workbook*, described above. Web page: www.midbio.org.

National Hospice and Palliative Care Organization (NHPCO), established in 1978, is a nonprofit organization whose mission is advocacy for the rights of terminally ill Americans. NHPCO is the largest nonprofit membership organization devoted exclusively to the promotion of hospice care in America. In addition to providing informational and educational materials to members, NHPCO provides information and referrals to the public. Web page: www.nhpc.org.

Five Wishes Advance Directive. Published by Aging With Dignity. This nationally used and very popular advance directive focuses on ways of talking about health care wishes and needs. Can be purchased and downloaded from their web site: <http://www.agingwithdignity.org/5wishes.html>. Also available by mail order from P.O. Box 1661, Tallahassee, FL 32302-1661 (Tel. 850-681-2010).

Shape Your Health Care Future with Health Care Advance Directives. Published jointly by the American Bar Association, the American Medical Association, and AARP. Available for free on the ABA Commission web site at: www.abanet.org/aging.

The Medical Directive, by Linda L. Emanuel, M.D., and Ezekiel J. Emanuel, M.D. This more medically-oriented advance directive includes six illness scenarios. For each, you consider possible medical interventions and goals of medical care. It also includes a proxy designation form. Can be purchased and downloaded from their web site: <http://medicaldirective.org>.