

## What you need to know about a Will in California

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Most people know about a Will but rarely do they know the requirements associated with a Will. What I believe will help you is to have a glossary to refer to as we go through a Will made in California.



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**Affirmation:** A pledge equivalent to an oath but without reference to a supreme being or for a “swearing”; a solemn declaration made under the penalty of perjury but without an oath.

**Affidavit:** A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a Notary Public.

**Attest:** To be a witness; testify

**Attestation Clause:** A provision at the end of an instrument (Will) that is signed by the instrument’s witnesses and that recites the formalities required by the jurisdiction in which the instrument might take effect (such as where the Will might be probated). The Attestation strengthens the presumption that all the statutory requirements for executing the Will have been satisfied.

**Will:** A document by which a person directs his or her estate to be distributed upon death.

**Heir:** A person under the laws of intestacy is entitled to receive an intestate decedent’s property.

**Intestate:** Of or relating to a person who has died without a valid Will.

**Legatee:** One who is named in a Will to take personal property; one who has received a legacy or bequest; one to whom a devise of real property is given.

**Devise:** The act of giving property by a Will.

**Bequest:** The act of giving property by a Will

**Decedent:** A dead person – one who has died recently.

**Oath:** A solemn declaration, accompanied by a swearing to God or a revered person or thing, that one’s statement is true or that one will be bound to a promise.

**Probate:** The judicial procedure by which a testamentary document is established to be a valid Will; the proving of a Will to the satisfaction of the court.

**Testament:** Traditionally a Will disposing of personal property.

**Estate:** The amount, degree, nature, and quality of a person’s interest in land or other property.

**Executor:** One who performs or carries out some act; a person named by the testator to carry out the provisions in the testator’s Will.

**Testator:** A person who dies leaving a Will.

**Sound Mind (Testamentary Capacity):** The mental ability a person must have to prepare a Will.

**Coercion:** Compulsion by physical force or threat of physical force; an act such as signing a Will is not legally valid if done under coercion.

**Undue influence:** The improper use of power or trust in a way that deprives a person of free will and substitutes another’s objective.

**Witness:** One who sees, knows, or vouches for something (witness to testator’s signature); one who gives testimony under oath or affirmation (1) In person (2) by oral or written deposition, by affidavit.

While the above glossary is not exhaustive by any imagination, it will, nonetheless, help you to understand the legal terminology to gain a basic understanding of Wills.

(Now, why didn't I put the glossary in alphabetical order? Simply because it will help you stay awake looking for the definitions). After all, why make it that easy?

## **Fees—Attorney and Executor**

If an estate doesn't require formal probate because it can be settled in another way, such as community property transfer to surviving spouse or a joint tenancy with right of survivorship, then an attorney is not entitled to a statutory fee. There are bank accounts that may be set up with a POD designation (Payable on Death) where the person you want to have the money will receive it when the testator dies.

Everyone is always concerned about attorney fees. It should be noted that the executor is entitled to the same fee as the attorney should the executor choose to accept these fees:

This is what the attorney and the executor are each entitled to receive:

4% of the first \$100,000.00 gross value of the Probate Estate.

3% of the next \$100,000.00

2% of the next \$800,000.00

1% of the next \$8,000,000.00

½% of the next \$15,000,000.00

(A "reasonable amount" determined by the court for everything above \$25,000,000.00).

## **Disinheritance and Probate**

Now you have the vocabulary and the costs associated with probating a Will for a large estate. But please keep the following in mind: In order to disinherit family members you must have a valid Will and exclude these family members by name. There are individuals who just don't want to give family anything and that's fine but you still have to do it correctly. Now, if you fail to do this correctly or if you fail to make out a valid Will under California law, then the state of California has written a Will for you and it is called the "Probate Code". This means that all your property will go to a family member related closest by blood-line, which is specifically what you *didn't* want when you made the Will – which did not meet the statutory requirements under California law. So the family that you despise and that you left nothing to gets it anyways. So, a word to the wise: you have to be careful here.

## **Signatures**

In California a Will has to be dated and signed by the testator. Then it has to be witnessed by two other individuals who also sign their name. The witnesses to the Will cannot have an interest in the Will (meaning that are not to receive anything from the Will).

In California we do not notarize a Will like some other states do.

You can make out what is called a Holographic Will in California. This is supposed to be in the handwriting of the testator and does not require any witnesses. However, this is not advisable as so many mistakes are made and if that turns out to be the case, then your Will will be invalidated and cannot be used.

## Distributing the goods

If you have valuable assets such as a home, stocks, bonds, raw land, mineral rights, cash, paintings, family heirlooms, etc., then at the very least you should have a Will in place. Even if you have just a few assets but they are valuable to you then you should also be thinking about a Will.

In California we often refer to a Will as the “last Will and Testament”. The Will is a mechanism to protect your family and your property. You can use a Will to

Leave your property to people, family, church, or other organizations.

Name a personal guardian to care for minor children (this has to be confirmed by the court).

Name a trusted person to manage your property you leave to minor children, and name a personal representative (executor) to make certain the terms of your Will are followed.

A Will can be made inexpensively for those that are concerned with the price. But the real expense begins after you have died (the big dirt nap).

Realize that probate can be costly as explained above. However, there is a non-profit group known as [SALA](#) (Senior Adult Legal Assistance) that can lend a hand drafting a Will and it is usually free.

Now, with all the above being said, is there a downside to doing a Will?

The answer really depends on whether or not you care about personal privacy. In a Will that is admitted to probate, there is no such thing as privacy as it has now become a public record and anyone can go to the court and pull the file and see exactly what your Will says (this may include your friends or enemies). If you don't mind this, then you probably have no problem with doing a Will.

If you have a small estate, it generally takes nine to eighteen months to probate a will in California. There are things that have to be done such as publishing in the newspaper, a four month period of waiting so that creditors can present a valid claim with the court. The personal representative (executor) named in the Will is usually appointed by the court as so requested in the Will. When all of these requirements have been met then the property can be distributed to the family, individuals or organizations that have been mentioned in the Will.

This is essentially the short version of probate. Is the Will the best way to go? Well, again it depends on the value of your estate, whether or not you value privacy, etc.

## Here are a couple of ways to avoid probate:

Have your checking account set up with a person's name on it in addition to your own. This is called a POD (Payable on Death account) and upon your death the funds go to this person.

If two people are on the deed to real estate, they should be named as joint tenants with the right of survivorship and then when one party dies the ownership vests in the surviving party.

If you have life insurance, please make sure that the beneficiaries are all eighteen years of age or older.

There are instruments that go outside of a Will (even if mentioned in the Will) if they have beneficiary designations.

## Do it now

Certainly, a Will is better than no Will at all but it does cause difficulty with those faced with what they consider the daunting task of having a Will drafted.

First of all, people just do not like to think about their own mortality (everyone is going to live forever, right?). It is obviously a very sobering moment to think about estate planning, and for many making a will is the beginning and the end of their estate planning.

Are there any other estate plans that are better than a Will? The answer is simply yes and it is called a Revocable Living Trust. While that is beyond the scope of our discussion, I just wanted you to know there are other methods available for estate planning.

A Will is a very important subject but I try to approach it with just a bit of humor so the readers can relax as they think about this subject.

Hopefully, you will get started and not wait until it is too late.

Think about this discussion and then read it again. Then vow that you will do something to move things along. There is nothing worse than leaving your family without direction when you are gone.

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