



A GUIDE TO WILLS FOR CANCER PATIENTS

**A PUBLICATION OF THE
CANCER ADVOCACY PROJECT
OF THE CITY BAR JUSTICE CENTER**

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INTRODUCTION

The Cancer Advocacy Project (CAP) is a legal services program of the City Bar Justice Center. The project provides cancer patients and survivors with no-cost legal information and advice in three areas: life (estate) planning, health law, and cancer-related employment discrimination. Experienced volunteer attorneys with the life-planning panel counsel clients and prepare documents such as simple wills and advance directives. The health law section provides advice and assistance with health insurance issues, e.g. denials of coverage by private health insurance companies. Our employment discrimination component provides information, advice and counseling on issues relating to workplace discrimination and employee rights and benefits.

CAP developed this simple, user-friendly guide to Wills to assist New York’s cancer patients, survivors, and their families in answering basic questions on this important topic. We hope it will prompt readers to consider preparing a Will so they can be confident that their assets will be distributed according to their wishes and their loved ones will be taken care of.

ABOUT THIS GUIDE

This guide is not intended to serve as, or substitute for, legal advice and neither the Cancer Advocacy Project nor the City Bar Justice Center are responsible for the accuracy or adequacy of any of the information contained in the guide, or your reliance on this information.

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WHY DO YOU NEED A WILL?

In simple terms, you need a Will so that you can be assured that your property is distributed according to your wishes. Approximately 60% of Americans over 50 have a Will, and so should you. You will feel confident that your loved ones - both relatives and friends, and any charities you support will receive as much of your assets as possible, without complex and expensive legal battles. Additionally, if you are a single parent, your Will can identify a guardian for any minor children that you have.

HOW WILLS DISTRIBUTE YOUR ASSETS

If you have a Will in place at the time of death, in the eyes of the law you have died testate. Your Will describes how to distribute your estate, meaning all property that is solely owned by you. Your Will designates an executor (or executrix, if female) who will be in charge of carrying out your wishes.

It is important to understand that your Will cannot take property away from people. In most cases, if you and your spouse own your house jointly, upon your death your share will immediately pass to your spouse and he or she will become the sole owner. Also, the state of New York protects surviving spouses by giving them the option to “elect” to receive certain assets from your estate, no matter what you provided, or did not provide, for them in your Will.

WHAT IF YOU DON'T LEAVE A WILL?

If you die without a Will, you have died “intestate”, which means that a court will choose a neutral administrator to distribute your assets. The administrator may not be someone that you would have chosen yourself, and will have to be paid out of the funds held in your estate. If you die intestate, your assets will be divided as follows:

If you are survived by your:

- spouse and descendants (i.e. children), spouse takes the first \$50,000 plus half of the rest, and your descendants share the remainder equally.

- spouse, but no descendants: spouse takes all.
- descendants, but no spouse: your descendants take all.
- parent(s), but no spouse or descendants: parent(s) take all.
- parents' descendants (e.g. your siblings) and there are no closer relatives: parents' descendants take all.
- grandparent(s) or their descendants, and there are no closer relatives: half to the maternal side and half to the paternal side (but not including second cousins if there's a first cousin on either side).
- If "descendants" includes a mix of generations, your living children get full equal shares; if any of your children predecease you, then their children will divide equally the combined shares of all their deceased parents.

If you die intestate but leave no surviving relatives, your property escheats (is forfeited) to the state.

COMMON EXCUSES FOR NOT HAVING A WILL

"Everyone knows what they are getting."

"I left a letter dividing up my possessions in my desk drawer."

"I don't have much, so the kids can just divide it however they want."

"I already told my oldest child how to divide everything up."

The only way to ensure that your wishes are carried out is to put them in a Will. Verbal promises are not only insufficient, but could cause lengthy and expensive litigation in dividing up your estate. Despite your best intentions, do not assume that your family and friends will be able to peacefully resolve the issues that will arise if you do not leave a Will.

Even if you do not own much at this time, do not assume that it is not worth expressing your wishes in a Will. Personal items, such as sentimental items of jewelry or family photographs, can become sources of family conflict after a death. There is also a chance that you may unexpectedly acquire a substantial sum of money in the

future, e.g. from an inheritance or lottery win and a Will allows you to plan for such unforeseen events.

DRAFTING YOUR WILL

When you leave someone an asset in your Will, you have bequeathed that asset to a beneficiary. A Will is a formal legal document that communicates your intentions to those who will divide up your estate. While there are no “magic words” that must be used, you must follow certain formalities so that your Will is enforceable: (1) it must be in writing, (2) you must sign it, (3) in the presence of two witnesses.

In order to execute a Will, you must have testamentary capacity, which in New York requires that you be at least 18 years of age, understand the nature and consequences of executing a Will, know the nature and extent of the property you are disposing of and the beneficiaries you are dividing it among.

CHOOSING AN EXECUTOR

Drafting a Will allows you to choose the person who takes on the responsibilities of fulfilling your wishes, rather than leaving this choice to a court. You should take care to choose someone who is not only trustworthy and dependable, but has the time and energy to fulfill the important duties you are entrusting to them. It is also preferable to choose someone who lives in or near New York. Finally, you may decide to designate your lawyer as the executor, but remember that you might be able to reduce legal fees if you pick a family member or friend who will do nonlegal “legwork” for free. (Note: CAP/City Bar Justice Center cannot serve as executor for CAP clients).

It is particularly important to share the identity of your executor with your family in advance. Although acting as an executor can be very time-consuming, some perceive it as an honor and you should try to avoid creating feelings of jealousy. If your executor is also a beneficiary of your Will, s/he will be bound not to give him/herself

preferential treatment. Lastly, it may be wise to choose a “backup” executor in the event that your executor becomes unavailable.

GUARDIANSHIP

If you are a single parent, your Will should also designate a guardian for your children in the event that they are younger than 18 at the time of your death. While a court will have to approve of the guardian that you propose, designating one in advance will help guide the court and better respect your wishes. It will also avoid conflicts between different family members (for instance, between different sets of grandparents). If you are divorced but were named the legal custodian of your children, you may designate someone other than your former spouse, but the court may not approve of your selection.

HOW IS A WILL IMPLEMENTED?

Your Will is written to take effect upon your death, when it is admitted to probate. You would now be referred to as the “testator” (or “testatrix” if female). At that time, your executor will do an appraisal of all the assets in your estate, so that any estate taxes and any funds due to creditors can be paid off. Then the executor prepares to dispense the assets to your beneficiaries. First, however, s/he must make sure that the costs of administering your Will, your funeral expenses and any debt or taxes previously owed can be taken care of.

CHARITABLE GIVING

Remember that your estate can also benefit any charitable organizations that you wish to support. Many such organizations have staff that will help you designate them as a beneficiary in your Will according to the laws of the state of New York. As always, however, it is best to get independent advice from your own lawyer.

A CHECKLIST FOR YOUR WILL

Your Will should be as comprehensive and accurate a document as possible, so that it is implemented in accordance with your wishes. The following is a list of information you should compile:

- Names/addresses/birth dates of your spouse, children, and other relatives who may be beneficiaries, and any special needs they may have.
- Names/addresses/phone numbers of possible executors and, if you have young children, guardians for them.
- Amount and sources of your income, including interest, dividends, and other household income, such as your spouse's salary or income your children bring home, if they live with you.
- Amounts and sources of all debts, including mortgages, installment loans, leases, and business debts.
- Amounts and sources of any retirement benefits, including IRAs, pensions, Keogh accounts, government benefits, and profit sharing plans.
- Amounts, sources, and account numbers of other financial assets, including bank accounts, annuities, loans, etc.
- Any life insurance policies, including account balances, issuer, owner, beneficiaries, and amounts borrowed against them.
- List (with approximate values) of valuable property you own, including real estate, jewelry, furniture, collections, heirlooms and other assets. You may want to list the names of potential beneficiaries next to each item. If the property is jointly owned, name the co-owner.
- Any documents that might affect your estate planning, including prenuptial agreements, marriage certificates, divorce decrees, recent tax returns, existing Wills and trusts, property deeds, etc.

KEEPING YOUR WILL UP TO DATE

It is important to review your Will either every year or when there is:

- a birth or adoption in your family
- a death or disability in your family
- a change of residence
- a dramatic increase in your or your beneficiaries' financial worth

- a change in marital status of you or a family member
- a change in the status of your business
- a change such that the executor, guardian (or trustee) named in your Will becomes unavailable

Although used less often these days, if you amend your Will using a codicil, you must make sure to follow the same formalities as when you executed the original Will.

Additionally, you can write your Will to account for possible changes in circumstances (a conditional Will); these require more planning to ensure that your exact wishes are implemented.

Finally, remember that you can revoke your Will, either by writing a new Will that overrides the old one or by signing a document stating your intention to revoke the Will and using the same formalities as you followed when you executed (signed) the Will.

DRAFTING A WILL IS ONLY ONE PART OF ESTATE PLANNING

Remember that disposing of your property and choosing guardians in a Will is only one step in planning for the future. You and/or your spouse may want to purchase life insurance or disability insurance. You may also wish to sign a Health Care Proxy and Living Will, appointing someone to speak on your behalf if you are unable to make medical decisions for yourself and stating your wishes concerning extraordinary measures. A Power of Attorney and Appointment of Agent to Control Disposition of Remains declaration are also useful advance directives to consider.

[Project note: CAP has created a separate estate planning guide which includes information about advance directives: “*A Simple Guide to Advance Directives and Estate Planning*”].

You must also consider taxes: if your total assets exceed a certain threshold (which varies according to the year of your death), federal estate taxes will be withdrawn from your estate. You may also owe New York state estate tax, though this amount will likely be much

smaller. Finally, your beneficiaries may be required to pay certain gift taxes.

[Project note: It is unlikely that anyone meeting CAP's financial eligibility requirements to prepare life planning documents through the project would reach the threshold to pay federal or state taxes on their estate.]

ARE THERE OTHER WAYS TO DISTRIBUTE MY ASSETS?

A Will is one of the more common ways to handle your estate, but you should be aware of other instruments. You could transfer certain property into joint tenancy with the right of survivorship with someone else. Upon your death, your interest in the property automatically passes to that person, without any executor or court involved. You may also wish to establish retirement accounts or payable-on-death bank accounts that designate your beneficiaries. Finally, you could give your property away as gifts, subject to certain tax limitations. These options should be discussed with your lawyer, who will help guide you through them.

In some circumstances, including the size of your estate, the likelihood that your heirs will fight over your assets, and weighing certain tax consequences, you may wish to create a trust for your children before your death. A trust holds property for the benefit of someone else, and may release portions of the property in different phases. One option, a living trust, implemented while you are still alive, ensures that your estate will be efficiently and quickly divided up upon your death.

Any kind of trust includes three parties: a grantor (you) who owns property that s/he wishes to have protected and transferred to heirs, a trustee who has legal control over the trust and administers it for the benefit of beneficiaries, whom you wish to receive the assets in a controlled and supervised manner. A trust is a kind of three-way contract that a lawyer must help you establish.

FINDING A LAWYER TO DRAFT YOUR WILL

This guide is intended to answer basic questions about your Will. However, to ensure that you protect your estate, it is best to consult a lawyer who will help draft your Will. Your lawyer can guide you through federal and state taxes; help you choose an executor; decide how to best provide for your family and loved ones; foresee any potential complications such as ex-spouses or current spouses who are not U.S. citizens; and help you designate a guardian for your children if necessary.

FREE OR LOW-COST LEGAL SERVICES

The Cancer Advocacy Project assists low- and moderate-income cancer patients and survivors in New York City to prepare their life planning documents at no cost. Potential clients undergo a simple intake screening to determine whether they meet the project's financial eligibility guidelines. Those who are eligible will be paired with a private attorney who volunteers his or her time to assist CAP clients with their estate planning.

There are other legal services organizations in New York that also offer free or low-cost Will preparation. In general, these services are limited to certain populations. It is important to call ahead and ask:

- Do you have income eligibility guidelines? *Many organizations require that you be below the poverty line.*
- Do I have to be a resident of a particular county to be eligible? *Some local clinics only work with residents of their borough.*
- When is your clinic open? Do I have to make an appointment? *Some law school-based clinics are only open part of the year.*

IF YOU CAN AFFORD A LAWYER

If you do not meet the eligibility requirements for free or low-cost legal services, you will have to hire a lawyer. Generally, lawyers charge by the hour or a set fee to execute your Will. If they do charge by the

hour, you can save money by tracking down documents on your own so your lawyer does not have to. You should always ask about fees, even before your first formal consultation. It is also important to have a fee agreement in writing to avoid any misunderstandings.

If you do decide to hire a lawyer and do not know of any or are not referred to any, you can always call the **New York City Bar Association's Legal Referral Service** at **(212) 626-7374**. The operators there will recommend a lawyer to meet your needs, and your first half-hour consultation with that lawyer will cost only \$35, after which you can decide whether to go forward.

BUYING A FORM WILL

Many websites offer form Wills, generalized documents for you to fill in. Some of these websites provide the documents and leave the rest up to you. Others are interactive and allow you to communicate information to be filled in on the document.

A Cautionary Note: *These services can be less expensive than hiring a lawyer, but they are no substitute for actual legal consultation. It will be impossible for you to verify that the document will be a valid Will for your estate; if your Will is invalid, you will die intestate. The forms are usually very general and are unable to deal with special circumstances that you may have. On the websites that allow you to communicate information to be filled in on the form, the information will not necessarily be kept confidential. You simply do not know who is running these websites, and how competent they are. Lastly, if the final product fails or proves to be unsatisfactory or inadequate in conveying your wishes, your beneficiaries may be unable to recoup their losses from the website because of disclaimers they force you to sign.*

GLOSSARY

Administrator: the person or financial institution that is appointed to take care of the estate of a deceased person who died without a Will.

Beneficiary: a person or entity that is entitled to receive something from your estate.

Bequeath: to give personal property under provisions of a Will.

Codicil: a written amendment to a Will.

Conditional Will: where the validity of the Will is made conditional by its own terms.

Escheat: assigning property to the state when a person dies with no known beneficiaries under a will and no known heirs if there is no Will.

Executor or Executrix: the person or financial institution that is appointed to administer the estate of a deceased person who died with a Will.

Guardian: an adult appointed by a surviving parent in his/her Will or by a court, who is responsible for a minor or incapacitated person.

Intestate: dying without a Will.

Joint tenancy with the right of survivorship: can apply when two or more people own property together. When one of them dies, his or her share automatically goes to the surviving owner or owners. You cannot bequeath (give away) this property in your Will.

Predecease: when a person named in the Will, (i.e. as a beneficiary), dies before the Testator.

Probate: the process of determining if the deceased person left a valid Will and admitting that Will to probate.

Revoke: cancel or rescind a document.

Testator or Testatrix: term used to refer to the person who signed the Will, after they have died.

Testate: refers to dying with a Will.

Trust: an arrangement, usually established by a written document, to provide for the management and disposition of assets.

Trustee: an adult individual or financial institution that is designated to be responsible for the administration of a trust.

Will: a written document that disposes of one's property at death.

For more information

If you have any questions about this guide, suggestions for improving it, or the names of other organizations that you would like to see included in future editions, please contact the Cancer Advocacy Project at:

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