

Tools for Preparing Wills and Trusts

Many of us avoid talking about death, but we all know that death touches our lives eventually. A will (and possibly also a trust) is a key component in your life plan, and often the only way to make sure the people you love are protected after your death. Lambda Legal client Keith Bradkowski found this out the hard way after his partner Jeff Collman was killed in the September 11th attacks on the World Trade Center. Jeff had not written a will, so on top of his grief, Keith was forced to endure the anxiety of hostile negotiations with Jeff's parents and employer over benefits and basic possessions. Take the power now to protect the people you love from added grief after your death by writing a will.

Please note: This document offers general information only and is not intended to provide guidance or legal advice regarding anyone's specific situation.

FIRST STEPS

1. Think about what you own—from cash, accounts and real estate to personal property like jewelry, books and cars—and whom you want to inherit those assets after you die.
2. Think about who would be the right person to be your **executor** or **administrator** (see "Terms to Remember" at the end of this insert for all terms in **bold**) when you die, to carry out your instructions, go through all your belongings and make all the necessary arrangements.
3. For legal help, consult Lambda Legal's Help Desk at 866-542-8336, www.lambdalegal.org/help or the other resources in the insert "Tools for Selecting an Attorney."

A WILL

TAKE THE POWER! Create a **will** so you can direct what should happen to your personal belongings after your death, including your home, cash, bank accounts, car and pets.

Why do I need this power tool?

When you don't have a will, you die **intestate**, which means state law dictates how your property will be distributed. Depending on circumstances like where you live and whether your relationship is respected legally in your state, the state may automatically hand over your assets to a blood relative, ignoring the people to whom you actually want to leave what you have. While everyone should have a written will, it is essential for LGBT people and people living with HIV, who often come up against discriminatory laws as well as extra challenges from family members.



Martha Stark, former Finance Commissioner for New York City, took the power and prepared a will. Martha says, "My mother died at 46. She didn't have a will. I want to make sure my family is provided for if I die or become ill."

How it works: Create a legal document called a will, which governs the distribution of your possessions after you die. In the will, you identify **beneficiaries**, people and/or organizations who receive things under the will. You also name an executor or administrator, the person who makes sure the directions in your will are followed. The legal process of sorting out a deceased person's affairs is called **probate**. All the property that will be distributed to beneficiaries becomes part of what is called an **estate**. Before any money goes to beneficiaries, the estate must pay any applicable taxes and other fees, which reduce the size of the estate.

Here are some things to think about before writing a will.

- If you are concerned that a relative may challenge your will, it is important to evaluate the concern with an attorney. Attorneys have developed ways of dealing with people who might challenge your will. If you live in a state that does not respect your relationship legally, your attorney may also have advice about how big a role a life partner should or should not play in creating the will, to avoid claims by hostile relatives that your partner exerted "undue influence" over you for his or her own financial gain.
- Consider whether to provide instructions in your will for the estate to pay your funeral and burial expenses. Doing so helps ensure that your wishes are fulfilled—and that your loved ones will not have to pay for these expenses out of their own pockets. You also may want to instruct that funeral expenses not be paid by the estate unless your wishes for funeral arrangements are respected. (See insert "Tools for Protecting Your Wishes for Your Funeral.")
- Some of your assets, such as pension benefits, life insurance proceeds and jointly owned property, may go automatically to particular beneficiaries without being specified in your will, because you designate these beneficiaries through steps specific to those assets. (See insert "Protecting Your Assets After You're Gone.") (Be aware that the value of those assets may nevertheless be included in your estate for tax purposes, which may increase the taxes owed by your estate and lower the amount left for beneficiaries in the will.) Alternately, you might want to consider a **trust**, which offers more privacy (because it does not go through a public probate process) and potentially less opportunity for legal challenge, but which can be cost-prohibitive for smaller estates due to the increased legal oversight required.
- If you have children, your will is one way to designate a guardian to care for your children, to protect against both the court appointing someone you would not want and your children becoming wards of the state. Because the process for probating a will can be very lengthy, you should also take other steps to

secure your children's well-being separate from your will. (See insert "Tools for Protecting Your Children.") If you used assisted reproductive technologies to bring children into your family, you might consider including provisions disposing of any remaining reproductive materials and defining whom you consider to be your intended children and/or grandchildren regardless of biological or genetic connections.

- There are some do-it-yourself guides for writing a will, and many attorneys agree that a self-made will is better than no will at all if the cost of hiring an attorney is prohibitive for you. However, LGBT people and people living with HIV do well to have a lawyer's expertise to help counter the discrimination that is built into many states' laws, as well as to navigate the particular requirements your state has for creating a valid will.

A LIVING TRUST

TAKE THE POWER! In addition to a will, which you always need, consider working with an attorney to create a **living trust** to avoid some disadvantages of the probate process.

Why do I need this power tool? A living trust is an arrangement which allows you to transfer ownership of your assets to a legal entity—the trust—and designate either yourself or someone else to control those assets while you are still alive. You personally will no longer own those assets, the trust will; but if you specify yourself as your trust's initial **trustee**, you will still control them

during your lifetime (and you may always dissolve the trust as long as you remain in control, if you change your mind). Placing some or all of your assets in a living trust has several advantages:

- The assets that remain in your trust after your death can be distributed more quickly to beneficiaries after you die because the process is less time-consuming and, in some states, significantly less expensive than probate.
- A trust is harder to contest than a will, and can provide more privacy for your beneficiaries after your death than does the probate process.
- Critically, a trust document allows you to designate someone else as a financial trustee if you are still living but become incapacitated, which can be of special significance to same-sex couples in jurisdictions where their relationships are not legally recognized as well as to single people who need to designate a friend or family member to act on their behalf.

Trusts are, however, more expensive to establish than simple wills, and require regular maintenance to ensure that your assets are properly titled to ensure that they are covered by the terms of the trust. Check with your attorney to see whether the cost of setting up and maintaining a trust makes sense for your estate planning needs.

How it works: With an attorney's help, create a document that

establishes a living trust and then transfer as many assets as you'd like into that trust. For this trust, you are the **grantor** (who puts assets into the trust), the trustee (who decides what goes in and out of the trust and whether to make any changes to the assets in the trust) and the beneficiary during your lifetime (who gets money from the trust). In addition, it is possible to structure the trust so that you can change or eliminate it at any time, just as you can do with a will during your lifetime. (You should still have a will, in part to make sure your wishes are honored for any assets that are not placed into the trust.) Lastly, the trust document provides for the appointment of a successor trustee—someone to take over for you if you should become disabled or when you die. Here are some things to think about before creating a living trust:

- Don't forget to re-title your assets so that your trust, rather than you, is the legal owner for any assets you put in the trust, otherwise you may wind up with an empty trust (meaning that it might as well not exist). An attorney can explain how this re-titling is done. You also may want to add a provision to your will called a "pour-over" to ensure that assets accidentally omitted from the trust in your lifetime will be automatically legally transferred into it as part of the probate process.
- A trust may be a good vehicle to use if you own real property in more than one state because it should allow you to avoid potentially expensive and

time-consuming probate proceedings in multiple states.

- Just like jointly-owned property and life insurance, the assets placed in the trust during your life are outside the process of probate but are still considered part of your estate for tax purposes.

- Putting assets into some kinds of trusts does not shield them from creditors.

- There are other types of trusts you can explore with an attorney to meet personal priorities or achieve tax benefits, such as the wish to provide for a beneficiary but have someone else in charge of spending the

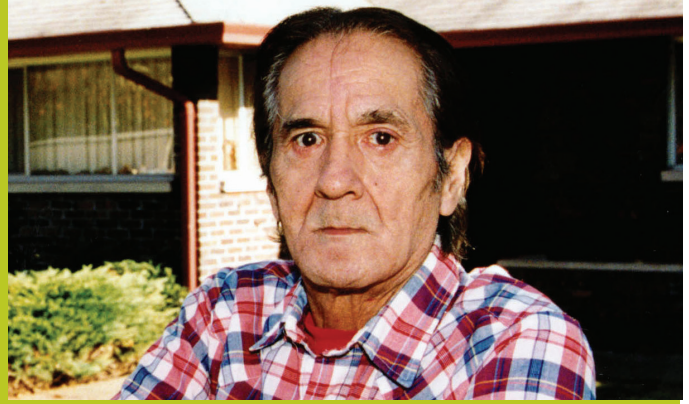
money for that beneficiary, or the wish to maximize your giving to charity while still providing for yourself (see insert “Leaving a Legacy for Equality”).

TIPS TO CONSIDER BEFORE YOU TALK TO AN ATTORNEY

- Think about whom you want to name as your executor (sometimes called an administrator): someone you trust who is willing to take on the job. Have the name of a second person for the role, too, in case the first person dies before you or cannot serve for any other reason. Be sure to talk to these individuals to make them aware of what you are asking of them.
- People you leave money to may die before you, even if they are children now, so consider naming “secondary” or “contingent” beneficiaries, which can be individuals or organizations.
- An attorney will want to know details about all of your assets, such as the amount of money in your bank and retirement accounts, because the amounts will determine how your attorney handles certain issues in your will, especially taxes. The attorney also may ask about other things in your life, including whether anyone might object to your will if you leave them nothing, because that can change how the will is drafted. If you are anxious about sharing information about your property and the people in your life, keep in mind that attorneys are bound by strict rules of confidentiality and ethics, and those with integrity take the rules very seriously. (To help evaluate an attorney’s competence and integrity, see insert “Tools for Selecting an Attorney.”)
- Think in advance about two ways you can provide for beneficiaries in your will. One is to make a specific bequest, such as giving \$10,000 to someone. Another is to make a **residuary** bequest, which is usually a percentage of the estate after all taxes, debts, funeral expenses and specific bequests have been paid.
- Be aware that in states that extend legal respect for your relationship, your spouse or partner may have rights after your death separate from the will or trust regarding access to property during the probate process and inheritance. Ask your attorney about these protections and how they might affect your estate planning.

VASQUEZ v. HAWTHORNE

Many years prior to Washington state achieving full marriage equality, Frank Vasquez and Robert Schwerzler shared a life together in rural Washington—a home, business and other property—for 28 years. But when Schwerzler died suddenly, leaving behind no legal documents stipulating his wishes or identifying Vasquez as his partner, Vasquez was left without clear legal rights to their shared assets. Schwerzler's siblings—his legal heirs—demanded that Vasquez move out of the house and turn over the business and all the couple's other assets to them. After a long legal battle, the state high court agreed with Lambda Legal and Vasquez in a decision that broke new legal ground for same-sex couples in Washington, and the case settled with Vasquez finally having a clear right to stay in the couple's home.



Power Tool Tip: Denying same-sex couples legal protections in the case of a separation or one's death, while also denying access to marriage, leaves these couples with few means to protect or resolve questions of property and surviving partner benefits. And if you are single or even if your relationship is recognized in your state, you may want to make plans that are different from the government default estate distribution rules. Plan ahead for the unexpected by drawing up a will and other documents that protect your wishes for your family and loved ones.

TIPS TO THINK ABOUT AFTER THE WILL OR TRUST IS DONE, SIGNED AND LEGALLY BINDING

- Review your will every three to five years, or when something significant in your life changes, like a purchase or sale of property, the ending of a relationship or the beginning of a new one, the addition of children to your family or the death of a beneficiary. This will help you make sure that your will or trust continues to represent your wishes and will benefit the people and organizations you care about most. Remember that some legal life changes such as marriage, entering a civil union or statewide registered domestic partnership, or getting a divorce can, in some states, make a will null and void, but usually will not nullify jointly-held property allocations or beneficiary/"payable-on-death" designations. This can be true even if your marriage is to the same person you designated as the beneficiary of your will, so be sure to check with your lawyer about the status of your will if you marry or divorce.
- For assets like life insurance and some retirement benefits which are left directly to named beneficiaries (and thus are outside of a will and the probate process), make sure you keep your beneficiary designations up to date. Too often people lose out on their partner's retirement benefits because the partner named an ex-partner or someone else as a beneficiary long ago and never updated the paperwork. You should also include contingent beneficiaries in case your primary beneficiary dies before you. Check routinely to verify that your beneficiary designations are accurate, too.
- Keep your estate planning documents in a secure place like a fireproof, waterproof safe in your home, or in your lawyer's office, and make sure that select people know where the documents are and have access in the event that something happens to you. It doesn't help to have a plan in place if your loved ones cannot implement it.

TERMS TO REMEMBER

Beneficiary: A person or organization that inherits your assets.

Estate: All your property that will be distributed to your beneficiaries upon your death, or during your lifetime through a living trust.

Executor (also Administrator): The person you designate to make sure the directions in your will are followed.

Grantor: A person who puts her or his assets into a trust. May be the same person as the trust's trustee.

Intestate: The status of your estate should you die without a will. State law will dictate how your property will be distributed.

Living Trust: An arrangement which allows you to transfer your assets to beneficiaries while you are still alive. You will no longer own those assets, but if you specify yourself as your trust's initial trustee, you will still control them during your lifetime.

Probate: The legal process of sorting out a deceased person's financial and legal affairs.

Residuary: Any assets remaining in the estate after all gifts are made to beneficiaries and costs of probate (including taxes) are paid. Many wills provide for a beneficiary of these remaining assets, also known as a "residuary clause."

Trustee: The person who decides what assets go into or are taken out of a trust, and whether to make any changes to assets named in a trust. May be the same person as the trust's grantor.

Will: a document in which you specify what should happen to your property after your death, including your home, cash, investments, cars and pets.