

Basic Estate Planning for Unmarried Couples

Few people, whether young, old or somewhere in between, like to think about dying, much less what they would like done with their house, furniture, or other property when they pass away. But putting off estate planning is not a wise choice for anyone, especially not for unmarried couples.



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This memo provides you with some basic background information to get you started on preparing your "estate plan." This memo is not intended to substitute for the assistance of an attorney. It is usually worth consulting an attorney, if only to check that any documents you have prepared meet the basic requirements to be valid in Washington State. If you have a large estate (valued at more than \$250,000), we strongly encourage you to work with a lawyer to help in your planning effort. You may call the Legal Voice information line for referrals to attorneys and other legal services.

What is a will?

A will is the most common estate-planning document. It is the legal document that explains how and to whom you would like your property distributed when you die. If you aren't married and you want to make sure that your partner receives all or part of your assets upon your death, you need a will.

Do I need a will if I don't have any property and/or many assets?

Yes. Anyone who owns property -- either "personal property" like cash, jewelry, furniture, or stocks or "real property" like land or a house -- should have a will.

What happens if I die without a will?

If you die without a will (or other legal means of transferring property at death), you are considered to have died "intestate." If you die "intestate," Washington law, rather than you, will determine who receives any property that you owned at death. The court will appoint a personal representative to administer your estate (e.g., pay your taxes, debts, funeral expenses, etc.), and then distribute the rest of your property to your "legal heirs." Washington intestacy law spells out who is a legal heir and who has what priority in receiving a portion of your estate.

Same Sex Couples

If you and your same-sex partner have registered as domestic partners in the State of Washington and you die without a will, your domestic partner can inherit some property from your estate because Washington law now treats him/her as a legal heir. See the Legal Voice memo "Domestic Partnership Q&A" for more information on Washington State's Domestic Partnership Law. It is on our website, www.legalvoice.org.

Even with the protections offered by the Domestic Partnership law, it is still very important to prepare a will so that you, rather than the Washington law, can control what should happen to *all* of your property upon your death.

You should also know that if you are in a same-sex relationship and you die without a will, only those children that are legally yours, either biologically or through formal adoption, will receive any portion of your estate under the intestacy laws.

Different-Sex Couples, at least one of you is 62 years old or older

If you and your partner have registered as domestic partners in the State of Washington and you die without a will, your domestic partner can inherit some property from your estate because Washington law now treats him/her as a legal heir. See the memo "Domestic Partnership Q & A" for more information on Washington State's Domestic Partnership Law. It is on our website, www.legalvoice.org.

NOTE: If you have a will that you prepared before you and your partner registered as domestic partners, you must modify the will if you want to change who will receive your property upon your death. A valid pre-existing will that pre-dates your domestic partnership will be enforced even if it leaves your property to someone other than your domestic partner. This makes it all the more important to prepare and finalize all of your legal documents (even after you've entered into a domestic partnership) to ensure that your wishes are honored.

How do I prepare a will?

Washington has several different laws that outline the requirements for preparing and executing (signing before witnesses and having notarized) a will. So if you can afford to, it is best to consult with an attorney to make sure that you have followed all of the necessary steps to make sure that your will is valid and enforceable. This is the best way to make sure that your wishes will be followed, that any property you have will be transferred to the people you would like, and to reduce the chances that someone will challenge your will after your death.

What do I need to include in my will?

- **IDENTIFY WHO YOU WANT TO RECEIVE YOUR PROPERTY.**

In legal terms this is referred to as "devise and bequeath." You can use your will to specify exactly who you would like to receive what items from your estate. Your "estate" is the sum total of real and personal property that you own at the time of your death, less any debts. For example, you could give your interest in your house to your partner, your historic book collection to your sister, and your jewelry to your nephew.

Same-sex couples

If you are not a legal parent to your children, the only way your kids will be able to inherit anything from you is if you prepare a will and specify what you want them to receive.

There is no reason why you cannot leave all of your assets to your partner. If you have a large estate, however, you should consult an attorney and/or tax accountant to consider the potential tax consequences of such a decision to your estate.

In addition to specific items for specific people, you should also designate someone to receive the “residue” of your estate. The residue is anything that you have not specifically left to a particular beneficiary. You may leave the residue to a particular person, a company, or a charitable organization. It is important to include this in your will because the content and size of your estate is likely to change after you finish your will.

- **IDENTIFY WHO YOU WANT TO BE IN CHARGE OF OVERSEEING YOUR ESTATE.**

This person is referred to as your “personal representative.” This is the person who will be responsible for overseeing your estate during the “probate” process. Probate is the court process where your will is verified as valid and enforceable and your assets are divided for distribution to your creditors and "heirs." Your personal representative will pay your bills, watch over and manage your assets during the probate process, and finally distribute your assets the way the court has decided. The person you designate as your personal representative should be someone who you trust to follow your wishes while managing your assets during the probate process. Being a personal representative does not require a high level of technical knowledge, but it does require high ethical standards.

Note: your personal representative will be entitled to “reasonable compensation” for providing these services, to be paid from your estate.

It is perfectly acceptable and legal to name your partner as your personal representative. In any case, you should choose someone located in the state. You should also name an alternate personal representative in case your first choice is not available for any reason.

- **IDENTIFY WHO YOU WANT TO TAKE CARE OF YOUR CHILDREN.**

If you are a legal parent to any minor children, you may use your will to identify who you would like the court to appoint as your children’s legal guardian. The guardian is the person who will become responsible for your children when you die.

If your children have a second legal parent, when you die, custody and responsibility will in almost all cases transfer to the surviving parent. Where there is no surviving legal parent, the court will look to the person that you named

as the next choice for guardian for your children. Thus, if your partner is not a legal parent to your children and you want him/her to be their guardian upon your death, you should nominate your partner as guardian in your will.

Same-Sex Parents

It is important to note that children with same-sex parents often do not have a legal relationship with at least one of their parents. As a result, if you are the sole legal parent and you die without a will, your child could end up living with family that you may be uncomfortable with, or even end up in foster care. It is also critical that as a LGBT family you take other affirmative steps to protect your parent-child relationships.

Ultimately, it will be up to a judge to decide who will be your children's guardian. It is likely that the judge will approve your request if there is no surviving legal parent and if you have clearly explained why you selected the particular person you did. If you do not specifically nominate your partner, the court probably will not appoint your partner to be the guardian of your children.

Also, you should always name an alternative guardian, just in case your first choice is not available for whatever reason.

There is more information about using wills and other documents to declare who you would want to care for your children in our packet "Placement of Minor Children in case of Death.", available on our website at www.legalvoice.org.

- **FUNERAL ARRANGEMENTS, ETC.**

You can use your will to designate the type of service you would like (if any) and how you would like your remains to be disposed of (e.g., burial or cremation).

What procedures or formalities must I follow to make sure my will is valid?

Under Washington law, a will must include all of the following to be valid and enforceable:

- It must be in writing, dated, and signed.
- The person who is the subject of the will (legally called the "testator") must
 - be legally competent (i.e., "of sound mind");
 - have created the will voluntarily (i.e., free of inappropriate influences);
 - and
 - have been at least 18 years old when s/he executed the will.
- At least two competent, uninterested people must witness the will.

If you handwrite your will (called a holographic will) you must be sure that you have at least two competent, uninterested people witness the will. Holographic wills that are not properly witnessed are invalid in Washington.

When selecting your witnesses, be sure not to choose anyone who you have designated to receive any property in your will, or anyone who might receive property if your will were declared

invalid. Your witnesses must be people with no interest in your estate. Further, they should sign your will in front of a notary public, and, if possible, sign a separate formal "acknowledgment." The acknowledgement will provide proof that you were of sound mind when you signed your will and that you signed your will voluntarily. An attorney can help you with the forms for acknowledgment or you can call the Law Center's Information line for referrals to self help resources. Finally, it is a good idea to choose people to be your witnesses who you think will outlive you and will be easily located when you die, in case there is any dispute about the validity of your will.

What happens if I move to another state?

Each state has its own rules regarding the creation and validity of wills. However, if you have created a will in Washington that meets Washington's requirements, that will should be recognized as valid and should be followed in the state where you live at the time of your death. Similarly, if you prepared a will in another state under that state's laws and subsequently moved to Washington, the Washington courts should honor your will.

How can I change my will once I have made it?

Your will remains valid as originally signed until it is changed or revoked. Unfortunately, you cannot just cross out something in your will or add a sentence in the margin. Changes must be made formally. There are three ways to accomplish this:

- You can simply physically destroy your will – preferably in front of several other people who you know. This could include tearing it up, burning it, marking through all the text, etc. You should be sure to destroy all of the copies of your will. If you do this, however, you will no longer have a valid will unless and until you create a new one.
- You can write and execute what is known as a "codicil" to your will. A codicil is typically used to make minor additions, modifications, or deletions to your will after you have completed and executed your will. It is like a "p.s." to your will and must be executed with all the same formalities of your original will to be valid (typed, signed in front of appropriate witnesses, etc). To ensure that it is not overlooked when you die, you should be sure to attach any codicils to the back of your original will.
- You can prepare and sign a new will revoking your prior will. This is the preferred method if you intend to make significant changes. It is important that you clearly state in your new will that you are revoking any and all prior wills and any codicils to your original will.

NOTE: If you are in a domestic partnership and you have a pre-existing will that you prepared before you and your partner registered, you must modify the will if you want to change who will receive your property upon your death. For example, if you have a will that gives your home to your sister, Josephine and you subsequently enter into a domestic partnership with Bill, unless you change your will, your home will go to your sister Josephine, not to your partner Bill.

Where should I keep my will?

The original. You should keep the original copy of your will in a very safe place. This could include a fireproof lock box in your house or a safe deposit box at the bank. After you pass away, the safe deposit box can be opened by anyone else to whom you have granted access. Alternatively, under a recent law, you can deposit your will with the County court. Also, if you hire a lawyer to help you prepare your will, your lawyer may be able to store the original copy of your will in his or her safe.

Wherever you choose, be sure to tell one or more of your family members and/or friends where you've kept your will so that it can be quickly and conveniently located after your death.

Copies. You should keep a copy of your will in a different location than your original will. It is good idea to give a copy to the person you have identified in your will as your personal representative. Any copies of your will should include a note stating the location of your original will. You may also want to keep a list of your assets, bank accounts, insurance policies, etc. with any copies of your will. This list will help with the probate process.

Note: You should keep only a very limited number of copies of your will. If you make multiple copies of your will, it can be difficult to keep track of them all. Real confusion could arise if you physically destroy your original will because you want to make a new one, but later someone showed up with a copy of the original will and claimed that it was still valid.

Are there other ways to distribute my property?

Yes. Many people use other legal devices to designate who will receive their property and assets upon their death. The main reason people use these alternatives is to avoid the time and cost of probate. The probate process can be costly and generally takes about a year to complete. The costs of probate come out of the value of your estate. Consequently, many people want to avoid probate so that their property can go directly to their beneficiaries. Additionally, you may receive favorable tax treatment by using one of the options described below. The tax consequences differ for each of these devices, however, so it is important to talk with a lawyer or accountant when considering any of these options. The most common of these methods include the following:

- **TRUSTS**

A trust is an agreement under which money or other assets are held and managed by one person for the benefit of another. A complete discussion of trusts is beyond the scope of this memo; however, you should know that different kinds of trusts can be created to accomplish specific goals. Each kind may vary in the degree of flexibility and control it offers.

One type of trust is a revocable trust. A revocable living trust permits you to transfer your ownership of your assets to the trust, while still maintaining control over those assets during your lifetime. Although the trust is technically the owner of the property, you maintain management and control of the property as the trustee. You can also create

a charitable remainder trust, which would transfer the residue of your estate to a charity of your choice following your death. You could create a trust for your children, designating someone else to manage the trust assets for your children until they are old enough to manage the assets themselves. Some people even create pet trusts to ensure that their beloved dog or cat is cared for after their death.

Trusts do not make sense for everyone, so it is important to talk with an attorney when considering and creating any of these types of trusts.

- **PAY-ON-DEATH BANK ACCOUNTS (A/K/A TOTTEN TRUST)**

A pay-on-death bank account allows you to name one or more "beneficiaries" who will automatically (outside probate) receive all of the money and property in your account when you die. During your life, you retain full control of all assets in the account. At your death, the bank or other institution that holds the account automatically distributes the contents of the account to the designated beneficiaries. Pay-on-death accounts do not provide any relief from estate taxes, if they would otherwise be applicable to you.

- **PAY-ON-DEATH SECURITY ACCOUNTS**

These are similar to pay-on-death bank accounts, except that they apply to securities (e.g., stocks and bonds), rather than cash accounts. Pay-on-death security accounts enable you to designate a person to whom your securities will automatically be transferred upon your death. Ask your securities broker for the appropriate forms to create a pay-on-death security account.

- **LIFE INSURANCE**

Ordinarily the proceeds of your life insurance will be paid directly to the named beneficiary without going through probate.

- **RETIREMENT PLANS**

You may list your partner (or anyone else) as the designated beneficiary for your retirement plan(s). In most cases, the beneficiary can control how quickly he or she receives the benefits of your plan. The beneficiary may elect to receive the proceeds all at once, or may defer payment over time in order to avoid potential tax consequences. You should check with your employer about how to designate a beneficiary and any limitations on how the proceeds of your account may be distributed after you die.

- **JOINT TENANCY WITH RIGHT OF SURVIVORSHIP**

By owning property with your partner as "joint tenants with right of survivorship," you ensure that when one of you dies, the other automatically receives the other's interest in the property. This form of ownership is most common with real property or bank accounts, but can also be applied to just about any personal property. The key is

maintaining a clear written record that you intend to own the property as joint tenants with right of survivorship.

There are, however, numerous “down-sides” to joint tenancy with right of survivorship, so you should consult with an attorney before deciding to use this form of ownership.

Note: You need to be certain that your will is consistent with the designations you’ve made in your non-probate assets. For example, if you’ve named your partner as the recipient of your retirement account and then you subsequently state in your will that you want your retirement account to go to your nephew, the court will enforce the terms of your will and give your retirement benefits to your nephew. If, by comparison, you designate your partner as the beneficiary of your retirement account *after* you have executed your will, then your partner, not your nephew, will receive the proceeds of your retirement account. Whichever designation was made last in time will usually control.

Will my estate be required to pay estate taxes when I die?

Washington’s law regarding estate taxes, also known as “death taxes,” is currently in flux. Similarly, federal law regarding estate taxes is continually changing. If you anticipate that the net value of your estate -- including all of your cash, securities, retirement accounts, personal property, real property, etc. -- may exceed \$1,000,000, you should consult a lawyer and/or a tax accountant to help you address the potential tax issues. There are many different options that may help you save on estate taxes.

Related Legal Voice Publications:

Domestic Partnership Q & A
Placement of Minor Children in case of Death