



Too often, people do not consider the important issues of whether to make a will, what happens if there is no will, and how to create an “advance directive” to guide your end of life and other critical healthcare decisions. This chapter will help you understand these issues and the probate process.

Making a Will

A will is a written document that transfers your property, after your death, to those whom you designate. **If you want to make sure your property will pass to the people you want to receive it, then you should make a will.** If you do not have a will, there are laws that will decide who is entitled to your property after you die. See the “Not Having a Will” section in this chapter.

Under Vermont law, a valid will must meet the following general conditions:

- the **“testator” or person making the will** must be at least **eighteen (18) years of age**;
- the testator must be of **sound mind**;
- the will must be **in writing**;
- the will must be **signed** by the testator or the testator's name is written by another person in the testator's presence and at the testator's express direction;
- the testator's **signature must be witnessed** by two or more credible individuals (“witnesses”) in the presence of the testator and of each other. The witnesses must sign their own names to the will also in the presence of the testator and each other. “Presence” requires that the testator and witnesses can see each other sign.

Wills written in other states may also be recognized as valid wills in Vermont. A valid will does not require you to use an attorney. However, you may wish to consult an attorney to ensure that you create a valid will and that your property will pass according to your desires.

To assure safekeeping, you can deposit your will with the Register of the Probate Division of the Superior Court in the county in which you live for a small fee. Your will is kept by the court in a sealed envelop to guarantee privacy. During your life, you or another person with your valid written orders can retrieve the will from the court.

You may change or cancel your will at any time prior to your death. This may be accomplished by:

- creating another will, a supplement to your will, or another writing that follows the same conditions needed to create a valid will; or
- the testator burning, tearing, canceling, or obliterating the will with the intention to revoking it. It is also acceptable for another person to destroy the will if it is done in the presence of the testator and by his or her express direction.

Keep in mind the importance of **updating your will following marriages, divorces, terminations of relationships, births, adoptions, and deaths.**

Some important material that may be included in your will include:

- Naming a person in the will to carry out the directions in the will and to take care of any estate matters. This person is referred to as **“the executor”**.
- Naming a **guardian for your minor children**, if you have any.
- Expressly and properly indicating the **people who you want to receive your property**. These people are known as **“the beneficiaries”**.
- Properly indicating **what property you wish to go to each beneficiary**.

You have the right to give away real property such as land, referred to as **“devising property,”** and personal property such as money or other personal belongings, referred to as **“a bequest,”** to anyone merely by naming that individual in the will itself. It does not matter what, if any, your personal or familial relationship is to that person.

It is important to note that **surviving spouses have certain rights that cannot be taken away by a will**. When a surviving spouse is named as a beneficiary in a will, the spouse can choose to waive the provisions made for the spouse in the will and instead take one-half (50%) of the deceased’s probate property after creditors are paid.

Additionally, a surviving spouse can receive all household furnishings as long as none of the deceased’s children object. If there is an objection, the probate court will decide the amount of furnishings to award to the surviving spouse. A surviving spouse may also receive a homestead allowance of up to one-hundred and twenty-five thousand dollars (\$125,000), if the deceased owned the house that was used as a dwelling. Further, the probate court may give the surviving spouse a support allowance out of the deceased’s estate.

Unlike a surviving spouse, **children are not legally entitled to inherit under Vermont law against your will’s objection**. Hence, a will that directly states your intent to exclude a child from inheriting will prevent that child from inheriting your property. This is known as **“disinheriting.”** If you fail to disinherit a child in your will and the child is not a named beneficiary, then that child can claim a right to inherit a share of your property as a forgotten (“omitted”) child. Under Vermont law, the omitted child can be born either before or after you make your will. Additionally, all minor children are entitled to an allowance necessary for their support up to the age of eighteen (18). **This support takes priority over creditors.**

Not Having a Will

Vermont law determines how your property will be distributed if you die **“intestate” (without a will)**. Vermont law considers both your real and personal property as part of your estate, and will distribute them without distinction.

When a person dies without a will, the property will pass as follows

- Your surviving spouse will receive all (100%) of your estate, if you have either no surviving children, or all the surviving children are also the children of your surviving spouse.
- If you have at least one surviving child that is not the child of your surviving spouse, then your surviving spouse will receive half (50%) of your estate.
- Any thing not passing to your surviving spouse will go to your surviving children and your predeceased children’s children (your grandchildren).
- If you have no surviving spouse or children, the estate will pass in the following order: (1) to your

surviving parents equally; (2) if you have no surviving parents, then to your surviving siblings and the surviving children of any deceased siblings; (3) if you have no siblings, then to your surviving grandparents; (4) if you have no surviving grandparents, then to your next of kin in equal shares.

- For someone to inherit, they must survive the deceased individual by one hundred and twenty (120) hours.

You should understand that if you do not have a will, your domestic partner has no right to receive any property that is owned exclusively by you at your time of death. This is true regardless of the relationship's sexual orientation. **Partners in a civil union have the same rights as spouses in regards to intestate death.**

Other Forms of Property Distribution

Property can also be transferred after your death by a document or process that does not require a will or to be transferred through probate. This is referred to as property that “passes outside the will.” Some examples of property that might pass outside the will include:

- Property owned together with another person in a “**joint tenancy**” or a “**tenancy by the entirety**” where the deceased's interest in the property passes directly to the surviving joint owner. (See the [Housing and Property Rights chapter of *The Legal Rights of Women in Vermont*](#).)
- Dividends from a life insurance policy that is paid directly to the people named as beneficiaries in the policy.
- A joint bank account.
- A Totten trust – a bank account that is “payable on death” to a named individual (“beneficiary”).

Property that passes outside the will is not considered a part of the “probate estate.” **However, this property might be included in the estate for tax purposes.**

Since the laws of property ownership are complicated, it is recommended that you also have a will. It is important to get good advice when drafting a will and estate plan to prevent unnecessary complications in the future.

Probate Division of the Vermont Superior Court

All property that does not pass directly to others (e.g. jointly owned property, life insurance proceeds) is handled through a legal proceeding in the Probate Division of the Vermont Superior Court.

- The probate proceeding is always started by a person filing a “petition to open an estate” with the proper Probate Division. The petition must be accompanied by a filing fee, a death certificate or other proof of death, and any wills.
- The Probate Division then determines if the deceased (the person who died) left a valid will.
- The Probate Division will then determine whether an “**executor**” has been named in the deceased's will. An executor is an individual or entity such as a bank appointed by the will to administer and distribute the property in the estate according to law.
- If a person does not leave a will, or does not name an executor in the will, the Probate Division will appoint someone to take care of the estate. This appointed person has the same duties as an executor but is called **an administrator**. The surviving spouse or next of kin has thirty (30) days to apply to the Probate Division for appointment as an administrator. After thirty (30) days, a suitable and competent person, including a person to whom the deceased owes money, may be appointed by the Probate Division to be the administrator.

The executor or administrator has many duties and responsibilities. These may include having to:

- determine and notify all interested parties of the various stages of the probate process;
- collect and protect the assets of the estate;
- prepare and file with the probate court an “inventory” or list of the estate assets – it may be necessary to hire a qualified appraiser to establish an items fair market value;
- collect all income and debts, notes, or other claims due the deceased;
- complete any pending lawsuits in which the deceased was involved;
- carry on the business of the deceased;
- pay valid claims of creditors;
- prepare and file all state and federal estate and personal income tax and other taxes;
- sell property if necessary with the probate court’s authorization to raise money to pay claims of creditors as well as taxes and legal fees;
- prepare an “accounting” to the probate court;
- distribute remaining assets to proper individuals or entities according to the probate court’s final decree;
- file a closing report with the probate court upon the completing the distribution of the remaining assets;
- employ an attorney where advisable to assist with the legal management of the estate.

While any legal issues about the estate are being finalized, the probate court may take money from the estate to support the surviving spouse and minor children.

The vast majority of the work involved in settlement of estates is usually completed in nine months. Unusual complications may delay the final settlement of an estate.

When disputes arise, or if there is a question about the proper meaning of a document or the identity of a person, a hearing may be scheduled by the Probate Court. At the hearing, the Court will hear testimony and, after consideration, issue its decision.

Vermont law allows a simplified probate procedure for smaller estates, called the “small estate procedure.” This procedure involves less court supervision and allows the estate to close more quickly. The procedure may save you time and money, but is limited to estates that meet the following criteria:

- the beneficiaries are limited to a surviving spouse, children of any age, or both;
- the deceased’s estate consists of only personal property (no real estate requiring probate to pass title); and
- the value of the estate does not exceed ten-thousand dollars (\$10,000.00).

Additionally, Vermont law allows the title of a motor vehicle to pass directly to a surviving spouse without opening an estate (go through probate court) under certain circumstances:

- when the deceased has no will and the motor vehicle is the primary asset of the deceased’s estate; or
- when the deceased has a will that does not make the vehicle a specific gift to someone else and no other individuals are named on the vehicle’s title. (This direct transfer only applies to up to two (2) vehicles when a deceased has a will)

You will need to pay a small fee to transfer the vehicle’s registration and title into your name.

Advance Directives for Health Care

Vermont law recognizes the fundamental right of an adult to determine the extent of health care the individual receives during periods of incapacity and at the end of life. You may create an **“advance directive” to ensure that your end of life and other critical healthcare decisions will be honored.**

An **advance directive** is a written document, signed by you and two witnesses, that outlines your wishes for medical treatment in the future when you lack capacity to or do not wish to make medical decisions. Many people may think of an advance directive as a “living will” or a “durable power of attorney for healthcare.”

An advance directive is generally executed if:

- it is dated;
- signed by person making the advance directive (“the principal”) or by another individual in the principal's presence at the principal's express direction if the principal is physically unable to do so;
- the principal signs in the presence of two or more witnesses at least eighteen (18) years of age; and
- the witnesses sign the advance directive and affirm that the principal appeared to understand the nature of the document and was free from duress or undue influence at the time the advance directive was signed.

It is important to note that the agent appointed in your advance directive, your spouse, your parent, your adult sibling, your adult child, your adult grandchild, or any beneficiary may not act as witness to your advance directive. Also special requirements apply to principals who are or will be nursing home residents, or who are or will be patients in a hospital.

If you are at least eighteen (18) years old, you may do any of the following in an advance directive:

- appoint one or more agents and an alternative agent who will have authority to make health care decisions for you under the advance directive;
- identify those persons whom you do not want to serve as an agent;
- identify those persons – adults or minors – whom your agent will or will not consult with;
- identify a preferred clinician;
- authorize your agent or health care provider to release medical information to certain people;
- specify the scope of an agent’s authority to make health care decisions for you;
- specify any special circumstance under which the agent will have authority to act or not to act;
- specify the type of health care you desire or do not desired, and any specific treatments you desire or reject when being treated for a particular condition or disability;
- direct which life sustaining treatment may be administered by medical means to you (either when you are or are not pregnant);
- include a provision that allows your agent to authorize or withhold health care over your objection when you lack capacity;
- direct how your remains will be disposed of or appoint an individual to make arrangements for your remains.

The agent you appoint must:

- be an adult at least eighteen (18) years old; and

- have capacity - a basic understanding of the diagnosed condition and the benefits, risks, and alternatives to the proposed health care.

Your health care provider cannot be appointed as your agent. Additionally, anyone who is involved in a residential care facility, a health care facility, or a correctional facility where you live may not be your agent, unless they are related to you by blood, marriage, or adoption.

An appointed agent will have the authority to make health care decisions for you **after your doctor certifies that you lack the capacity to make your own decisions.** This person is obligated to follow your instructions (given by you either orally or in writing in the form) when making decisions on your behalf.

As a **principal**, you may change, suspend, or revoke all or part of your advance directive by:

- executing a new advance directive;
- by signing a statement suspending or revoking all or part of an advance directive;
- by personally informing your clinician – who must immediately record the revocation in your medical record and notify the revoked agent; or
- by burning, tearing, or obliterating the advance directive, or by causing that to be done by another person at your direction and in your presence.

The Vermont Department of Health provides numerous forms to aid you in creating your advance directive. Additionally, the Department of Health has established a free electronic database called the **Vermont Advance Directive Registry** that stores advance directives and makes them accessible to hospitals or other medical service providers. You are not required by law to send an advance directive to the registry. However, registered directives will allow hospitals or other providers to have quick access to these documents in an emergency.

Find the most local and most appropriate agency/organization to help you—go to Vermont Commission on [Women’s Resource Directory—Legal section.](#)

Relevant Laws

Vermont:

Advance Directives For Health Care and Disposition, 18 V.S.A. §9700, et seq.
 Taxation and Finance, 32 V.S.A. §1434 (Probate Court fees and costs)
 Wills & Estates, 14 V.S.A. Chapters 1 – 123
 Vermont Legislative Session Laws 2009-2010, Act 55
 Vermont Department of Health, Advance Directives For Health Care Rules

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