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The Legal Rights of Women in Vermont

Wills, Probate Court & Advanced Directives

Chapter 14

This chapter includes information about:

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.

Wills

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 **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 envelope 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.** Important material that may be included in your will includes:

- 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 $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 18.

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;
- Anything not passing to your surviving spouse will go to your surviving children and 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.
- If you leave no living heir or beneficiary your estate will revert back to the state of Vermont.
- For someone to inherit, they must survive the deceased individual by 120 hours, or 5 days.

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 sexual orientation of the domestic partners in the relationship. 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*.)
- Proceeds 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");
- A pension fund or IRA that is paid to named beneficiaries.

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 people have a will, even if some or most of their property will be transferred by a document or a process listed in this section. It is important to get good legal advice when drafting a will and an estate plan in order to prevent unnecessary complications.

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 30 days to apply to the Probate Division for appointment as an administrator. After 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 and disinterested appraiser to establish an item's 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, and 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. 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; OR the beneficiaries are limited to surviving parent(s) but no spouse or child; and
- 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 $10,000.00.

Additionally, Vermont law allows the title of one or two motor vehicles to pass directly to a surviving spouse without going through probate court when the decedent has not made a specific bequest of the vehicle(s) in the will or the vehicle(s) is (are) titled in the name of one or more persons other than the decedent or the surviving spouse.

Advance Directives for Health Care

Vermont law recognizes the fundamental right of an adult to determine the extent of health care they receive 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 the 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 following individuals may NOT act as witness to your advance directive: the agent appointed in your advance directive, your spouse, your parent, your adult sibling, your adult child, your adult grandchild, or any beneficiary.

Special requirements apply to principals who are or will be nursing home residents, or who are or will be patients in a hospital to ensure these principals are willingly and

voluntarily executing advance directives. Principals in these circumstances must have a signed statement by an ombudsman, patient representative, a recognized clergy member, a licensed attorney, a Probate Court designee, or an individual designated by the hospital. The statement must affirm the principal understands the nature and effect of the advance directive.

If you are at least eighteen (18) years old and have "capacity" (a basic understanding of the diagnosed condition and what it means to appoint someone to make decisions on your behalf), 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;
- direct the type of health care you desire or do not desire, 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, including funeral goods and services or appoint an individual to make arrangements for your remains;
- make, limit, or refuse to make an anatomical gift;
- provide any other direction you desire regarding future health care or personal circumstances

Note, there are restrictions on who you can appoint as your agent. **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, civil union, or adoption. Furthermore, anyone serving the interests of a funeral director, crematory operator, cemetery or procurement organization may not exercise authority over the disposition of your remains, anatomical gifts, or funeral goods or services unless related to you by blood, marriage, civil union, or adoption.

When an advance directive becomes effective:

- when a principal's clinician, after speaking with an interested individual, determines

that the principal lacks capacity and has made reasonable efforts to notify the principal and the principal's agent;
- when the triggering circumstance specified in the advance directive has been met; or
- when the advance directive is executed, if so specified in the directive

Upon determination by the principal's clinician, or upon the request of any "interested individual" (including the principal), the principal must be reexamined to determine whether the principal has regained capacity. If the principal has "capacity", the principal has authority to make their own decisions, even in the event of a disagreement with the agent.

Note: an "interested individual" means the principal's spouse, adult child or grandchild, parent, adult sibling, reciprocal beneficiary, clergy person or any adult who has exhibited care and concern for the principal and who is personally familiar with the principal's values.

Authority and Obligations of an Advanced Directive Agent

An agent must make decisions based upon the specific instructions contained in the advance directive, the principal's applicable additional wishes or the agent's knowledge of the principal's values or beliefs. If the agent cannot determine what the principal would have wanted under the circumstances, the agent must make a decision based on the principal's best interests. The agent must not consider his or her own interests, values or beliefs. An agent who is unable or unwilling to make a decision on the principal's behalf must recuse him or herself and notify any interested parties.

Changing, Suspending or Revoking Your Advance Directive

As a **principal,** you may change, suspend, or revoke all or part of your advance directive by:
- executing a new advance directive;
- signing a statement suspending or revoking all or part of an advance directive;
- personally informing your clinician – who must immediately record the revocation in your medical record; or
- burning, tearing, or obliterating the advance directive, or by causing that to be done by another person at your direction and in your presence.

To the extent possible, the principal must communicate any suspension or revocation to the agent or other interested individuals. A clinician, health care provider, health care facility, or residential care facility who becomes aware of a change must make reasonable efforts to confirm, record and flag the change. An agent or guardian who becomes aware of a change must make reasonable efforts to confirm the change, ensure recordation, and provide notice to interested individuals. If the principal's advance directive has previously been submitted to the registry, any amendments should be submitted as well.

Note: An interested party may file a petition for review in Probate Division of the Superior Court to settle a dispute concerning an advance directive.

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** (VADR) 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
Motor Vehicles, 23 V.S.A.2023 (Title to Motor Vehicles)

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