



*Helping Older Persons With
Legal & Long-Term Care
Problems*

Wills

1. What Is A Will?

A will is a formal document that lets you provide for the distribution of your estate when you die. [\[1\]](#) [\[2\]](#) An estate consists of real property (e.g., land), personal property (e.g., stocks, bank accounts and cars) and intangible property (e.g., claims, interests, and rights) that you own at death that does not pass outside of the probate estate. See question 17.

2. What If I Die Without A Will?

If you have no will, you are said to have died “intestate” and, with certain exceptions, your assets are distributed according to Ohio’s statute of descent and distribution. The Ohio intestate law is complex. For example, depending on the nature of your family, your estate may be distributed entirely to your spouse or may be divided among your spouse and surviving children. If you want to distribute your estate in amounts or to beneficiaries contrary to the Ohio intestacy statute, you must have a will that states your wishes. [\[3\]](#)

3. Why Do I Need A Will?

You need a will if you want to:

- (a) give specific property to specific people;
- (b) make special provisions for certain property or individuals;
- (c) name your executor (the person who will carry out your will);
- (d) provide for charities or individuals outside your immediate family;
- (e) name a guardian for minor children [\[4\]](#);
- (f) disinherit someone; or
- (g) leave an entire estate to a spouse who would receive only a portion of the estate under Ohio’s statute of descent and distribution. See question 2.

4. Who Can Make A Will?

Ohio law permits anyone 18 or older, with sound mind and memory and not under restraint, to make a will. [\[5\]](#) The person making the will is called the “testator”. “Sound mind and memory” means you understand:

- (a) the act of making a will;
- (b) the general extent of your property;
- (c) your family relationship; and
- (d) to whom you are giving property through the will. [\[6\]](#)

“Not under restraint” means you were not defrauded or unduly influenced when you made your will. [\[7\]](#)

5. What Must I Do To Make A Will?

Your will must be in writing. It may be handwritten or typed. You must date and sign the will on the last page in front of two competent witnesses, who see you sign the will and hear you acknowledge that the will is yours. The witnesses must be at least 18 years of age. The witnesses must sign the will and they can also testify that you were of sound mind and memory and not under restraint. If you are unable to sign the will, another person may sign the will for you if you specifically direct the person to do so, and the person signs in your and the witnesses’ presence. [\[8\]](#)

6. Where Should I Keep My Will?

Keep the original will in a safe place where it may be found easily after your death. Leave a copy with the attorney who wrote it for you. Tell your executor where a copy can be found or give a copy to the executor. Wills, deeds to burial lots, and insurance policies left in a safe deposit box may be released to a representative of the decedent. Written permission of the tax commissioner is not required for asset transfers with respect to decedents dying on or after January 1, 2013. [\[9\]](#)

7. What Kind Of Property Can Be Distributed By A Will?

Generally, any land or personal property owned by you at the time of your death can be distributed to beneficiaries by your will. [\[10\]](#) Exceptions are:

- (a) property interests that terminate at death (e.g., life estates);
- (b) survivorship bank accounts [\[12\]](#) or land held jointly with the right of survivorship; [\[11\]](#)
- (c) insurance death benefits made payable to specific beneficiaries; [\[13\]](#)
- (d) payable on death bank accounts [\[14\]](#); and
- (e) transfer on death designation affidavit for real estate. [\[15\]](#)

8. Must The Executor Of An Ohio Will Be An Ohio Resident?

Not always. An out of state executor is allowed if the executor is related by blood or marriage or if the state in which the out of state executor resides permits a non-resident, non-relative to serve as an executor. [\[16\]](#)

9. Can I Disinherit My Spouse Or Children?

If your spouse is omitted from or disagrees with the will, she or he can instead choose to take that part of the estate she or he would have received if you had died without a will. The spouse must do this within five months of the initial appointment of the estate administrator or executor. [\[17\]](#) A child, however, can be disinherited, but this intention should be stated in your will to avoid the conclusion that the disinheritance was an inadvertent omission. [\[18\]](#)

10. Do My Beneficiaries Have Any Rights Before My Death?

No. A will does not take effect until your death. You can change or revoke the will at any time before your death. When you revoke a will, it means that the will has been canceled and is no longer valid. [\[19\]](#)

11. How Can I Change My Will?

You can make additions to your will by signing a “codicil,” with all the formalities of a will. The codicil must be in writing, dated and signed by you and two witnesses. You cannot change a properly executed will by writing revisions into the will, even if you initial and date the changes. Such changes are valid only if they occur before the will is signed and witnessed. If major changes are needed, consider making a new will. [\[20\]](#)
[\[21\]](#)

12. Must A Will Be Presented To Probate Court?

Yes, except in rare cases. A will can legally affect property distribution only if it is filed in probate court. Beneficiaries cannot receive land through a will until the will has gone through probate. Simplified probate procedures called “release from administration”, and “summary release from administration” may be used in small estates if the total value of the estate is \$35,000 or less regardless of heirs or \$100,000 or less if the spouse is the heir and certain criteria are met. [\[22\]](#) [\[23\]](#)

13. What If I Lose, Destroy Or Spoil My Will?

A copy may be valid if it was dated and signed in front of two witnesses and has not been revoked. However, if your will is lost, damaged or destroyed, the best option is to make a new one. [\[24\]](#)

14. How Are Wills Revoked?

A will is revoked by any one of the following events:

- (a) if you, the testator, or someone in your presence and at your request or express written direction, tears, obliterates or destroys the will with the intention of revoking it;
- (b) you make a new, valid will; or
- (c) you make a codicil revoking rather than changing the will.

In addition, if you are divorced, your marriage has been dissolved or annulled or you are separated with a formal separation agreement, any property granted under a will to a former or separated spouse is revoked, unless the will expressly provides otherwise.

[\[25\]](#)

15. Are Verbal Wills Valid?

A validly executed written will cannot be revoked by a subsequent oral will. [\[26\]](#) If you have no written will, a verbal will can be valid with regard to any property you own, except land. Examples of personal property that can be transferred under a verbal will include stocks, bonds, cars, coin collections, jewelry and appliances. A verbal will is valid only if you are dying, know you are dying and say what you want in your will to two competent, disinterested witnesses. The witnesses must put the will in writing and sign the transcription within ten days. The transcription must be filed in probate court within three months after your death. [\[27\]](#)

16. Are Wills From Other States Valid In Ohio?

Yes, but only if the will complied with the laws of the state in which it was made. [\[28\]](#)

17. Can I Avoid Probate?

In most cases, not entirely. Probate is a legal process that transfers your property after your death. However, you can avoid certain property passing through probate by:

- (a) holding property jointly with the right of survivorship; [\[29\]](#)
- (b) establishing *inter vivos* (living) trusts during your lifetime; [\[30\]](#)
- (c) naming beneficiaries to your retirement and investment accounts;
- (d) establishing payable on death bank accounts; [\[31\]](#) and
- (e) creating transfer on death affidavits for your real estate [\[32\]](#) and Bureau of Motor Vehicle titles. [\[33\]](#)

These alternatives should be pursued only after talking with an attorney.

Revised 2015

Pro Seniors' Legal Hotline for Older Ohioans provides free legal information and advice by toll-free telephone to all residents of Ohio age 60 or older. If you have a concern that cannot be resolved over the phone, then the hotline will try to match you with an attorney who will handle your problem at a fee you can afford.

In southwest Ohio, Pro Seniors' staff attorneys and long-term care ombudsmen handle matters that private attorneys do not, such as nursing facility, adult care facility, home care, Medicare, Medicaid, Social Security, protective services, insurance and landlord/tenant problems.

This pamphlet provides general information and not legal advice. The law is complex and changes frequently. Before you apply this information to a particular situation, call Pro Seniors' free Legal Hotline or consult an attorney in elder law.

Copyright © 2015 by:

Pro Seniors, Inc.
7162 Reading Rd.
Suite 1150
Cincinnati, Ohio 45237

Switchboard: 513.345.4160
Clients Toll-free: 800.488.6070
Fax: 513.621.5613
TDD: 513.345.4160

E-mail: proseniors@proseniors.org

Web Site: www.proseniors.org

Endnotes:

[1] [O.R.C. §2107.01](#) (Will Construed)

[2] [O.R.C. §2107.03](#) (Method of Making a Will)

[3] [O.R.C. §2105.06](#) (Descent and Distribution)

[4] [O.R.C. §2111.12](#) (Guardian of Minor)

[5] [O.R.C. §2107.02](#) (Who may Make a Will)

[6] The statutory requirement of "sound mind and memory" is fulfilled by a testatrix's ability to understand at the time the will is executed (1) the nature of the act being performed, (2) the general nature and extent of the property of which disposition is being made, (3) the

identity of those who have natural claims upon her estate, and (4) to appreciate her relation to members of her family. [Doyle v. Schott](#) (Hamilton County 1989), 65 Ohio App.3d 92, 94, 582 N.E.2d 1057, citing *Niemes v. Niemes* (1917), 97 Ohio St. 145, 119 N.E. 503 (the Niemes test). Testamentary capacity is determined as of the date of the execution of the will. Note that testamentary capacity and sanity are not the same. A mentally incompetent person may still have the mental capacity to make a will.

- [7] [In re Estate of Smith](#), 120 Ohio App.3d 480 (Ross County 1997) (In the instant case, the probate court, citing R.C. 2107.02, found that the testator was not legally capable of executing the document offered as her last will and testament because she was under restraint. While not specifically so stating, the court below appears to have engaged in an undue-influence analysis. "Restraint," as used in R.C. 2107.02, includes the concept of "undue influence." 1 Merrick-Rippner, *Probate Law* (5 Ed.1997) 400, Section 26.10. The courts of this state have found undue influence when a testator is restrained from disposing of property in accordance with his own wishes, substituting instead the wishes of another. *Hamilton v. Hector* (1997), 117 Ohio App.3d 816, 691 N.E.2d 745, citing *West v. Henry*, 173 Ohio St. 498, 20 O.O.2d 119, 184 N.E.2d 200. The requisite elements of undue influence are (1) a "susceptible" testator; (2) another's opportunity to exert undue influence on the testator; (3) improper influence exerted or attempted; and (4) a result showing the effect of such influence. [Citations omitted])

- [8] [O.R.C. §2107.03](#) (Method of Making a Will)

- [9] [O.R.C. §5731.39\(F\)\(G\)](#) (Written Consent of Tax Commissioner to Transfer of Assets)

- [10] [O.R.C. §2107.011](#) (Jurisdiction to Probate)

- [11] [O.R.C. §5302.17](#) (Survivorship Deed Form)

- [12] [Wright v. Bloom](#), 69 Ohio St.3d 596 (1994) (We hold that the opening of an account in joint and survivorship form shall, in the absence of fraud, duress, undue influence or lack of mental capacity on the part of the depositor, be conclusive evidence of the depositor's intention to transfer to the survivor the balance remaining in the account at the depositor's death. We also hold that the opening of the account in joint or alternative form without a provision for survivorship shall be conclusive evidence, in the absence of fraud or mistake, of the depositor's intention not to transfer a survivorship interest to the joint party in the balance of funds contributed by the depositor remaining in the account at the depositor's death. Such funds shall belong exclusively to the depositor's estate.)

- [13] [O.R.C. §5731.12](#) (Value of Gross Estate includes Insurance Payable to Estate)

- [14] [O.R.C. §2131.10](#) (Payable on Death Accounts)

- [15] [O.R.C. §5302.22](#) (Transfer on Death Designation Affidavit for Real Estate)

- [16] [O.R.C. §2109.21\(B\)](#) (Residence Qualifications of Fiduciary)

- [17] [O.R.C. §2106.01](#) (Election by Surviving Spouse)

- [18] [O.R.C. §2107.34](#) (Afterborn or Pretermitted Heirs)

- [19] [O.R.C. §2107.33](#) (Revocation of Will)

- [20] [O.R.C. §2107.05](#) (Incorporation by Reference)

- [21] [O.R.C. §2107.084](#) (Revoking or Modifying a Valid Will)
- [22] [O.R.C. §2113.03](#) (Release from Administration)
- [23] [O.R.C. §2113.031](#) (Summary Release from Administration)
- [24] [O.R.C. §2107.26](#) (Lost or Destroyed Wills)
- [25] [O.R.C. §2107.33](#) (Revocation of Will)
- [26] [In re Estate of Mantalis](#) 109 Ohio App.3d 61 (Montgomery County, 1996) (Held that pursuant to R.C. 2107.33(A), a validly executed written will cannot be revoked by a subsequent oral will, even if the oral will has been reduced to writing in compliance with R.C. 2107.60.)
- [27] [O.R.C. §2107.60](#) (Oral Will)
- [28] [O.R.C. §2107.18](#) (Admission of Will to Probate)
- [29] [O.R.C. §5302.17](#) (Survivorship Deed Form)
- [30] [O.R.C. §5301.255](#) (Trust Recording)
- [31] [Wright v. Bloom](#), 69 Ohio St.3d 596 (1994) (We hold that the opening of an account in joint and survivorship form shall, in the absence of fraud, duress, undue influence or lack of mental capacity on the part of the depositor, be conclusive evidence of the depositor's intention to transfer to the survivor the balance remaining in the account at the depositor's death. We also hold that the opening of the account in joint or alternative form without a provision for survivorship shall be conclusive evidence, in the absence of fraud or mistake, of the depositor's intention not to transfer a survivorship interest to the joint party in the balance of funds contributed by the depositor remaining in the account at the depositor's death. Such funds shall belong exclusively to the depositor's estate.)
- [32] [O.R.C. §5302.22](#) (Transfer on Death Designation Affidavit for Real Estate)
- [33] [O.R.C. §4505.10](#) (Certificate of Title Transfer to Transfer-on-Death Beneficiary)