

## Introduction

**You are not required by law to have a will**, but you are highly encouraged to have one to ensure that the property you leave behind upon your death will be distributed according to your wishes. If you decide to have a will, you also need to decide on whether to use a lawyer's services or to do it yourself.

A will allows you to have a say on how your wealth will be distributed after your death. If you want to further design how your wealth will be utilized long after your death, or if your situations are complex (e.g., wealth, debt, family), you should consider a living trust. Unlike wills, living trusts should always be done by lawyers because they always involve technical details.

Laws related to wills differ by state, but for a will to be valid in New Mexico it must be signed in front of two witnesses who then sign the will document as witnesses. Any individual who has reached the age of 18 and is of sound mind can do this at any time after his or her 18th birthday.

## What Will Happen If There Is No Will?

If a New Mexico resident dies and leaves no will, their property is distributed according to laws designed to meet the ends of impartiality. Without a will, who the heirs would be and how they would share the property and assets under the present law are shown in Table 1. This happens after all assets are accounted for and valued, family and personal allowances are satisfied, and all debts are settled, listed by entitlement priority.

## Factors That Increase the Need For a Will

In general, a more complex situation demands an increased need to have a will (and even using a lawyer to write one). These factors include:

1. Huge amount of wealth, including homes, vehicles, and personal business assets.
2. Complex family structure caused by divorces, children from different marriages and relationships, adoption, cohabitation, and separation may affect how you intend to leave your wealth upon your death.
3. Plan to hand down (bequest) wealth to non-family members. You may have non-family members who have been very significant in your life or dear to you, including teachers, schools, universities, uncles and aunts who raised you, and religious organizations.

## Property

There are two basic kinds of property: real property and personal property. Real property consists of land and fixed permanent improvements on land, such as buildings and fences. Personal property includes most of the remaining things, other than land, that people acquire during their lifetimes. Examples of personal property are furniture, vehicles, electronics, home appliances, and personal effects.

Who gets what depends greatly on whether a particular property is a community or separate property, especially when the deceased dies without

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**Table 1. How Property Is Distributed Without a Will**

<b>Single Individual (including widowed, divorced, and unmarried)</b>	
With children or children's descendants	All to children in equal shares or to descendants by their representation
Without descendant but with parent	To surviving parents or parent
Without descendants or parent but with sibling	To siblings in equal shares. If any are deceased, then to lineal descendants of siblings.
Without descendants, parent, sibling, or descendant of sibling	One-half to maternal grandparent or grandparents, then to heirs of those grandparents. One-half to paternal grandparent or grandparents, then to heirs of those grandparents.
None of the above	All to the state of New Mexico
<b>Married Individual</b>	
Without children	All to spouse
With children	Community property—all to spouse Separate property—one-fourth to spouse and three-fourths to children in equal shares

a will. Community property is anything you or your spouse purchased or accumulated while you were married. Separate property is a property:

- owned before marriage;
- received as inheritance or gifts to one spouse, including those received during marriage; and
- purchased (and paid for) as a separate property even during marriage.

Parallel definitions apply to community and separate debts.

### **Avoiding Probate**

Probate is the legal process of gathering a deceased person's assets, valuing the assets, paying the deceased person's debts, and distributing one's wealth after one's death according to a will or the governing laws of inheritance, usually state law. People like to avoid the probate processes because a simple probate process, which takes place in an informal probate court, takes four to six months to be completed, costs a few hundred dollars, and becomes a publicly available record. The following ways can be used to avoid probate.

1. **Pay on death (POD) beneficiary:** POD designations provide for successor ownership of a specific account only upon the death of the original owner. The recipient has no rights of ownership during the owner's lifetime. The owner can change or terminate the designation at any time. POD works for bank accounts (checking,

savings, CD), retirement accounts, and investment accounts. It is important to note that assets transferred via POD are taxed like additional income, with the exception of Roth accounts.

2. **Transfer on death (TOD) deeds:** A TOD deed provides a designation of ownership similar to POD only upon the death of the account owner. This can be done for real property (home, land) and cars at district court with a \$25 processing fee (in 2012).

The use of POD or TOD designations can be appropriate estate transfer tools to avoid probate. Unlike joint accounts, they do not grant ownership to others during the original owner's life, nor do they become a part of the probate estate on death. They allow the owner to keep accounts that may be needed during an extended illness and allow easy change of the beneficiary to adjust to changing times. Should bankruptcy or a calamity befall the beneficiary, creditors of the beneficiary have no rights to the POD and TOD accounts during the owner's lifetime.

3. **Joint accounts:** If your real property, vehicles, and bank accounts have your beneficiaries' names as co-owners, the assets will be shared by the living beneficiaries. Putting your beneficiaries' names in the title is easy to do, but there are disadvantages:

- a. Since the beneficiaries are co-owners of the assets, their creditors can make a claim against the assets.

- b. For Medicaid planning purposes, giving away your portion of the house may affect your Medicaid eligibility.
- c. If a beneficiary (e.g., child) gets divorced, the beneficiary's ex-spouse can claim a portion of the asset.
- d. It is not easy to revoke the rights of the other co-owners. If you plan to transact the assets (e.g., sell, borrow against the asset) or take a beneficiary's name out, you need to have the beneficiaries' approvals.

4. **Living trusts:** Compared to a probate process with or without wills, living trusts do not become public record, are more expensive, and are highly technical such that they should be handled only by lawyers. A living trust is a document created in a will or by a separate instrument, and it manages property held by it for a specific purpose and for one or more specific beneficiaries. Living trusts are discussed in NMSU's Cooperative Extension Service Guide G-256, *Comparison of Living Trusts and Wills* ([http://aces.nmsu.edu/pubs/\\_g/G256.pdf](http://aces.nmsu.edu/pubs/_g/G256.pdf)).

5. **Gifting:** Transferring assets while you are alive means that you don't have assets to be transferred via a will or living trust. For tax year 2013, the gift and estate tax exemption is \$5.25 million (\$10.5 million for married), while gifts to your spouse are not subjected to the gift tax so long as your spouse is a U.S. citizen. A non-citizen spouse can receive up to \$143,000 tax free per year (2013). New Mexico is not one of the states that impose state estate tax or inheritance tax.

Having many beneficiaries for one asset may not be the best thing to do because beneficiaries may arrive at a stalemate on how to best proceed with a shared asset. For instance, a house that was successfully transferred to beneficiaries may be left untouched for years because beneficiaries cannot come to a consensus on whether to sell, rent, or sell the house to one of the beneficiaries in order to preserve memories associated with the house.

**Important:** Assets that are transferred through these probate-avoiding methods will not be distributed according to your will. In other words, they will not be part of your probate estate if you have to go through probate.

### Other Important Notes on Wills

- Whether or not you have a will:
  - There is a family allowance of \$30,000 and a spousal personal property allowance of \$15,000, all of which have priority over debts owed by the deceased.
  - The priorities of a probate court:
    1. The \$30,000 family and \$15,000 personal property exception mentioned previously, then
    2. Debt and payment obligations of the decedent, and finally
    3. The heirs of the estate.
- If there is no will:
  - The spouse will automatically inherit everything because New Mexico is a community property state, and
  - In case of no surviving spouse, the estates are inherited equally by children.
- If an heir or a spouse dies within 120 hours (5 days) of the deceased estate owner, they are treated as to have died simultaneously, which may pose serious ramifications with community or surviving heir questions.
- The state only gets your property if you have no living relatives.
- If you have a will, you are supposed to make others aware of it and its location. You should share this information with close ones and note it in your Letter of Instructions, which is explained in Guide G-246, *Information To Help Your Heirs* ([http://aces.nmsu.edu/pubs/\\_g/g-246.pdf](http://aces.nmsu.edu/pubs/_g/g-246.pdf)).

### **Final Caution**

Laws governing distribution of property and tax are changed from time to time by the legislature. To be well informed, keep up with any changes that are made through your attorney and accountant. Guide G-256, *Comparison of Living Trusts and Wills* ([http://aces.nmsu.edu/pubs/\\_g/G256.pdf](http://aces.nmsu.edu/pubs/_g/G256.pdf)), will help you understand these estate-planning alternatives. Other issues, such as Medicaid planning, life insurance, and capital gains tax, are beyond the guide's scope.

The information given here is general and may not be applicable to you. For solutions to specific estate and tax issues, seek the advice of competent legal and tax professionals. You may contact these organizations for further information and specific questions:

- National Academy of Elder Law Attorneys for referral to lawyers providing services in these areas, 520-881-4005
  - State Bar of New Mexico for free legal advice from experienced attorneys for New Mexico residents aged 55 years and older
- New Mexico Bar Association, 1-800-876-6227
  - American College of Trust and Estate Counsel, 312-398-1888



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