



# Do You Need a Will?

Guide G-255

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## What will happen if there is no will?

The property of a deceased New Mexico resident who leaves no will 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 under the present law, are shown in table 1.

**Table 1. How property is distributed without a will.**

Single Individual (including widowed, divorced and unmarried)	
With children or children's descendants	All to children in equal shares or to their descendants by 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 the heirs of those grandparents.
None of the above	All to the state of New Mexico

  

Married Individual	
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

## What is meant by property and estates?

From biblical times, rules have been adopted to protect people and their rights to property ownership. These rules have evolved into laws varying by state with specific provisions for the property rights of people according to their position in the family—husbands, wives, widows, adults, children, minors and incompetent dependents.

There are two basic kinds of property: real property (real estate) 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 aggregation, other than land, that people acquire during their lifetimes.

The property someone owns at the time of death is referred to as an "estate." However, the nature of the interest one has in property while living determines whether that property becomes part of the "probate estate." When a New Mexico resident dies, the probate estate is administered under the direction of either the probate or the district court. The probate court handles only informal proceedings.

If someone dies without leaving a will, the person is said to die **intestate**, and the estate is divided according to New Mexico law. If someone leaves a valid will at the time of death, the person is said to die **testate**, and the estate is divided according to the will. Allowances for spouse and minor children, administration expenses, funeral bills, state and federal inheritance taxes and debts are first taken from the estate.

## **How does title to property affect the transfer of property at the time of death?**

### **Community property**

Community property, subject to certain limited exceptions such as gifts and inheritance, is property acquired during marriage and belongs to both husband and wife. The deceased's one-half goes to the probate estate to be disposed of by the will. With no will, the property is distributed according to the laws of New Mexico.

If someone owns property solely in his or her name, it becomes part of the probate estate at the time of death. If the deceased holds property in co-ownership other than community property, the determination of whether the ownership will become part of the probate estate is governed by the type of co-ownership that existed before death.

### **Tenants in common**

If two or more co-owners who are unmarried to each other hold title to property, they may own it as tenants-in-common. When one dies the deceased's share of the property becomes part of the probate estate of that owner.

### **Joint tenants**

If two or more co-owners hold title to property as joint tenants, at the death of one owner the surviving owners acquire the deceased owner's interest in the property. Nothing passes to the deceased owner's probate estate. However, unless the other joint owner is the deceased's spouse, the value of the interest is taxable in the deceased's taxable estate. There may be other disadvantages to joint tenancy ownership. In some instances where the consequences of joint ownership are not considered in a will, a disclaimer could immediately be executed by the surviving joint owners to give effect to the distribution under the will.

### **General considerations**

The Economic Growth and Tax Relief Reconciliation Act of 2001 (2001 Tax Act) provides a tax on all property transfer at death subject to equivalent tax exemptions. It also limits the tax basis benefits to the surviving spouse after 2009.

While community property generally must be probated to transfer ownership to the surviving spouse, joint tenancy property between spouses does not require probate to transfer community property ownership. Without a contrary written intention, joint tenancy property among spouses in New Mexico is community property. A certified copy of the death certificate of the deceased joint spouse owner must be recorded in the appropriate county clerk's office to complete the transfer.

Before placing ownership of family property in joint tenancy, it is advisable to first discuss the consequences of doing so with both tax and legal advisers. Never transfer property to joint tenancy with someone other than the spouse without consulting legal and tax advisers. There are tax consequences and significant risks. Also, the property will not be available for gifts in a will.

### **What if the home is the only probate estate?**

Where the family home is valued at less than \$100,000 by the county assessor and a will exists transferring the home to the surviving spouse, no probate of the first deceased spouse's estate is necessary. A sworn statement of the survivor, called an "affidavit," meeting the requirements of the Probate Code may be recorded in the county where the home is located no earlier than 180 days from the date of death. This affidavit has the effect of transferring the home solely to the surviving spouse.

### **How can I transfer bank and brokerage accounts?**

Bank and brokerage accounts owned solely by the deceased become part of the probate estate. Accounts held jointly in the names of more than one person avoid probate by passing to the survivor upon an owner's death.

New Mexico allows an individual to specify who should receive specific bank accounts upon the death of the account owner. This right to designate is not to be confused with joint tenancy ownership. Similar to insurance beneficiaries, most banks and credit unions permit "Paid on Death" (POD) designations, which 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.

As with banks, many investment companies offer “Transfer on Death” (TOD) for brokerage accounts. A TOD provides a designation of ownership similar to POD only upon the death of the account owner.

Many grandparents prefer to create accounts earmarked for grandchildren without providing immediate ownership and management rights to these accounts. Often grandparents can accomplish this objective by completing a POD or TOD designation. The grandchild does not own the account and, if the grandchild develops habits unsatisfactory to the grandparent, the transfer can be revoked.

Accommodation signatures are permitted by some banks. A nonaccount owner signs the account’s signature card as an accommodation to the owner. Just as an owner, the accommodation party may make withdrawals. Those withdrawals then can presumably be used for such purposes as payment of the owner’s routine bills upon illness. Great care must be taken when selecting a trustworthy accommodation party.

The use of POD or TOD designations can be appropriate estate transfer vehicles to avoid probate. They grant no ownership to another nor 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 POD and TOD accounts during the owner’s lifetime.

### **What is a transfer on death deed?**

An individual may designate a subsequent recipient of New Mexico real property through a Transfer on Death Deed (TODD). A TODD gives no rights to the beneficiary during the owner’s lifetime. It may be revoked or changed without involving the beneficiary. By recording a certified copy of the death certificate in the county clerk’s office where the property exists, the title changes to the beneficiary without a probate.

### **What if I have a safety deposit box?**

A safety deposit box held in joint ownership can be opened by the survivor. It also may be opened by someone authorized on the box’s signature card. In the absence of such individuals, the box may be opened by the personal representative of an estate.

When opened by an individual searching for a will, an inventory should be made of the contents. The bank usually allows removal of:

- any writing purporting to be a will of the decedent;
- any writing purporting to be a deed to a burial plot or to give burial instructions; and
- any document purporting to be an insurance policy on the life of the decedent to the beneficiary named in the policy.

### **Is life insurance part of a probate estate?**

Life insurance may name an individual or one’s estate as the beneficiary of life insurance. In the later case, it becomes a part of the probate estate upon death. Such designation can become an important part of any estate plan that has trusts for minor children. If insurance proceeds pass to a minor, the minor has immediate access to the money at age 18, instead of an older age customary in wills. Depending upon the tax bracket of the probate estate, insurance may cause an estate to be taxed at a much higher rate. If the spouse becomes owner of the policy before death, proceeds may not become part of either the taxable or the probate estate. In nontaxable estates, spousal ownership often is not important.

### **Trust**

Trusts are discussed in NMSU’s Cooperative Extension Service Guide G-256, “Comparison of Living Trusts and Wills.” A trust is a document created in a will or by a separate instrument. It will manage property held by it for a specific purpose and for one or more specific beneficiaries. Upon the trust’s termination (often the maker’s death), property held by the trust passes as nonprobate property to the final beneficiary.

### **How do my family’s needs determine my course of action?**

Although the law provides for the transfer of property in intestate estates, a person can make other distribution of property through a will. Each family has its own challenges and situations that must be considered when planning for the final disposal of property. Examples include:

- A child already may have received a part of his or her inheritance.
- A child may have made special sacrifices to help parents.
- A child may be a minor or handicapped, requiring special provisions made for health care and education.
- A family business may not involve all members of the family, yet must be continued after death.
- For families with special problems regarding any members' welfare or security, allowances may be made for property disposal in ways that promote the whole family's welfare and happiness.

### **A will provides a means to:**

- Have one's wishes executed as to distribution of the estate;
- Develop understanding of the family's financial situation among heirs when an estate is settled;
- Possibly save on the estate taxes and expenses of probate proceedings;
- Accomplish charitable acts;
- Name the personal representative of choice and make that job easier and simpler;
- Nominate a guardian for minor children; and
- Create a trust that can protect children or incompetent or ill members of the family.

### **Who may make a will?**

Any individual who has reached the age of 18 and is of sound mind.

### **When should a will be made?**

At any time after a person's 18<sup>th</sup> birthday, but while the individual is in good mental health, a person should make a will and keep it up to date.

### **Steps in making a will:**

1. Record all your property and list all family members. There is no need to itemize things like basic household furnishings and clothing.
2. Check ownership to all assets, including real estate, bank and investment accounts, promissory notes and individually owned stocks and bonds to determine if they are owned solely or jointly and if any have POD or TOD designations. Check beneficiary clauses on Individual

Retirement Accounts, annuities, retirement accounts and life insurance policies. Give the information to your legal and tax advisers.

3. Decide what distribution of property best serves your intent. For instance, the will of a single or married person with no children may be simple. It names a personal representative and turns all property over to spouse, parents or siblings. A person with children may want to designate the disposal of specific property in detail. For handicapped children, a special needs trust may be set up.
4. Seek legal and tax advice from a professional.
5. Select a personal representative. A person who knows and understands the family situation will be most likely to take care of the best interest of all concerned. Some banks can be named personal representative.
6. A will in New Mexico must be in writing to be legal, and it must be signed by you.
7. Two people who do not benefit by the terms of the will should be selected as witnesses to the will. They must sign at the same time you sign your will.
8. Keep the will up to date. Examine it at least once a year. Family situations and property holdings change from time to time, and the will should be adjusted to best meet the new circumstances. Copies are easy to make and mark on. Except to revoke the will, do not make any changes on the original.
9. An amendment called a "codicil" may be added to change or make additions to a will. It also must be in writing, signed and witnessed.

### **What makes a will, or certain parts of it, invalid?**

A valid will executed and dated after the one in question.

Lack of enough witnesses or failure of witnesses to sign the will within the strict requirements of New Mexico law.

Tearing, burning, canceling or obliterating all or any part of the will by the testator or another under his or her direction, with the intention of revoking.

Additions or revisions without proper signatures and witnesses.

A subsequent divorce or remarriage.

If a child is not named in the will, that child receives the share to which the child would have been entitled if no will had been made. The same may be true for an omitted spouse who was married after the execution of the will.

## What if I make a gift now?

Property transfer without a fair payment is considered a “gift” for the purpose of taxation. Gifts to spouses and gifts to others of not more than \$11,000 are not taxed. Gifts may require appraisals and the filing of a gift tax return. Gifts greater than \$1 million are taxed at a higher rate than an identical transfer at death. Unless the gift is cash or some personal property, the recipient will need your tax basis information. Thus, see a tax adviser before making the gift. People, especially last surviving parents, sometimes transfer property directly to their children. While this technique might avoid probate, it may cost the child a large capital gains tax if the property is later sold by the child. In estates of less than the amount of the estate tax equivalent exemption, careful thought should be given to making such gifts. Health needs and expensive medical care become issues for many senior citizens. Questions related to Medicaid planning are beyond the scope of this article but also are very important.

## How much of my estate is federally taxable?

The 2001 Tax Act imposes no tax on outright transfers to spouses. In addition to the exemption for spouses, there is an estate tax credit giving an equivalent exemption. The exemption and maximum tax rate change each year until 2010, when the tax is repealed. However, the tax returns in 2011. Estate tax planning is important when the combined fair market value of a married couple’s assets exceeds the tax credit. Table 2 summarizes the rate schedule until 2009.

**Table 2. Estate/gift tax maximum rates.**

Calendar Year	Maximum Rate	Estate Tax Credit
2002	50%	\$1,000,000
2003	49%	\$1,000,000
2004	48%	\$1,500,000
2005	47%	\$1,500,000
2006	46%	\$2,000,000
2007, 2008	45%	\$2,000,000
2009	45%	\$3,500,000

The 2001 Tax Act did not repeal the tax on gifts. The gift tax credit increased to \$1 million in 2002. It has no further increase, although the maximum gift tax rate will drop to 35 percent in 2010. For non-U.S. citizens or noncitizen spouses, it is important to consult a tax adviser.

## Who will settle my estate?

In New Mexico, people who are not disqualified have priority for appointment in the following order:

1. The person named in the will.
2. The surviving spouse who also is named in the will to receive the property.
3. The other recipients in the will.
4. Other heirs of the decedent.
5. Any interested person, which may include creditors.

## Who will raise my children?

The distinction between “guardian” and “conservator” is important. A “guardian” has authority over the person of the individual and a “conservator” controls the property. Both require court appointment. If both parents die prematurely, who will take care of the children? The last surviving parent may nominate in a will a guardian over any minor children and place all property in trust for the children. Any child 14 years old or older may object to a guardian’s appointment. However, the objection of a minor will not necessarily prevent the appointment. The court will consider the best interest of the child first. In doing so, the parents’ designation of a guardian will be given strong consideration.

Children who have experienced the traumatic loss of both parents often face the additional trauma of a custody battle among grandparents, aunts and uncles. Accordingly, it is imperative that parents provide for a guardian of their children. Such appointment also ensures that children will be raised by people who have similar religious and philosophical backgrounds, as well as appropriate moral and character values.

### **How long (and how much) will it take to settle my estate?**

It is impossible to estimate the length of time or the cost that will be involved in settling an estate. Time and cost are both functions of the estate's composition claims against the estate and the estate's inheritors. Usually, any informal probate not requiring a federal estate tax return will last four to six months. If a will exists, the estate may be probated informally; otherwise, a formal, more costly probate is necessary. There usually will be no inconvenience to the surviving spouse or children. If a federal tax return must be filed, most of the estate can be distributed at the time of filing, usually nine months from the date of death. The IRS then has nine months to examine this tax return.

### **What should I consider in selecting a personal representative, trustee, guardian or conservator?**

Although a personal representative typically is thought of as a short-term liquidator, and a trustee, guardian and conservator are thought of as long-term managers, the characteristics of all but the guardian are basically the same: objective business ability and, preferably, some experience with handling or investing the property of others. A guardian fills the role of a substitute parent. There is no restriction on state of residence of a person appointed as guardian, conservator, trustee or personal representative.

### **What about burial instructions and anatomical gift provisions?**

Because a will is not ordinarily probated until some time after a person's death, it is not a satisfactory place to deal with funeral instructions and anatomical gifts. A letter to one's family, religious leader or other person of choice is an effective method for dealing with funeral instructions. Anyone with a New Mexico driver's license will have the opportunity to make anatomical gifts.

A request for cremation must be unconditional and, if possible, made clear to those individuals who would be called first upon the individual's death. Someone will have to sign a cremation authorization after death.

### **Do I need a power of attorney?**

Although mental incompetence is regularly thought of in connection with the elderly, it is not confined to that group. It arises at any age, caused by illness, medication or accidental injury. Most often, it arrives without warning.

Whether an individual is temporarily or permanently incompetent, many decisions must be addressed by those who are personally interested in that person. To alleviate many foreseeable difficulties, a person may elect now to give a power of attorney to another who serves as an agent when the need arises. The power of attorney may be limited to certain specific duties or may be very broad. It may contain personal, business and health care authority. It may be effective immediately or spring into life upon the occurrence of a certain event.

In many instances, powers of attorney serve as useful and inexpensive alternatives to expensive guardianships and conservatorships. It is important to note that powers of attorney that do not contain appropriate wording to be "durable" may not be useful during a period of incompetence. Even correctly drawn, old powers of attorney may be considered "stale" when the necessity for use occurs. Periodic written renewal before a notary public is advisable. Powers of attorney are not effective for land, unless the power of attorney is recorded in the county clerk's office where the land is located. Although powers of attorney prepared in other states may be legally sufficient, one should review those powers of attorney with a New Mexico attorney.

## What is a custodial trust?

The Uniform Custodial Trust Act (CTA) permits another form of trust. Under the CTA, a person may not be both title holder of the trust and beneficiary of the trust at the same time. When the CTA trust is established, it may have a line of succession so that when the first beneficiary dies or relinquishes rights to the trust in writing, the next beneficiary receives the interest of the fund. Also, the CTA trust may be designated to terminate upon a future event.

A CTA trust that is created with multiple beneficiaries is considered to be a separate trust with an equal undivided interest for each beneficiary. Trusts that are established for the benefit of a husband and wife are assumed to have a right of survivorship. A trust with multiple beneficiaries other than husband and wife must be specifically set up with a right of survivorship if one is desired. A right of survivorship is not presumed.

When the CTA trust is established, a custodian is designated. The custodian is the person or organization that retains the title until the trust ends.

If the beneficiary is not incapacitated, then the custodian must follow the directions of the beneficiary with regard to control, management, investment and retention of the trust property. The custodian is required to collect, hold, manage and invest the property in trust as well as keep records of all the transactions, including all necessary tax records. The custodian's records should be available to the beneficiary at all times. In exchange for these services, the custodian is entitled to repayment of related expenses and reasonable compensation.

## Advance directives

If at life's end an individual desires life support to be withdrawn, it must be accomplished with an advance directive complying with New Mexico law. This law, however, is more potent. It permits not only future death decisions but also future health care decisions, when a person is unable to express his or her wishes (even when the condition is not life ending). The advance directive must be witnessed in the same manner as a will is witnessed in New Mexico. Although the term "living will" misidentifies this document, such a name does not invalidate its use so long as it complies with New Mexico's law as an advance directive.

Community-based organizations and medical practitioners often have printed forms available for completion. It is important to note, unlike wills, that an advance directive signed in or valid in another state might not be valid in New Mexico and vice versa.

## 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, will help you understand these estate planning alternatives. Other issues, such as Medicaid planning 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 call the New Mexico Bar Association at 1(800) 876-6227, the American College of Trust and Estate Counsel at (312) 398-1888 and the National Academy of Elder Law Attorneys at (520) 881-4005 for referral to lawyers providing services in these areas.

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