

Example of a Simple Will, With Comments

LAST WILL AND TESTAMENT OF _____

I, [WILL-MAKER'S NAME], of [WILL-MAKER'S ADDRESS], revoke all Wills and Codicils previously made by me, and declare this to be my Last Will and Testament.

Comment [DLM1]: There is nothing magic about the name. More and more, attorneys are simply calling these documents my "Will."

Comment [DLM2]: Typically a new Will revokes (or replaces) a prior Will. If you want to amend an existing Will, typically you use a codicil rather than a new Will.

[Editorial Notes: O.C.G.A. (the Official Code of Georgia Annotated) § 53-4-3 provides: "No particular form is necessary to constitute a will. To determine whether an instrument is a will, the test is the intention of the maker to be gathered from the whole instrument, read in light of the surrounding circumstances. If the intention is to convey a present interest, though the possession is postponed until after death, the instrument is not a will. If the intention is to convey an interest accruing and having effect only at death, the instrument is a will." The rule is the same in Tennessee.]

[Editorial Notes: O.C.G.A. § 53-4-40 provides: A will may be changed or revoked by the testator at any time prior to the testator's death. Section 53-4-43 provides: An express revocation may be effected by a subsequent will or other written instrument that is executed, subscribed, and attested with the same formality as required for a will.]

[Editorial Notes: O.C.G.A. § 53-4-10(a) provides: Every individual 14 years of age or older may make a will, unless laboring under some legal disability arising either from a want of capacity or a want of perfect liberty of action.]

ARTICLE I.

IDENTITY OF TESTATOR'S FAMILY

I have [GENERAL DESCRIPTION OF SPOUSE, CHILDREN OR CLOSE LIVING RELATIVES], now living, whose names and addresses are _____.

Comment [DLM3]: The primary purpose for this section is to show that the Will-maker knows who the natural objects of his/her bounty are.

I have no children and no spouse. All references in this Will to [E.G., "MY CHILDREN"] shall mean the persons referenced in this Article I.

[Editorial Notes: Traditionally, capacity to make a Will is measured by evaluating the Will-maker's ability to understand the process, state values and designate how property will be distributed at death. The traditional rule is that the Will-maker must: (1) understand the nature of the act (e.g., it's a Will); (2) understand the nature of the property to be distributed (e.g., my home); (3) understand who the natural objects of his/her bounty are (e.g., spouse, children, closest living relative); and (4) be capable of expressing an intelligible distribution scheme. See *Redfern, Wills and Administration in Georgia, Sixth Edition § 4-2 (2000)*. O.C.G.A. § 53-4-11 provides:

- (a) Testamentary capacity exists when the testator has a decided and rational desire as to the disposition of property.
- (b) An incapacity to contract may coexist with the capacity to make a will.
- (c) An insane individual generally may not make a will except during a lucid interval. A monomaniac may make a will if the will is in no way connected with the monomania. In all such cases, it must appear that the will expresses the wishes of the testator unbiased by the insanity or monomania with which the testator is affected.
- (d) Neither advancing age nor weakness of intellect nor eccentricity of habit or thought is inconsistent with the capacity to make a will.]

¹ In this document, the person who is making or executing the Will is referred to as the Will-maker.

[Editorial Notes: It is especially important to identify children if one is being excluded. Otherwise, the distribution scheme in the Will may be challenged. For example, O.C.G.A. § 53-4-58 provides:

If at the time of execution of the will the testator fails to provide in the will for a living child of the testator solely because the testator believes the child to be dead, the child is entitled to receive a share in the estate as follows:

- (1) If the testator had no other child living at the time the will was executed, an omitted child receives a share equal in value to that which the child would have received had the testator died intestate but only to the extent that any provision in the will to or for the benefit of the surviving parent of the omitted child is not thereby reduced; or
- (2) If the will contains testamentary gifts to one or more other children of the testator, an omitted child is entitled to receive the share of the estate that the child would have received had the testator included all omitted children with the children to whom testamentary gifts were made under the will and had given an equal share to each child. To the extent feasible, the interest granted an omitted child must be of the same character, whether legal or equitable, present or future, as that left to the testator's other children under the will. In satisfying the share for the omitted child, the shares of the other children shall abate ratably, preserving to the maximum extent possible the testamentary plan adopted by the testator.]

ARTICLE II.

EXTENT OF DISPOSITION OF PROPERTY

It is my intention by this Will to dispose of all of the property which I may own, which is subject to disposition by my Last Will and Testament.

[Editorial Notes: Often, statements of intention are helpful so long as they are short, clear and are not contradictory (Use the K.I.S.S. principle). O.C.G.A. § 53-4-55 provides: In the construction of all wills, the court shall seek diligently for the intention of the testator and shall give effect to such intention as far as it may be consistent with the rules of law. Provided the proof of intention is clear and convincing, the court may transpose sentences or clauses, change conjunctions, and supply or delete words in cases in which a sentence or clause as it stands is unintelligible or inoperative in context.]

ARTICLE III.

TANGIBLE PERSONAL PROPERTY AND REAL PROPERTY

I give all real and personal property that I own at my death, including but not limited to any personal effects, household furniture and furnishings, automobiles, stocks, bank account monies, insurance proceeds, any other account monies, books, pictures, jewelry, art objects, homes, manufactured homes, hobby equipment and collections, and clothing, to **[NAMES OF, OR CLASSES OF, PERSONS WHO GET YOUR STUFF]** who are living on the date of my death in shares of substantially equal value to each of them and in such a manner as they may agree. **If the [PERSONS NAMED ABOVE] do not agree²,** then all of my personal and real property shall be distributed to the **[PERSONS NAMED ABOVE]** in such a manner as my Personal Representative may determine, but in shares of substantially equal value to each of them. **If [PERSONS NAMED ABOVE] fails to survive me,** then all my real and personal

Comment [DLM4]: This is one of many ways of disposing of property. An alternative might be to give specific items to specific persons.

Comment [DLM5]: Typically it is a good idea to include a dispute resolution mechanism.

Comment [DLM6]: It's a good idea to think about where your property will go if your intended beneficiary dies before you do.

² A dispute resolution procedure is only necessary where you leave your stuff to more than one person under circumstances where there could be dispute over who gets what. This is unlikely to occur with an equal division of cash. It is, however, very possible with collections and other items of value or sentiment.

property shall be bequeathed to the survivor(s) of **[PERSONS NAMED ABOVE]**, or if there are none, then said property shall become a part of my residuary estate.

[Editorial Notes: It is important to think about whether you want your property to pass to the heirs of your beneficiaries if you out-live your heirs because Georgia law will make your decision for you if you do not make specific provision in your will. The general rule is that an absolute gift goes to the beneficiary's heir (e.g., if you make an absolute gift to your son, and your son dies before you do, then the gift goes to his spouse and children, or whoever he designated in his Will). O.C.G.A. § 53-4-64 provides:

- (a) If a beneficiary is dead when the will is executed or otherwise dies before the testator, but has any descendants living at the death of the testator, the testamentary gift, if absolute and without remainder or limitation, shall not lapse but shall vest in the descendants of the beneficiary in the same proportions as if inherited directly from the deceased beneficiary under the intestacy laws of this state.
- (b) The provisions of subsection (a) of this Code section shall also apply to a testamentary gift to a class unless there appears a clear intent to the contrary.
- (c) If a beneficiary is treated as having predeceased the testator due to a divorce or annulment, as provided in Code Section 53-4-49, or due to the beneficiary being responsible for the death of the testator, as provided in Code Section 53-1-5, the provisions of subsection (a) of this Code section shall apply only to vest the testamentary gift in descendants of the beneficiary who are also descendants of the testator.]

[Editorial Notes: Gifts of specific property can be dangerous unless you still have the property at the time of death. For example, "all of my XYZ stock to my son John" is an invalid gift if you do not own the XYZ stock when you die. A better way of providing for John might be to include an alternative share of the residuary estate if the stock is no longer owned, or to include a statement regarding the value of the stock and make a bequest of that amount of money if the stock is no longer in the estate. Regarding this issue, O.C.G.A. § 53-4-66 provides: Except as provided in Code Section 53-4-67, a specific testamentary gift is adeemed or destroyed, wholly or in part, when the testator for any reason does not own the subject of such gift at death. – Section 53-4-67 goes on to provide:

- (a) If the testator exchanges property which is the subject of a specific testamentary gift for other property of like character, or merely changes the investment of a fund so given, the testator's intention shall be deemed to be to substitute the one for the other, and the testamentary gift shall not fail.
- (b) If, within six months prior to the testator's death, property which is the subject of a specific testamentary gift is lost, stolen, or destroyed, and if such loss, theft, or destruction is covered, wholly or in part, by insurance, the specific beneficiary has the right to any proceeds of such insurance that are unpaid at the testator's death or, if any such proceeds have been paid prior to the testator's death, to a pecuniary gift equal to the amount of the proceeds so paid. The foregoing provisions shall also apply if the property is damaged but not destroyed, except that the amount of the insurance proceeds or the pecuniary gift to be paid to the specific beneficiary shall be reduced by the cost of any repairs made to the damaged property by the testator or the testator's personal representative.
- (c) If, within six months prior to the testator's death, property which is the subject of a specific testamentary gift is taken by condemnation, the beneficiary has the right to any award for such condemnation unpaid at the testator's death or, if any such award has been paid prior to the testator's death, to a pecuniary gift equal to the amount of the award so paid.]

[Editorial Notes: Occasionally, Will-makers will insert "no-contest" clauses in their wills in an attempt to limit challenges. If the Will-maker desires that type of clause, then the following should be kept in mind: O.C.G.A. § 53-4-68(b) provides: A condition in terrorem shall be void unless there is a direction in the will as to the disposition of the property if the condition in terrorem is violated, in which event the direction in the will shall be carried out.]

ARTICLE IV.

DISPOSITION OF RESIDUARY ESTATE

All the rest of the assets, which I may own at the time of my death (referenced below as my "residuary estate"), I give to the **[PERSONS WHO GET THE KITCHEN SINK]**.

Comment [DLM7]: This is the "kitchen sink" provision that ensures you have given away everything. If you fail to give away your entire estate, then your Will really doesn't accomplish the goal, which is to avoid having the State decide who gets your property.

if they survive me.³ If all of the **[FIRST CHOICE PEOPLE]**⁴ fail to survive me, then I give my residuary estate to **[SECOND CHOICE PEOPLE]**, in substantially equal shares to each of them, and to be divided among them in such a manner as they may agree. If either _____ fails to survive me, and all the _____ also fail to survive me, then I give my residuary estate to the survivor. If _____ and all the _____ fail to survive me, then I give my residuary estate to **[THIRD CHOICE PEOPLE, OR CHARITY]**, in substantially equal shares to each of them still living, and to be divided among them (those still living) in any such manner as they may agree.

[Editorial Notes: O.C.G.A. § 53-4-59 provides: Testamentary gifts may be specific, demonstrative, general, or residuary. A specific testamentary gift directs the delivery of property particularly designated. A demonstrative testamentary gift designates the fund or property from which the gift is to be satisfied but nevertheless is an unconditional gift of the amount or value specified. A general testamentary gift does not direct the delivery of any particular property. A residuary testamentary gift includes all the property of the estate that is not effectively disposed of by other provisions of the will.

Understanding the distinctions in Section 53-4-59 is particularly helpful when the Will-maker dies with significant debt which must be paid. Certain classes of gifts “abate” (think “evaporate”) before others. O.C.G.A. § 53-4-63 provides:

- (a) Unless otherwise directed, the debts of the testator shall be paid out of the residuum. Unless otherwise provided in the will, a residuary gift or any part thereof, including a residuary gift to a surviving spouse in lieu of year’s support, shall be deemed a gift of the net residuum or part thereof remaining after all debts and expenses of administration, including taxes, have been paid.
- (b) If the residuum proves to be insufficient for the payment of the testator’s debts and the expenses of administration, then general testamentary gifts shall abate pro rata to make up the deficiency. If general testamentary gifts are insufficient, then demonstrative testamentary gifts shall abate in the same manner. If both general and demonstrative gifts are insufficient, then specific gifts shall abate in the same manner.
- (c) After the estate assets in the executor’s hands are exhausted, a creditor may proceed against each beneficiary for that beneficiary’s pro rata share of the debts to the extent a testamentary gift has been distributed to that beneficiary.
- (d) Realty and personalty shall be equally liable for the payment of debts.
- (e) Unless otherwise expressly directed in the will, nothing in this Code section shall be deemed to limit any rights to reimbursement for federal estate taxes, generation-skipping transfer taxes, or any other taxes that may be available to personal representatives under federal law.]

ARTICLE V.

EXPENSES OF ADMINISTRATION OF MY ESTATE

All costs of safeguarding, insuring, packing, and storing my tangible personal property before its distribution and of delivering each item to the place of residence of the beneficiary of the item shall be deemed to be expenses of administration of my estate.

³ We include this to demonstrate the use of conditional language. Here, for example, a gift to a son “if he survives me” would leave the grandchildren without an inheritance if he son died before the Will-maker. An alternative would be to simply leave the gift to the son (so it passes to his heirs) or to specifically provide that if he does not survive the Will-maker, then his share goes to his descendants.

⁴ Although the same would apply to any gift you make, if you name a beneficiary who is currently on Supplemental Security Income or Medicaid, unless you take precautions to protect them, they may lose benefits when they inherit your gift. You should always consult with a lawyer when planning for disabled persons.

I direct my Personal Representative to pay out of my residuary estate, all estate, income, and inheritance taxes, all valid debts, and expenses of my last illness, cremation, funeral, and burial, and those incurred in the administration of my estate.

Comment [DLM8]: While it is a good idea to give your executor authority to pay taxes and valid debts, it may also make sense to give your executor discretion to dispute certain claims.

ARTICLE VI.

APPOINTMENT OF AND POWERS OF THE PERSONAL REPRESENTATIVE/EXECUTRIX

I appoint my [NAME OF PERSON OR PERSONS WHO WILL ADMINISTER THE ESTATE], to be the Personal Representative and Executrix of my estate.

In addition to all powers granted by law, I give my Personal Representative and Executrix the power, exercisable in the discretion of my Personal Representative and Executrix and without court order, to retain, sell (at public or private sale), exchange, lease for any term (even though commencing in the future or extending beyond the date of final distribution of my estate), mortgage, pledge, or otherwise deal for any purpose with the property, real or personal, from time to time comprising my estate, for any consideration and on any terms (with or without security) as my Personal Representative and Executrix shall determine; to borrow money for any purpose, at interest rates then prevailing, from any individual, bank, or other source; to invest in any property whatsoever; to compromise or abandon any claims in favor of or against my estate; to hold any property in the name of a nominee or in bearer form; to employ accountants, depositories, attorneys, and agents (with or without discretionary powers); to execute contracts, notes, conveyances, and other instruments, including instruments containing covenants and warranties binding on and creating a charge against my estate, and containing provisions excluding personal liability; to make distributions wholly in cash or in kind, or partly in each; to allot different kinds or disproportionate shares of property or undivided interests in property among the beneficiaries; and to determine the value of any property distributed in kind.

Comment [DLM9]: This is an example of a powers clause that we often see. Typically, we recommend giving your executor VERY BROAD power to act on behalf of the estate.

I give my Personal Representative and Executrix the power to make elections under the tax laws as my Personal Representative and Executrix deems advisable.

ARTICLE VII.

It is my intent and desire and I so direct, that my body be cremated. I do not wish my body to be buried, and I do not wish my organs to be donated.

Comment [DLM10]: Although this direction would help your executor understand your wishes, this power is more often placed in a power of attorney for health care.

I DECLARE, this instrument to be my Last Will and Testament, and I have signed this Last Will and Testament at _____ [address] on _____ [date].

Comment [DLM11]: Your Will should be executed in front of two (2) witnesses and a notary, using a self proving affidavit. Although the notary and self proving affidavit are not required, if you fail to use them, then you will need to have the witnesses appear in court when the Will is probated, which can prove to be difficult. Your witnesses should be at least 14 years old and must observe both the Will-maker and each other signing the Will.

Execution/Signing

[**Editorial Note:** While it is always best to read what you sign, here is another reason to read your Will. O.C.G.A. § 53-4-21 provides: Knowledge of the contents of a will by the testator is necessary to the validity of a will. If the testator can read, the testator’s signature or acknowledgment of that signature is presumed to show such knowledge.]

[**Editorial Notes:** O.C.G.A. § 53-4-20 provides:

(a) A will shall be **in writing** and shall be **signed by the testator** or by some other individual in the testator’s presence and at the testator’s express direction. A testator may sign by mark or by any name that is intended to authenticate the instrument as the testator’s will.

(b) A will shall be attested and **subscribed in the presence of the testator by two or more competent witnesses**. A witness to a will may attest by mark. Another individual may not subscribe the name of a witness, even in that witness’s presence and at that witness’s direction.

(c) A codicil shall be executed by the testator and attested and subscribed by witnesses with the same formality as a will.]

[**Editorial Note:** O.C.G.A. § 53-4-23 provides: (a) If a subscribing witness is also a beneficiary under the will, the witness shall be competent; but the testamentary gift to the witness shall be void unless there are at least two other subscribing witnesses to the will who are not beneficiaries under the will. (b) An individual may be a witness to a will by which a testamentary gift is given to that individual’s spouse, the fact going only to the credibility of the witness.]

[**Editorial Notes:** With regard to the “Self-proving affidavit,” mentioned in the comments, O.C.G.A. § 53-4-24 provides for a form of affidavit, as follows:

(a) At the time of its execution or at any subsequent date during the lifetime of the testator and the witnesses, a will or codicil may be made self-proved and the testimony of the witnesses in the probate regarding such will may be made unnecessary by the affidavits of the testator and the attesting witnesses made before a notary public. The affidavit and certificate provided in subsection (b) of this Code section shall be the only prerequisites of a self-proved will or codicil.

(b) The affidavit shall be evidenced by a certificate, affixed with the official seal of the notary public, that is attached or annexed to the will or codicil, in form and content substantially as follows:

STATE OF GEORGIA

COUNTY of _____

Before me, the undersigned authority, on this day personally appeared _____, _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and all of said individuals being by me duly sworn,

_____, testator, declared to me and to the witnesses in my presence that said instrument is the last will and testament or a codicil to the last will and testament of the testator and that the testator had willingly made and executed it as a free act and deed for the purposes expressed therein. The witnesses, each on oath, stated to me in the presence and hearing of the testator that the testator had declared to them that the instrument is the testator’s last will and testament or a codicil to the testator’s last will and testament and that the testator executed the instrument as such and wished each of them to sign it as a witness; and under oath each witness stated further that the witness had signed the same as witness in the presence of the testator and at the testator’s request; that the testator was 14 years of age or over and of sound mind; and that each of the witnesses was then at least 14 years of age.

Testator

Witness

Witness

Sworn to and subscribed before me by _____, testator, and sworn to and subscribed before me by _____ and _____, witnesses, this _____ day of _____, ____.

(SEAL)
(Signed) _____
(Official Capacity of Officer)

(c) A self-proved will or codicil may be admitted to probate without the testimony of any subscribing witness, but otherwise it shall be treated no differently from a will or codicil that is not self-proved. In particular, without limiting the generality of the foregoing sentence, a self-proved will or codicil may be contested, revoked, or amended in exactly the same fashion as a will or codicil that is not self-proved.]

[Editorial Notes: A simple Will, such as this, is a “cookie-cutter,” “One-size-fits-all” form. It will not assist you in minimizing estate taxes. It will not protect your heirs if they are poor money managers. It will not protect your heirs’ eligibility for government benefits if they are disabled. It provides not direction concerning how your heirs use your money. This is the bare minimum.]

[Editorial Notes: The ORIGINAL Will should be kept in a safe place. O.C.G.A. § 53-4-46(a) provides: A presumption of intent to revoke arises if the original of a testator’s will cannot be found to probate.]

THIS DOCUMENT IS PROVIDED FOR EDUCATIONAL USE ONLY AND IS NOT INTENDED AS A SUBSTITUTE FOR LEGAL ADVICE. YOU SHOULD ALWAYS CONSULT A LAWYER BEFORE MAKING IMPORTANT LEGAL DECISIONS AND GET PERSONAL LEGAL ADVICE. IT WAS ONCE SAID THAT A MAN WHO ACTS AS HIS OWN LAWYER HAS A FOOL FOR A CLIENT. THERE IS A LOT OF TRUTH IN THAT COMMENT.

Contact us at the Elder Law Practice of David L. McGuffey, LLC if you have questions about how to provide for your loved ones. We represent families in Georgia and Tennessee and can be reached at (706) 428-0888.