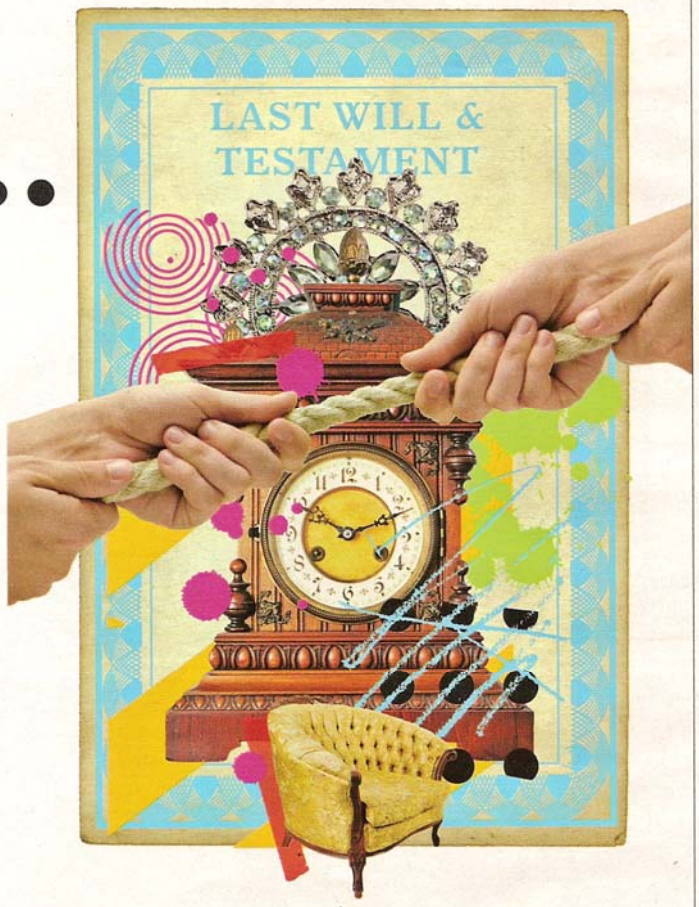
Where There's a Will...

... there's a way for there to be potential conflict. Take these steps to make sure your parents' wishes for your inheritance don't go unfulfilled



When your aging parents pass away, will you and your siblings be treated equally? Which of you will inherit the art deco diamond ring or lushly framed antique wedding photos? And what if a parent is remarried: Will a second wife or husband be able to claim a right to money you believe is yours? These can be painful and awkward issues to probe. Nevertheless, having a conversation with parents about their will—starting with whether they even have one—is vitally important, and not at all selfish or mercenary. Most parents want their adult children to be treated fairly after they die, but those wishes could easily go unmet if no will exists or it's written in a way that's vague, incomplete or otherwise faulty.

Here are common mistakes made when drafting wills—and the legal steps you should encourage your parents to take so that your inheritance is protected and a host of headaches doesn't become their legacy.

1 WORST-CASE SCENARIO Your father wills his entire estate to his second wife.

WHAT CAN HAPPEN You could end up with nothing when your stepmother passes away. That could be exactly what your father wanted—or not. Your father may have innocently assumed that his second wife would bequeath the remaining assets to you and your siblings upon her death, perhaps because that's what they discussed. But if it's not written in the will, she's under no legal obligation to do so. "Surviving spouses can leave inherited property to whomever they please—a new wife or husband if they remarry or their children from a previous marriage," says Michael D. Whitty, a partner in the trusts and estates practice at Winston & Strawn, a Chicago-based law firm.

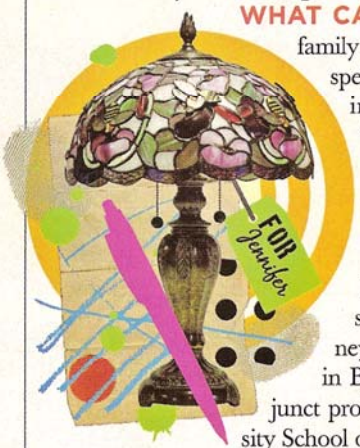
WRITE IT RIGHT If your parents are divorced and remarry, CONTINUED ON PAGE 100

ILLUSTRATIONS, CHARLES WILKIN

it makes sense that they'd want to provide for their new spouse and their grown children. To ensure that both things happen, they shouldn't leave their separate assets to their new husband or wife outright. Instead, encourage them to write a will that says the investments will be held in a "testamentary trust" for your stepmother or stepfather's use during their lifetime and then pass directly to you and your siblings upon his or her death, Whitty advises. All kinds of property can be placed in such a trust, including real estate. To protect these assets for future generations, your stepparent should be named the beneficiary but not the trustee of the trust. (The trustee can be an individual or an institution, such as a bank.) In this way, your stepparent can live in the house and use the interest from the investments for living expenses, but can't manage the investments or sell them. The principal will be preserved for you and your siblings.

2 WORST-CASE SCENARIO

Your widowed mother dies, and her will says that all of her money and property should be divided equally between her two children. But you and your sister are fighting over who gets the jewelry and china—and now you're not speaking.



WHAT CAN HAPPEN The potential for family rifts is great when parents haven't spelled out in their will who gets what in the way of prized heirlooms. "Since these items often have more sentimental than monetary value, siblings will tell each other, 'Mom always wanted me to have this grandfather clock' or 'This bracelet is how I will remember Mom,'" says Ryan M. Bornstein, an attorney with Harvey Ballard & Bornstein, in Berwyn, Pennsylvania, and an adjunct professor of law at Villanova University School of Law. "But some people will fight over an item because one thinks that, say, a ruby ring is worth more than the sapphire earrings."

WRITE IT RIGHT There are two ways your parents can ward off squabbles (and possible permanent estrangement) among their children after they're gone: Ask them to list all of their personal property in their will or in a memo attached to it (jewelry, furniture, china, crystal, artwork, collectibles, clothing, etc.) and name the person who is to receive each individual piece, rather than simply say that it should be split equally. Or suggest that they give you and your siblings the special items while they're still alive. "The benefit of making a very specific and comprehensive list of personal belongings is that there will be fewer things for heirs to fight over, and there's more likelihood that the parents' wishes will be followed," Bornstein says. "And the benefit of giving away personal property during life is that your mother can see you wearing her favorite necklace."

3 WORST-CASE SCENARIO

Your widowed mother added your brother's name as "joint tenant" of her mutual fund investment account so he could help her manage it. Her will said that the two of you should split everything 50–50, but now that she has died he's not sharing the account's assets.

WHAT CAN HAPPEN Your brother is entitled to keep it under the right of survivorship. "It's very common for elderly parents to put an adult son or daughter's name on a checking or any other kind of account for the convenience factor of allowing their child to help them pay bills," explains Bornstein. "Plus, many of them wrongly assume that it will save their child from paying federal estate taxes down the road."

So how would you get your fair share from your brother? "You'd have to ask a judge to determine whether your late mother put his name on the account for convenience or because she intended to give it to him when she died," says Rebecca Rosenberger Smolen, a partner with the Philadelphia law firm Wolf, Block, Schorr and Solis-Cohen. You're not guaranteed to win in court—it's difficult to prove what your mother had in mind—but you are assured of high legal CONTINUED

fees and added stress during your time of mourning.

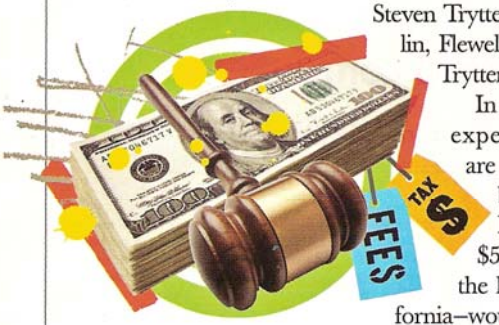
WRITE IT RIGHT Urge your elderly parents to create a "financial power of attorney," a written document in which they authorize an adult–usually an adult child–to be their "agent" who can act on their behalf in financial matters if they become physically or mentally incapacitated and can't carry out their affairs. If they balk, ask them to put all their children's names on their financial accounts as "joint tenants" as this will ensure that the estate is ultimately divided equally (assuming, of course, that equal division is what your parents want) and sibling squabbles are avoided. If they place all their children's names on the account and one of the siblings dies, however, the remaining children will split the money–and the deceased child's sons and daughters won't be entitled to a dime.

"Power of attorney is far better than joint tenancy, because it avoids the thorny question of what was intended by the parent, and it allows a parent the flexibility to change his or her mind about how to dispose of the property at death," Smolen explains. "Once property is in joint names, technically the other joint tenant–or tenants–has a vested right in the property. Also, in cases in which the accounts are quite large, your parent may owe gift taxes upon the creation of the joint tenancy."

Finally, a power of attorney isn't just for the elderly. If you don't have one and if either your husband or you become disabled at any point in your life, neither of you can automatically make financial decisions for the other. Instead, the healthy spouse would need to petition the court to be appointed guardian–a time-consuming and expensive ordeal. Most people name their spouse as their agent and designate a relative or close friend as a backup in case the couple becomes incapacitated together. A minor can't be an agent.

4 WORST-CASE SCENARIO Your father leaves you a hefty inheritance, but the money gets tied up in probate.

WHAT CAN HAPPEN In some states the probate process is simple and may take only a few months with minimal expense. But in other states, such as California and Florida, it's cumbersome and costly. "If there are no complications, you'll get your money within a year, but sometimes it can take two to three years," says Steven Trytten, a founding partner of Anglin, Flewelling, Rasmussen, Campbell & Trytten, in Pasadena, California.



In California the legal fees and expenses to probate an estate are generally determined on the basis of the size of the estate. For example, an estate of $500,000–a modest one, given the high cost of property in California–would cost about $16,000 to probate, according to Trytten. If the $500,000 estate consists of a $1 million house subject to a $500,000 mortgage, however, the costs are calculated on the basis of the full $1 million value, resulting in a bill of $27,000.

WRITE IT RIGHT If your parents live in a state with burdensome probate procedures (ask a local attorney to find out whether their state is one), encourage them to consult a lawyer about transferring their property into a "revocable trust" that works like a will but is designed to allow the administration of the estate outside of probate court. So during a person's lifetime, the trust owns his property and assets, and when he passes away, his assets are administered without court supervision, which is less costly. Most of the language that might normally appear in a will appears, instead, in the revocable trust; a short will (often called a pour-over will) is also prepared to make sure that if for some reason an asset doesn't end up in the revocable trust, it can pass under the will to it.

"This precaution ensures that all property will eventually end up in the revocable trust but does not avoid a probate with respect to property that was not already in the revocable trust," Trytten explains. It's vital for people to create an inventory of assets when they draw up the estate plan–and again every time it's reviewed and updated–to ensure that each asset is in the right place. A few years ago Trytten represented a woman whose late husband had assigned all of his assets to a revocable trust, except for a $100,000 bank CD that he owned individually. The result? The widow couldn't get the money for a year, and she paid nearly $5,000 in legal fees and expenses by the time the probate had been completed. "If the bank or her husband had been paying better attention, the problem could have been fixed and probate could have been avoided," Trytten says. "In the abstract, a year's delay may not sound too bad–unless you really need the money. But for a surviving spouse who needs closure to move on with her life, a year can be an eternity."