



INFORMATION FOR CLIENTS OF TEXAS ATTORNEYS

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To Will or Not to Will

Death affects people in many ways. It never is timely. Death confronts the family with bereavement, with the need to readjust emotionally and financially, and often with an unknown future. Death is not only a personal issue but a legal one as well. A death certificate must be issued, and the estate of the deceased individual (the decedent) must pass to others.

Dying Intestate (Without a Will)

In Texas, property is characterized as separate or community. Separate property is that owned before marriage or acquired during marriage by gift or inheritance. Damages awarded during marriage from a personal injury lawsuit, except damages representing the loss of earning capacity, also are separate property. Community property is all

property, other than separate property, that is acquired by either spouse during marriage. Thus, there can be separate real property, separate personal property, community real property, and community personal property. When a person dies without a will, a legal instrument that states how the testator's property is to be distributed at death, the law determines who are the heirs, and assets are disposed of according to whether they are community or separate property.

If a person dies without a will, the law disposes of his or her property. The public policy of statutes governing the intestate distribution of property is to provide for the orderly distribution of property at death. The law does not play favorites, so the distribution is determined by how closely the heir was related to the dece-

dent, not by how wonderful one was to the decedent. Dying without a will may trigger undesired results and unexpected costs and delays.

Executing a Will to Achieve Desired Property Distribution

A testator is a person who leaves a will in force at his or her death. A valid will avoids many of the problems that may arise from dying without a will and allows a person to leave property to the person(s) he or she desires. In addition to naming the recipients of the testator's property, the will also designates the individual(s) who will manage the property and care for minor children. In larger estates, the will often contains provisions that minimize estate taxes.

A will can also set up a trust, a method by which property is held by one



party (the trustee) for the benefit of another (the beneficiary). To establish a trust, the testator transfers property, with the specific intent to create a trust, to the trustee who manages and administers the property for the benefit of named beneficiaries. A testamentary trust arises under a will and becomes effective when the testator dies. A trust is an effective way of managing property for the benefit of minor or incapacitated persons or persons who are incapable of managing their own financial affairs. A trust also is useful to prevent a spendthrift child from immediately spending his or her inheritance by preserving the funds for the child's education or other important needs. Further, a trust may be used to protect the child's inheritance from the claims of his or her creditors because property placed in a trust generally may not be reached by a beneficiary's creditors until it is distributed to the beneficiary. There also are many other legitimate reasons to create a trust in a will.

Requirements for Execution

For a will to accomplish any or all of these results, it must have been properly signed. Texas recognizes three kinds of wills: oral; handwritten (holographic); and typewritten (formal).

To execute any of these wills, the testator must meet the following requirements:

1. is at least 18 years of age, married, or serving in the armed forces;
2. is of sound mind at the time of execution;
3. not unduly or fraudulently induced (forced or deceived) to make the will; and
4. has testamentary intent (present intent to bequeath property at death).

Additional requirements must be met for each type of will.

Conclusion

If you die without leaving a will, you risk that your property will not be distributed as you desire. Even when the heirs at law are the same as you would have selected yourself, there is no advantage to letting the law take its own course. The advantage lies in dying with a will. With a well-drafted will you can avoid legal pitfalls, name an executor of your estate, name a guardian for your minor children, establish trusts, mini-

mize estate tax liability, and minimize probate-related costs by providing for independent administration.

Although a will can be challenged in court, the grounds for contest in Texas are few, and the law favors carrying out the decedent's intent. Executing a will is not as complicated or as expensive as you might think. You are encouraged to talk with an attorney about wills, trusts, and estate administration and to have a will prepared by the attorney. ❖

This article was taken from the *To Will or Not To Will* pamphlet, prepared as a public service by the Texas Young Lawyers Association and distributed by the State Bar of Texas. For the complete pamphlet, contact the Public Information Department, State Bar of Texas, P.O. Box 12487, Austin 78711-2487; call (800)204-2222, ext. 1800; or visit www.tyla.org.

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