

# **WHAT YOU SHOULD KNOW ABOUT WILLS, TRUSTS & PROBATE AND THE CONSEQUENCES OF DYING IN TEXAS WITHOUT A WILL**

The following discussion should answer some questions you may have regarding wills and probate procedure in Texas.

The State bar of Texas and the American Bar Association, as well as most state bars, recommend that every adult person have a will.

## **WHAT IS A WILL?**

A Will is a legal document that allows you to direct the distribution of your property upon death in an economical and efficient manner. Gifts under a Will may pass either directly or in trust to a beneficiary.

A will is a legal document that is signed in accordance with state laws that pertain to testamentary transfers. Testamentary transfers pass title of your property pursuant to the terms of the Will to your beneficiaries upon your death.

## **WHAT IS A TRUST?**

A Trust is a legal entity in which legal title and management of the property are vested in a Trustee who administers the property for a designated beneficiary(s).

Property may be put into a trust while the donor is alive or the trust may take effect and property transferred to it after a person dies (a testamentary trust). A trust may be included in a will.

## **WHAT IS ESTATE PLANNING?**

Estate Planning is the process of ascertaining the appropriate legal document, i.e. Will or Trust for your estate, and what pertinent provisions to insert in the documents. You may desire to obtain the most favorable tax and other benefits available for your estate.

You may also desire to provide an efficient means to manage and pass your property to your heirs upon your death. In the course of assembling the various requested information, you should decide the way you desire your estate to be distributed.

Naturally, there are many factors that should be considered when arriving at a comprehensive estate plan, such as Federal Estate and Income Tax consequences; these may differ with each situation.

## **WHY SHOULD YOU HAVE A WILL OR A TRUST?**

If you die without a Will, the rules of intestate distribution dictate how your property will be passed. In Texas, your estate will be encumbered with significant additional legal expenses and delays in probate court if you do not have a Will. Many states require the posting of a bond. The cost of a bond can be a significant expense.

There are many tax and non-tax advantages for creating a Trust in your will (Testamentary Trust). For example, a person with a substantial estate may wish to leave a large portion of the estate in trust for his or

her beneficiaries to prevent the taxation of such property upon death of the beneficiary. Additionally, if a minor child is a beneficiary of the estate, it is advisable to create a Trust for the benefit of the child.

### **WHAT IS PROBATE?**

Probate is the process of submitting a Will to the Probate Court, administering an estate, and distributing the property.

A will must be probated as a prerequisite to its ability to transfer property to the intended heirs. A will has no legal right to transfer property until the appropriate court has entered a formal order or decree which admits the will to probate. A probate proceeding can be a contested or an uncontested matter.

An individual executor or family member (who is not an attorney) can handle the probate of a non-contested will in some states.

### **WHAT IS AN INDEPENDENT EXECUTOR?**

An Independent Executor or Executrix is free to administer your estate with a minimum of court supervision and legal expense. It is a streamlined and simplified probate proceeding.

An Independent Executor or Executrix has the duty to settle your estate and distribute your property as designated in your Will.

If the maker of the Will is married, the maker, known as a Testator, if a male, or a Testatrix, if a female, often designates his or her spouse as an Independent Executor. However, if the estate is expected to be substantial, or burdensome for the spouse to manage (for example, when a business or a farm will be an asset of the estate), then the Testator or Testatrix may wish to designate a bank or trust company as the Independent Executor, instead of the spouse. The maker could also consider someone to help the spouse as a Co-Independent Executor.

If you decide to provide for a Trust in your Will, you will designate a Trustee who will manage the Trust for your beneficiaries. If you are married, you may wish to designate your spouse as the Sole Trustee or a Co-trustee. You will also designate a Trustee who will manage any Trusts created for the benefit of your children.

An Independent Executor or Trustee (who is not a parent of your children) is not authorized to personally take custody of your minor children. You may, therefore, want to name a Guardian for your minor children who will be in a position to assume responsibility for the care of your children upon the death of the survivor of you and your spouse.

A Guardian may be designated either in your Will or in a separate written instrument. Sometimes a separate instrument is advisable if you have difficulty deciding upon a Guardian.

You should also designate one or more alternative Independent Executors, Trustees and Guardians who will act in the event your first choice predeceases you or is otherwise unable or unwilling to serve.

## **OTHER CONSIDERATIONS:**

If you move to a different state or country, have your Will reviewed by an attorney licensed in that jurisdiction to determine if the Will is valid in such state or country and whether or not probate of the Will may be complicated by the use of an out-of-state Will.

We advise our clients to place the original Will in a safe place such as a safe deposit box and keep a copy of their Will at home. It is also a good idea to give a copy of the Will to the Executor named the will.

The Will should be reviewed periodically so that it may be kept current. You should revise your Will whenever your personal circumstances change significantly, such as with a birth, death, remarriage or divorce, or if your assets change substantially.

Since your Will is a legal document, it cannot be changed unless formal procedures are complied with. Accordingly, please do not attempt to alter, write on your Will or change your Will yourself. You should call your attorney.

## **WHAT ARE SOME OF THE CONSEQUENCES OF DYING WITHOUT A WILL IN TEXAS?**

If you die without a will, you are considered to have died intestate. Consequently, your property will be distributed pursuant to the state's probate code provisions relating to intestacy.

Perhaps one of the most important reasons for having a will is to streamline and reduce the probate process and to simplify the winding up one's financial affairs.

Intestacy can create hardships for your family and can significantly increase the cost of closing out your financial affairs. It may cost your heirs significantly more money to have your estate administered if you have not executed a valid will which appoints an Independent Executor to serve without the requirement of posting a bond.

If you had a will and the will provided for the appointment of an Independent Executor to serve without bond, the cost of probating your will and winding up and administering you estate would have been relatively inexpensive compared to what it can cost if the court must appoint an executor to administer the estate.

The court appointed administrator may have to post a bond and have his or her actions approved by the probate court prior to winding the affairs of your estate.

The Independent Executor can very quickly and inexpensively wind up your affairs, pay your bills, sell unneeded assets, and distribute your property according to the terms of your will. One aspect of this procedure that makes it so quick and cheap, is that the executor does not have to obtain court approval for the above actions. The executor is only required to file the will for probate, attend the probate hearing, take the oath to serve as the executor, obtain letters of testamentary (to act for the estate) and then file an inventory and an appraisalment that lists the property owned by the deceased.

The executor is entitled to pay the debts and distribute the assets of the estate without court supervision. This saves a lot of time and a lot of attorney's fees! This is a very cost efficient way of handling probate since your estate only pays for the attorney's time in getting the will approved by the

probate court. Thereafter your estate does not have to pay the attorney to obtain court approval every time the executor wants to pay bills, sell property or distribute the assets to the beneficiaries.

You may lose that right if you die without a will because the probate court may supervise the entire distribution of the estate. The estate can then be eaten up by attorney's fees from court appointed attorneys and receivers as opposed to the moneys being paid directly to your heirs and beneficiaries.

Your estate is subject to many problems that could have been avoided, if you had executed a valid will. Your spouse and children may have to hire an attorney to allow them to obtain money for their support since funds may be subject to court control or held by banks, stock/mutual fund organizations etc. who are reluctant to release the money until they have received court approval for the release.

Banks commonly freeze accounts until court authorization is obtained to spend funds unless the bank account was set up as joint tenancy with a right of survivorship. An account that is designated as right of survivorship passes pursuant to the terms of the account by contract rather than through probate or through your will.

Many bank accounts are set up as tenants in common and therefore the bank may not allow moneys to be expended from the bank accounts until the proper probate procedure has been completed. The bank does not want to be liable for allowing a person to take funds from an account that he or she is not the correct owner of.

If your children are under the age of 18, a guardianship may be required in order to administer the property that the children inherited pursuant to your dying without a will.

For instance, your spouse may not be able to sell the home or personal property which was owned jointly by you and your spouse. This means that the family home, which was owned jointly by the husband and wife (in the event the husband died), could be owed jointly by the surviving spouse and the minor children. Since the children now own part of the home along with the spouse, the property is encumbered by the need for a court supervised guardianship.

If the surviving spouse desires to sell the property, he or she may be required to open an expensive guardianship. He or she must then obtain court approval before the home can be sold. He or she must then post a bond for acting as guardian and place one half of the net proceeds in a bank account for the use and benefit of the children.

If the home had passed to the surviving spouse as a beneficiary under a valid will, then the surviving spouse would not have to undergo this nightmare.

A will should appoint a guardian over your minor children. Frequently in a husband, wife situation with minor children, the husband will designate the wife as guardian in the event he dies and the wife will designate the husband as guardian in the event she dies. If the husband dies without a will, then the wife may still remain guardian of the children. However, she may be required to open a guardianship for and on behalf of the children for any property that the children may own.

The guardian may have to hire an attorney to open the guardianship and pay filing fees. The guardian may have to post a bond to safe guard the assets under the guardianship. The guardian may be required to make reports and obtain court approval prior to taking any action with the property subject to the guardianship. Typically, annual accounts are required in a court supervised guardianship. Those

forms must be prepared pursuant to the court's requirements. Frequently they are prepared by an attorney and are subject to close scrutiny.

The guardian must also render an accounting of how, why and when moneys were spent out of the guardianship estate.

When the children reach the age of majority and are no longer minors, they have a legal right to receive a complete accounting from the guardian of all of the financial actions taken during the term of the guardianship.

When the children reach legal age they then have the full legal right to spend their money as they please. The surviving parent will have no right to question the children's actions how, when and where they spend their money. If however, moneys that were earmarked for the children were placed into a trust pursuant to a valid will, the trustee could control the amount of money spent, how it should be spent, when it should be spent and for what purposes, such as education, health or maintenance.

An unfortunate nightmare related to this incident can be a situation where the children and wife own a piece of property, personal or real, jointly due to the dying without a will. Now that the children have reached the age majority, if he or she decides to sell his interest in the commonly held property and if there is a disagreement by the other parties whether or not the property should be sold, the child may file a lawsuit in a district court to force a partition, a division, or sale of the property.

The surviving spouse may have desired to keep the property. He or she may be dependent on some of that property of his or her livelihood.

Another horror story that can be caused by dying without a will is if the spouse remarries and thereafter dies without a legal and valid will, the subsequent or second spouse may be entitled to a homestead interest or an interest in some of the deceased's personal property.

Your natural children may need some of that property for their support, the second spouse may not be required to spend any of those moneys on your children's behalf.

If a proper will had been made which included a trust, the first husband could have provided in the trust that all of the property would be used to help, support, educate and provide for the welfare of the surviving spouse for life. Then the trust could have provided that the funds could be used to help educate, support and provide for the welfare of the children. After the children have completed their education, then the trust could have distributed the remaining moneys to the children.

Accordingly, a valid will with a trust provision may have succeeded in passing property to the husband's children and prevented a second or subsequent spouse, i.e. stepfather from obtaining the property.

In the event both the husband and wife die together and die without a will, then the natural parents have no say so as to who will take care of their minor children. At that point relatives and friends of the family may select a guardian by mutual agreement and in the event they fail to agree on a guardian, the probate court could make the selection.

There can be circumstances when a probate court may appoint a stranger or agency to be guardian of your children. If you die without a will, in some circumstances, your estate may pay more estate taxes than it would have if proper estate planning procedures had been used.

Your attorney can prepare a will which includes a trust that takes advantage of estate planning techniques designed to reduce the payment of the estate taxes. This can be significant, if you have a large estate.

## **CONCLUSION**

If you die without a will you lose your free agency to decide how you want your property and assets distributed. You give up your right to plan for your family. You defer to the state's intestacy laws, which may or may not be acceptable to you. You also increase the probate cost. Accordingly every adult should have a will. If you have any questions concerning durable powers of attorney, wills, trusts or probate, please contact us.

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