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Fact Sheet

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ESTATE PLANNING: YOUR WILL

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A will is a legal document that takes effect at death. It is used to administer the estate, including transferring property ownership and making provisions for the care of minor children.

There are many reasons for having a will. Your reasons depend on your family situation, the value of your estate, your obligation to dependents, and your desires for the kind of life your survivors will enjoy.

A properly drawn will simplifies the administration of an estate, minimizes costs, and minimizes family conflict over property distribution.

At your death, your estate–that is, your money and property passes to someone. To determine who gets your property, first decide which is *non-probate* property and which is *probate* property. Non-probate property is distributed according to a deed, title, or contract. Probate property is distributed according to your will–or, if you have no will, according to state law.

NON-PROBATE PROPERTY

At your death, the non-probate property you own passes to the person(s) indicated in a deed, title, or contract you have prepared during your lifetime. This property does not go through a court process called probate. Here are some examples of non-probate property.

- **Real estate you and your spouse own as "joint tenants with rights of survivorship."** This is the presumed method of ownership between husband and wife in Utah unless otherwise clearly indicated. At the death of one spouse, the property passes to the surviving spouse.
- **Real or personal property you own with one or more persons jointly with "rights of survivorship."** The deed or title to the property indicates rights of survivorship. At the death of one of the joint owners, his or her share passes to the surviving joint owner or owners.
- **Bank accounts that say the account is payable to "either or the survivor."** At the death of one owner, the money in the account passes to the surviving owner or owners.
- **Insurance policies payable to a beneficiary.** The proceeds are paid to the person named as

beneficiary in the insurance contract.

! **Property in a trust** is non-probate property if the trust agreement indicates how the trust property is to pass at the death of the trustor.

Survivorship rights in non-probate property are determined by deeds, titles, or contracts and cannot be changed by a will. Owning non-probate property usually is appropriate when all owners want the property to pass at the death of one owner to the other(s) and when there are no estate tax considerations. However, it is not always the best way to own property. Seek advice from a lawyer and a tax consultant before titling assets in joint names.

Non-probate property does not eliminate the need for a will. If you have both probate and non-probate property, you need a will to distribute the probate property. Even if all your property is non-probate, a will may be desirable to distribute the property should both owners or the owner and beneficiary die at or about the same time.

PROBATE PROPERTY

Probate property is all that you own that does not, by the way it is titled, have survivorship rights. Examples of probate property are your share of property owned as tenants in common, your share of household goods, and property owned only by you. Probate property is distributed at death either according to the directions in your will or under the laws of Utah if you do not have a will. The probate property is distributed in a court procedure commonly referred to as *probate*.

Distribution of probate property without a will (intestate)

When you die without a will (intestate), probate property passes according to the law of the state in which you are a resident at the time of your death. When property passes under Utah law, it passes only to the surviving spouse, blood relatives, relatives of half-blood, and children adopted as minors.

The following information outlines the distribution of probate property if a resident of Utah dies without a will.

1. **If a deceased person has a surviving spouse, Utah law provides that the surviving spouse will receive:**
   a. The entire estate if the deceased person has no children or descendants of children (grandchildren, great grandchildren, and so forth).
   b. The entire estate if all the children of the deceased person are also children of the surviving spouse.
   c. One-half of the estate if there are one or more children or their descendants who are not children of the surviving spouse (for instance, children of a former marriage). The other half of the estate is divided among the living children of the deceased. If a child is deceased prior to the parent's death, the child's share passes to his or her descendants.

2. **If a deceased person has no surviving spouse, but has children or descendants of children,** the estate is divided among the living children. If a child pre-deceased a parent, that child's share passes to his or her descendants.

3. **If a deceased person has no surviving spouse and no descendants,** property then passes to ancestors and their descendants. For example:
   a. if a deceased person has no surviving spouse and no descendants, property goes to the parent or parents;
   b. if no parent survives, property goes to brothers and sisters and to descendants of deceased brothers and sisters;
   c. if no parent or descendant survives, property goes to grandparents and descendants of deceased grandparents;
   d. if no grandparents or descendants of grandparents, property goes to the closest next of kin;
   e. if the deceased has no blood relative, property goes to the State of Utah.

When property passes under Utah intestate law, it passes by formula with no attention to special needs of family members. If a person writes a will, provisions can be consider the special needs of his or her heirs.

Distribution of probate property with a will (testate)

When you die with a will (testate), your probate property is distributed according to the instructions in your will. You determine who receives how much of your estate. Property can be left to relatives, non-relatives, and institutions.

Indicating in a will who receives property when you die is called a *devise*. For example, "I leave my diamond ring to Betty Fields and my piano to Harry Chart," or "I leave $1,000 to Marie Bancroft."

A *residuary devise* leaves a person all or part of everything that is not disposed of by a *specific devise*. An example is "I leave one-half of my residuary estate to my niece, Ruth Kilmer."

A will can indicate what happens if a person who is to receive property under your will is not living at the time of your death. For example, "I leave $50,000 to my son John Kilmer, if John is not living at my death I leave this to my daughter Ruth."

When writing a will, you have flexibility to choose who receives your property after you die. Think carefully about what you want to happen.

NOMINATION OF A PERSONAL REPRESENTATIVE

A personal representative, sometimes called the *executor*, handles the business affairs of your estate after your death. This may be an individual or a corporate trustee such as a trust company. A personal representative probates the will if there is one, safeguards and manages the assets, has assets appraised, sees that the bills and taxes are paid, distributes the estate to the correct people, and makes reports required by the court. When there is no will, the court selects a personal representative. The court looks first to the surviving spouse, then to relatives of the deceased.

When you write a will, you may nominate a personal representative to handle your estate upon your death. To nominate a personal representative, consider a person's competency to handle money and estate matters. Discuss the nomination with the individual and with your family. You may nominate as your personal representative a friend, relative, or a corporate trustee, such as a bank trust department. While a trust company has experience in handling estates and will not die or become incompetent, it might not give the same personal interest as a friend or relative. Also, a corporate trustee may not be economically feasible for small estates.

Your will can provide directions for the personal representative, making it possible for your wishes to be followed after your death. The court may review the selection of the personal representative when so requested by an heir. If there is just cause (e.g. incapacity, mismanagement, failure to perform duties), the court may remove that person and appoint another representative.

NOMINATION OF A GUARDIAN AND/OR CONSERVATOR

A *guardian* takes the place of a deceased parent in caring for a minor child (a child under the age of 18). A *conservator* takes care of the money and property of a minor child. The same person may serve as guardian and as conservator, or one person may be guardian and someone else conservator.

Guardian

The appointment of a guardian in a will or other written instrument becomes effective when the nominated person files an acceptance with the probate court. The guardian has the powers and responsibilities of a parent. It is assumed that the parents have selected the person most suitable and willing to serve as guardian of their children. The appointment of the guardian is reviewed only if there is an objection filed by a minor over 14 years of age or another person interested in the welfare of the minor. A testator's nomination of a guardian is much more than a strong suggestion to the court. It is legally binding unless the appointed person refuses to accept the guardianship or the court rejects the appointment for good cause.

In nominating a guardian, consider the potential guardian's values, lifestyle, and attitudes toward child rearing. Talk to that person as well as to other family members. Make provisions in your will for appointing another guardian in case the one nominated cannot accept the responsibility.

Conservator

If property passes to a minor child, the court may appoint a conservator to manage the property, especially if the minor child inherits a significant estate. The conservator may be the appointed guardian

mentioned in the will of the guardian. A parent may eliminate the need for a conservator by arranging a testamentary trust in the will. At death, the estate is passed to a trust managed for the benefit of the child. The will can set up the trust, name the trustee, and provide instructions for the trustee. A trustee may be an individual or a trust company.

A conservatorship, by law, terminates on the child's 18th birthday, and the child then has the property to manage. With a trust, distribution of the property to the child can be postponed until the child is older and presumably more competent to manage the property. Leaving the property in trust for the child usually allows more flexible arrangements than leaving the property outright to the child.

PREPARING A WILL

Your reasons for having a will depend in part on your family situation (see Table 1). If you need a will, now is the time to do it. Anyone who is at least 18 years old or is married and who is of sound mind may make a will. You may write your own will; however, legal advice ensures that your plans will accomplish your objectives. No matter how simple your will, the help of an attorney is desirable.

If you have an attorney for other business purposes, consult that attorney about a will. If your attorney does not do estate planning, he or she may suggest another attorney. If you do not have an attorney, a friend may be able to suggest one, or the Attorney and Lawyer Referral Service of the Utah State Bar can refer you to an attorney. If in Salt Lake County, phone 531-9075; outside the county, call toll-free 1-800-698-9077.

Before seeing an attorney, compile this information:

1. A list of people to be included in your will.
2. A list of your closest relatives.
3. A list of all your property, both probate and non-probate. Include the value of the property and any indebtedness against the property.
4. Ideas about what specific property you want to go to specific people.
5. If you have minor children, ideas about who ought to be the children's guardian.
6. Ideas about the management of property being left to a minor child.
7. Ideas about the financial needs of those people you are planning to provide for.

LAST BUT NOT LEAST

A secure place to store your will is your safe deposit box. In the past, some authorities advised against this because the box could not be opened until a State Treasurer's representative was present. This procedure is no longer followed in Utah, so a safe deposit box is a reasonable storage place. Some people prefer to store their will with their attorney. The important thing is to store it where it is easy for someone to locate when you die and where it will not be lost or accidently destroyed.

Periodically review your will to ensure that it meets changing conditions and continues to serve your best interests. Review your will whenever your family situation changes as a result of marriage, divorce, death of family members, birth or adoption of children, children reaching adulthood, and substantial changes in the dollar value of your estate.

You may change your will anytime, but you must follow correct procedures. Never change a will by crossing out sentences or writing on the original document. In some cases, changes can be made with an addition called a *codicil*. In some cases, a will is replaced by a new will.

You may revoke your will anytime. It is revoked when you destroy the will with the intent to revoke it. It also is revoked by executing a new will that expressly revokes any prior will.

For more information.....consult an attorney.

Table 1. ***The need for a will varies depending upon the family situation.***

Family situation	What happens with no will	Considerations that may indicate the need for a will
Unmarried–no children	Property passes to parents or parent. If no surviving parent, property passes to brothers and sisters or to the children of deceased brothers or sisters. A non-relative will not inherit.	Passing property to parents may make their estate planning more difficult. If parents would need financial help for their old age, a will could set up a trust for their benefit and indicate who is to get whatever is left in the trust at the parent's death. A will is necessary if property is to go to anyone other than the closest relative.
Unmarried–with children	The property of the parent passes in equal share to children. The court may appoint a conservator/guardian to handle minor child's estate and child will receive the money and property at age 18 if there is no surviving parent. If parents have never married, the property of the father passes to children only if paternity has been proven under law or the father has acknowledged paternity during his life.	The financial needs of children may not be qual. A conservator may be nominated in a will or alternate plans (such as a trust) made for the management of the children's estate. A divorced person may want to plan so that the former spouse will not have control over the children's money. A will can indicate who the parents would like to care for minor children in the event that there is no surviving parent. A father and mother who have never been married to each other need to pay particular attention to estate planning.
Married couple–no children	Property passes to the surviving spouse.	Plans should provide for what should happen to property if both die at or about the same time.
Married couple–all children are their children	Property passes to the surviving spouse.	Passing property to the surviving spouse gives that person freedom in the use of the money. It also assumes that the surviving spouse will look after the financial interest of the children. Think about the possible effects of a remarriage. In larger estates (over $625,000 in 1998 increasing to over $1 million after 2005), passing the entire estate outright to the spouse may have negative estate tax consequences.
Married couple–one or both of whom has a child who is not the child of the other spouse	If the deceased spouse has children who are not the children of the surviving spouse, property is divided: one-half passes to the surviving spouse and the other half passes in equal shares to each of the children of the deceased. A conservator may be appointed to manage the estate of a minor child.	The division between spouse and children may leave the spouse, particularly when there is a small or modest estate, with inadequate money for support. Plans can be made for the entire estate to pass outright to the spouse or for part of the estate to pass in trust for the benefit of the spouse and then to the children at the death of the surviving spouse.

This publication is not intended as a substitute for obtaining necessary legal advice.

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