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Estate Planning Basics: Wills

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ESTATE PLANNING BASICS: WILLS

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What Is a Will?

A will is what many people think of when they first consider estate planning. A will is simply a written document that describes how you want your property distributed after your death. By making a will, you can decide who shall receive your property, how much each beneficiary shall receive, when they shall own it, and to some degree, what they can do with it. A will can also provide guidance in appointing a personal guardian to raise any children under the age of 18 should both you and your spouse be unavailable.

Your will has no effect during your lifetime. Only upon death does a will disposing of your property become effective in carrying out the plans and wishes detailed in the will.

Dying Without a Will

If you die intestate–that is, without a will–your property will be distributed according to Utah law, which may not be what you would like at all. The state says if you are unmarried with no children, your property will pass to your parents, or if you have no surviving parent, to your brothers and sisters. If you are unmarried with children, your property will pass in equal shares to your children. The court will appoint a guardian to handle the financial affairs of any child under the age of 18.

If you are married with no children, your property will pass to your surviving spouse. This is also true if all your children are the biological children of both of you. If you are married but have children who are the child of one but not the other spouse, the property will be divided: one-half to the surviving spouse and the other half in equal shares to children of the deceased.

Who May Make a Will?

Any person eighteen (18) or more years of age who is "of sound mind" and not under undue influence can make a will. Some attorneys are videotaping the signing and witnessing of a will to help establish that the testator (person making the will) was of sound mind and not under undue influence.

What Is Probate?

Probate is a legal and administrative process to determine the validity of a will, to decide how property should be distributed to the heirs and

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beneficiaries, who should handle the deceased's business affairs, such as paying bills and taxes, and who should care for any minor children and their assets. Probate operates according to state law and because Utah is one of the states that has adopted the Uniform Probate Code (UPC), it is a relatively simple and inexpensive process.

Not all property a person owns is subject to probate. Property held in joint tenancy with right of survivorship; property held in a trust; life insurance or retirement assets such as IRAs, Keoghs, and pensions payable to a named beneficiary; payable-on-death checking and savings accounts (POD), and registrations on securities and securities accounts are all examples of non-probate property.

There are three types of probate administration: informal proceedings, formal proceedings and a small estate summary procedure. An estate may be opened informally and closed formally, opened formally and closed informally or any combination of the above.

Informal procedure. An application for an informal probate proceeding is filed with a district court clerk. If the clerk determines that all legal requirements have been met, he or she files the will and the executor can then proceed to settle the estate.

Formal procedure. A formal probate proceeding may be necessary when no will exists, when the validity of a will may is questioned, or when parties disagree about who the personal representative is or the distribution of assets. With formal probate, proceedings are held before a district court judge after proper notification to all interested parties.

Small estate probate procedure. If it appears from an inventory and appraisal that the value of the probate-able estate does not exceed $25,000, less reasonable funeral expenses and costs of any last illness, the executor may immediately distribute the estate without notice to creditors.

Choosing an Executor

Selecting an executor is an important part of preparing a will. Your executor can be a family member, a friend, an attorney, an accountant, or the trust department of your bank. It just needs to be someone both willing and able to carry out the complicated tasks assigned to the job. These include preparing an inventory of assets, collecting any money due your estate, paying off any debts, preparing and filing all income and estate tax returns, liquidating assets, distributing the estate and making a final accounting to the probate court. In Utah, fees paid to executors, whether professionals or friends, must be limited to what is "reasonable." Some executors, for example, family members, may waive collecting any fee at all. You should also name a successor executor in case, for any reason, your first choice can't serve. If possible, it's best to name an executor who lives in your state, or near it.

Can I Write My Own Will?

A person can make his or her own will, but the entire document must be written, dated and signed entirely in the handwriting of the person making the will. This type of will is called a holographic will. It does not have to be witnessed.

Self-made wills, however, frequently increase costs and trouble for heirs. Judges may require proof that the will was actually and voluntarily written by the deceased person, which can be difficult to demonstrate. A holographic will may be inadequate if you own property or move outside the State of Utah. (Holographic wills are not recognized in all states). It really takes just a little bit of extra trouble to have a lawyer advise and assist you in drafting a will that best suits your needs, and avoid the legal pitfalls that can result from a "do-it-yourself" will.

What Is a Pour-Over Will?

"Pour-over" wills are used in combination with revocable living trusts (see FL/FF-18). A "pour-over" will directs that anything you own at death passes to the trust. This is to take care of any assets that may not have been transferred to the trust. In most instances, the pour-over will does not have to be probated if you have transferred your major assets to the trust. Any assets left over would

qualify for a quick, administrative procedure for small estates.

Pre-Preparing Your Will

Before visiting an attorney who will write your will, take some time to organize what you will need. Inventory your assets and try to put a price tag on each one (see FL/FF-16, Estate Planning Basics: Getting Started). Then prepare a list of family members and other beneficiaries to be included in your will. Have an idea about what specific property you want to go to specific people or organizations. If you have minor children, jot down ideas about who ought to be the children's guardian. Who would manage the property (be the conservator) of any minor child? If you do not nominate a conservator in your will, the court will choose a person without your input. It is also a good idea to name an alternate guardian and/or conservator in case your first choice cannot serve.

Be precise when naming beneficiaries. State the person's full name and relationship to you (child, cousin, sister, friend, etc.) so your executor will know exactly who you mean. You may have more than one nephew named Michael. Clarity will also help prevent any challenges to your will.

Passing Heirlooms to the Next Generation

If you have family heirlooms that you would like to see remain in the family, you need to make decisions about them. There are two ways to pass items to family members: give them away during your lifetime or arrange for them to pass at your death to the individuals you choose. Talk with family members and find out what they would or would not want. You may discover some items you never realized had very special memories for a particular family member.

You don't need to include an itemization of your family heirlooms and who you wish to have it in your will; you can write a letter of intent that specifically identifies certain items and the persons you want to receive those items. (For example, "To my daughter Alice, I leave grandma's garnet pendant.") Attach a copy of this separate listing to your copy of your will and leave one with your attorney. To be sure your wishes are carried out, the will must refer to a "personal property letter." If there is no will or no reference to a separate listing in the will, the personal property letter is not binding. This letter should be signed and dated each time a change is made.

What Is the Cost of Having a Will Prepared?

Legal fees for drafting a will vary with the complexities of your estate and your family situation. Most law firms do not have a set fee for preparation of a will. Do not hesitate to ask an attorney for an estimate of his or her fee for preparing at will, preferably at your first meeting. To keep fees down, complete as much of the homework as possible before visiting the lawyer. Bring a list of your assets and liabilities, an idea of how you'd like to distribute your assets, who you would like to serve as guardian of any minor children and executor. Generally, writing a will costs less than writing a living trust.

Where Should a Will be Kept?

After a will is drafted, it should be stored in a safe place where it can easily be found. If you store your will in a safe deposit box, be sure that someone else has signatory privileges so that the safe deposit box can be opened right away. Some people prefer to store their will with their attorney. The important thing is to store your will where it is easy for someone to locate when you die and where it will not be lost or accidentally destroyed.

What is the Effect of Divorce, Annulment or Separation on a Will?

Divorce or annulment automatically revokes the provisions of any will made prior to the divorce. This means you would need to be sure to write a new will if a divorce or annulment were to occur. If you do not write a new will, the intestate rules would prevail. A separation decree that does not terminate the status of husband and wife is not considered a divorce, so any distribution made in a will to spouses who are legally separated pending divorce is still effective.

Can I Change My Will?

Once you write a will, you may need to change it. A change in marital status, move to a new state, the birth of a child, or a change in tax laws can all prompt a review and rewrite of your will. You can either write a new will or add a "codicil" to your existing will. A codicil is an instruction changing part of your existing will, and must be made with the same formalities as a will. Be sure to sign the new will and have it witnessed before destroying the old one. Consult your attorney before changing your will. Improper changes may not be effective and may inadvertently invalidate other parts of the will. So take the time to do it right.

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