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EXTENSION

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A Beginner's Guide to Wills¹

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Introduction

This is the first in a brief three-document series on estate planning. Each is simple and intended only to provide an outline to someone who knows little about the subject. The other two documents are (1) trusts and (2) living wills and power of attorney. Although many people think that they do not have enough assets to need a will—which presumably explains why 70% of Americans do not have a will (Nolo.com, 2000)—everyone should have a will. Most individuals have more than they realize, considering that an estate includes real and personal property. Real property is land and permanent improvements. Personal property includes everything else (e.g., stocks, bonds, mutual funds, cash, cars, furniture, art, jewelry, life insurance and retirement plans). The will is undoubtedly the most basic and perhaps the most important estate planning document.

What Is a Will?

A "will" is a declaration of what you want to do with your estate after you die. It shows how your assets will be distributed and lists the beneficiaries (people or organizations) that will receive your property and what portion of the estate each beneficiary will get. You appoint someone as the executor (male) or executrix (female) of your will to administer your estate after your death. The executor or executrix makes sure your property is distributed as you had intended and settles any outstanding debts and taxes out of your estate (AARP, 2000).

Wills and Estates

A will only deals with what is called the probate estate. This is the portion of your estate that is distributed under court supervision. It excludes the non-probate portion, which has property that passes automatically to a beneficiary through a separate arrangement such as jointly-held property or a life insurance policy with a named beneficiary (TIAA-CREF, 1999). Thus a will does not bequeath all of the estate.

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Both the probate and non-probate estates make up the gross estate. The gross estate is the total property the federal government uses to calculate federal estate taxes. Currently, the first \$675,000 of an individual's estate is exempt from federal estate taxes, or \$1.35 million for a couple. This value is to increase to \$1 million for an individual by 2006. The value of a gross estate is the value of all liquid assets, stocks and bonds, personal effects and other assets, real estate and death benefits from retirement plans and life insurance policies (TIAA-CREF, 1999).

How to Write a Will

Any adult of sound mind is entitled to write a will. Handwritten wills, called holographic wills, are only legal in 25 states and should therefore be avoided. The document must state that it is your will and should be signed and dated by you and signed by at least two (some states require three) witnesses. (Florida law allows a self proof of will form, if no witnesses can be found.) The witnesses must watch you sign the will although they do not have to read it. The pages of the will must be numbered, and each numbered page must be signed. None of the witnesses can be beneficiaries (Nolo.com, 2000). Although the will does not have to be notarized or recorded or filed with any government agency, it should be kept in a safe, accessible place where the executor or executrix can find it (Nolo.com, 2000).

A will does not have to be prepared by a lawyer. However, for complex matters a lawyer may be essential. There are many do-it-yourself forms and software kits to assist in preparing a will. Nolo.com sells a software kit (*WillMaker 8*) that has twenty different legal forms. Table 1 shows a sample will. There are also internet sites that provide some free or cheap legal documents. Examples include Legaldoc.com, LegalWiz.com and the Lectric Law Library.

What Happens If There Is No Will?

An individual who dies without a will has died intestate. If this happens, state law will determine what happens to the property through a process called intestate succession. This means that property will automatically be distributed to the spouse and children, or if they do not exist, the property goes to

other relatives or the state according to a statutory formula. Although this formula varies by state, it usually follows the guidelines shown in Figure 1.

Survivors	Portion of your estate
Spouse and no children	all to your spouse
Spouse and one child	1/2 to child, 1/2 to spouse
Spouse and more than one child	2/3 to children, 1/3 to spouse
Children and no spouse (Legaldocs, 2000).	all to children equally

Figure 1. Property distribution to family.

Also, a court will determine who will care for minor children and their property if the other parent is unavailable or unfit. If no relatives can be found, the property goes to the state (Nolo.com, 2000).

Problems with a Will

The main problem with a will is the amount of time the court takes to probate a will. Probate is the legal process that oversees the transfer of property from a deceased person's estate to the beneficiaries. The probate process takes place in the probate court located in the city or county of permanent residence of the deceased (AARP, 2000). Probate is usually completed in one year, with the minimum time generally being six months. The time obviously depends on the state and complexity of the estate (AARP, 2000).

The cost of probate is calculated as a percentage of the estate. Probate costs typically run from 2% to 7% of the estate and vary among states and courts. During probate the assets may be frozen, and any expenses must be settled by the beneficiaries. Probate also destroys privacy. Under probate, the will becomes a public record, as does the final settlement and inventory of estate property. These public documents may be viewed by anyone. This is why most people are recommended to also use a trust in their estate planning.

References

American Association of Retired Persons.
"AARP on the Issues." AARP Webplace. 2000.

Nolo.com Law for All. *Nolo's Legal Encyclopedia*. www.nolo.com. 2000.

The Lectric Law Library. Sample Legal Forms.
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York, NY: TIAA-CREF Library Series. 1999.

Table 1. Sample Will (The 'Lectric Law Library — <http://www.lectlaw.com>).**LAST WILL AND TESTAMENT OF _____**

I, _____, of _____ being of sound and disposing mind, do hereby make, publish and declare the following to be my Last Will and Testament, revoking all previous wills and codicils made by me. I declare that I am married to _____, to which I have referred to herein as my "spouse," and that I have _____ children now living whose names and birth dates are: [List children's names and birth dates.] I have _____ deceased children. All references to "my children" in this will include all of the above-named children and also any child(ren) hereafter born or adopted by me.

- I. My spouse and I are executing wills at approximately the same time in which each is the primary beneficiary of the other. These wills are not being made because of any contractual agreement between us, and either will may at any time be revoked by either maker at the sole discretion thereof.
- II. I appoint my spouse as personal representative of my will. If unable or unwilling to act, or to continue to act, as executor of my will, I then appoint _____ as personal representative of my will. No bond or other security of any kind shall be required of any personal representative appointed in this will. My personal representative, whether original, substitute or successor, shall hereafter also be referred to as my executor.
- III. I direct that my executor pay all of my funeral expenses, all state and federal estate, inheritance and succession taxes, administration costs and all of my debts subject to statute of limitations, except mortgage notes secured by real estate, as soon as practical.
- IV. I give, devise and bequeath all of the rest, residue and remainder of my estate, of whatever kind and character, and wherever located, to my spouse, provided that my spouse survives me. I make no provision for my children, knowing that, as their parent, my spouse will continue to be mindful of their needs and requirements.
- V. If my spouse does not survive me, then I give, devise and bequeath all of the rest, residue and remainder of my estate, of whatever kind and character, and wherever located, to my children *per stirpes*, and I direct that the share of any child of mine who shall have died leaving no issue shall be divided among my surviving children in equal shares *per stirpes*. [Note: *per stirpes* refers to line of succession.]
- VI. My executor shall have the following additional powers with respect to my estate, to be exercised from time to time at my executors discretion without further license or order of any court:
 - Business Interest. To sell or otherwise liquidate or to continue to operate my executors discretion, any corporation, partnership or other business interest received by my estate.
 - Property of My Estate. To retain any and all property and securities of my estate in the name of my executor as executor or in my executors own name.
 - Retention of Assets. To retain all property and securities of my estate for as long as my executor deems advisable.
 - Management of Estate. To invest, lease, rent, mortgage, insure, repair, improve or sell any and all real and personal property belonging to my estate as my executor deems advisable.
 - Mortgages, Pledges and Deeds of Trust. To enforce any and all mortgages, pledges and deeds of trust held by my estate and to purchase at any sale thereunder any such real or personal property subject to any mortgage, pledge or deed of trust.
 - Litigation. To initiate or defend, at my executors discretion, any litigation affecting my estate.
 - Attorneys, Advisors and Agents. To employ and to pay from my estate reasonable compensation to such attorneys, accountants, brokers, and investment, tax and other advisors as my executor shall deem advisable.
 - Adjustment of Claims. To submit to arbitration, to compromise or to release or otherwise adjust, with or without compensation, any and all claims affecting the trust estate.
 - Distribution of My Estate. In distributing my estate, to make said distribution wholly or partly in kind by transferring or allotting such real or personal property or undivided interest therein.
- VII. If any person, whether or not related to me by blood or in any way, shall attempt, either directly or indirectly, to set aside the probate of my will or oppose any of the provisions hereof, and such person shall establish a right to any portion of my estate, then I give and bequeath the sum of one dollar (\$1.00) and only that, and no further interest whatever in my estate to such person.
- VIII. In the event that any of my property, or all of it, at the time of my death is community property under the laws of any jurisdiction, then my will shall be construed as referring only to my community-property interest therein.
- IX. If any portion of my will shall be held illegal, invalid or otherwise inoperative, it is my intention that all of the other provisions hereof shall continue to be fully effective and operative insofar as is possible and reasonable.

IN WITNESS WHEREOF, I have hereto set my hand and seal this _____ day of _____, 20____.

Signed, sealed, published and declared to be the Last Will and Testament by ___ in the presence of all of us, who, in the presence and at the request of, and in the presence of each other, have hereunto subscribed our names as witnesses:

WITNESSES NAMES, SIGNATURES AND ADDRESSES