How do You Avoid Probate?

Despite the hype and the ads you may see warning of the dangers of probate, most people are not well served by complicated techniques and schemes designed to avoid probate. However, in some situations, avoiding probate in one or more jurisdictions may be desirable. For example, if you own real property in both Georgia and Florida, you may want your heirs to avoid the cost and expense of probating your estate in both states. One way of avoiding probate involves putting property into a revocable living trust. Revocable living trusts are described more fully in the Fiduciary Law Section's pamphlet of the same name. Another way to avoid probate in a second state might be to place the out-of-state realty in an entity such as a limited liability company or limited partnership.

How Much Does a Will Cost?

Lawyers usually charge either on an hourly basis or by setting a flat fee up front. In either event, the lawyer should be able to give you an estimate of likely charges before incurring significant expense, which should avoid unpleasant surprises down the road. Fees are based on either estimated or actual time spent by the lawyer and his staff. Usually, the process includes an initial meeting with the client, performing legal research, preparing recommendations as to the documents required, drafting the documents, making any desired revisions and witnessing and executing the will. The amount of time needed to complete the process depends on the complexity of each individual's personal situation. Generally, the more complex the will, the more expensive it will be.

How Long is a Will Valid?

The mere passage of time has no effect on the validity of the will. Of course, tax and other laws and circumstances may change, which may render the will invalid or create unintended results. Wills should generally be reviewed every two to three years, more frequently if you have a major life change, such as marriage, divorce, the birth or adoption of a child or a substantial increase in assets.

Legally, a will does not take effect until the testator dies and the probate court approves the will. Prior to death, a competent testator may at any time change, amend or revoke an existing will. No notice to or approval of the beneficiaries is required. Change is usually accomplished by signing a new will or executing an amendment known as a "codicil." A codicil is a separate document that expresses the changes to the will and is executed with the same formalities as a will.

What Effect Does a Subsequent Marriage, Divorce or Child Have on a Will?

Marriage, divorce and the birth or adoption of a child all may impact a will and its dispositive provisions. You should have your will reviewed upon any of these events.

Who Should Prepare a Will?

Drafting a will involves making decisions requiring professional judgment which can be obtained only by years of training, experience and study. Only a practicing lawyer can avoid the innumerable pitfalls and advise the course best suited for each situation. You should avoid using do-it-yourself kits or Internet templates, as they may create many problems.

What is a Living Will?

The state of Georgia recognizes the right of a competent adult person to make a written directive, known as a living will, instructing his physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition, coma and/or vegetative state. There are certain specific limitations on the contents, execution and witnessing of a living will. You should consult a lawyer if you wish to have one prepared. You may also want to consult your lawyer about signing a durable power of attorney for health care. Living wills and durable powers of attorney for health care are more fully described in the Fiduciary Law Section's pamphlet of the same name.

Some Suggestions Concerning Wills

A will signed and witnessed by two individuals in another state will usually be valid in Georgia. However, if you have moved here from another state, it is wise to have your will reviewed by a Georgia lawyer in order to ensure that it is properly executed and valid according to Georgia laws.

Self-prepared wills are also permitted provided they are properly executed and comply with Georgia laws. Many times, self-prepared wills contain ambiguous and confusing language causing many problems during the probate process. Thus, you can save your beneficiaries much grief and expense by consulting a lawyer to prepare and properly execute your will.

Changes in legislation and case law constantly modify the planning recommendations of a lawyer. You should review your estate planning, tax and incapacity planning opportunities with a lawyer whenever major life events occur and at least every two to three years.

Summary

Wills are not only for the well-to-do, they are important for all adults who are interested in ensuring that their wishes are respected upon death, and that their estates pass to their loved ones as quickly, as painlessly and as intact as possible. Wills are a component of successful estate planning, which seeks to transfer the individual's estate as she would have desired, avoid unnecessary costs and tears and minimize estate taxes.

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Wills

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Consumer Pamphlet Series

Why You (Yes, You) Need a Will

Confusion and myths surround the estate planning process. This pamphlet explains why all adults, regardless of wealth, should have a properly drafted and executed will. A will is necessary for ensuring that your estate is distributed among your loved ones and charities as you wish. A will also can save money and time in administering your estate once you are gone, which will lessen the burden on your beneficiaries and maximize the legacy left to them.

Who Needs a Will?

Every adult should have a will. Whether you have few assets, many assets, minor children, no children, or specific desires about who gets your property, you should have a will.

What are the Reasons to Have a Will?

- With a will, you decide how your property will be distributed. You may dispose of your property as you choose.
- A will may help you to lessen estate taxes imposed at your death (see more about estate taxes below).
- In a will, parents can name whom they want to be the guardian over their minor children.
- Your will can direct that your assets pass to your beneficiaries by way of a trust instead of outright distribution to the beneficiary. Trusts may assist in protecting assets from the claims of creditors or unwise choices made by beneficiaries. Trusts are a useful component in estate tax planning.
- With many people today in second marriages, a will with appropriate trust provisions may be helpful in ensuring that your assets ultimately pass to your children after being available for support of your surviving spouse. Without a will restricting those assets, the surviving spouse could be free to leave a portion of those assets at his or her death to a new spouse or to the spouse's children from another relationship.
- A will lets you choose the individual, bank or trust company to serve as executor of your estate. The executor will manage and settle your estate according to the law and your desires expressed in your will. Without a will, your beneficiaries would have to petition the court for an administrator to serve, which can be expensive and invite disagreement.
- A will lets you grant your executor full power to sell your property and liquidate your assets without having to petition the court for permission.
- A will enables you to eliminate unnecessary expenses and court costs involved in the administration of an estate without a will. For instance, bond premiums can be avoided by stating that you desire that the executor serve without a bond.
- You can make gifts to charity through your will.

What Happens if You Die Without a Will?

Dying without a will is referred to as dying *intestate*. Dying intestate generally means that the laws of the state of your residence will decide who receives what out of your estate. In Georgia, your surviving spouse and children, if any, would share the estate, subject to some limitations. Dying intestate creates additional costs in probating your estate, plus you don't get to decide who shares in your estate or make provisions for family members with special needs. Without a will, your minor children may be entitled to their full inheritance upon turning age 18.

How Can a Will Help Avoid or Reduce Estate Taxes?

If applicable, estate taxes can be severe. The top rate for individuals dying in 2006 is 46 percent. However, keep in mind that estate taxes apply to only a very small portion of the population (according to some estimates, in 2000 only two percent of the dying population in the United States paid estate taxes). If estate taxes are a concern, a properly structured will can contain provisions necessary to reduce estate taxes. One way a will does this is by taking advantage of the maximum amount you can give to individuals other than your spouse. Without a properly structured will, after your death, relatively few options may be available to reduce estate taxes. Tax consequences depend upon the individual case and you should discuss them with your lawyer.

What are the Formal Requirements for a Will?

A will is the legal declaration of a person's intention for the disposition of his or her property after his or her death. The laws of each state set forth the formal requirements for a legal will. In Georgia:

- You, the maker of the will (called the testator), must be at least 14 years old.
- You must be of sufficient mind and memory to realize you are making a will disposing of your property.
- The will must be in writing.
- The will must be signed by the testator and witnessed by at least two witnesses in the special manner provided by law. These witnesses should not be persons who are designated to take property under your will.
- The execution of the will must obey certain technical formalities.

What Property Does a Will Control?

A will only controls the property passing through the testator's probate estate. A testator's probate estate consists of all property owned by the person upon his or her passing that is not otherwise controlled by contract or operation of law. Probate assets include cars, personal property, real estate held individually and as tenants in common and bank accounts in the name of a single spouse.

Many types of property, however, pass to beneficiaries and others without regard to what the will provides. These assets may form a significant portion of the estate. The following are some examples of property that is not controlled by the will: (1) life insurance with beneficiary designations, (2) retirement accounts with beneficiary designations, (3) property owned as joint tenants with right of survivorship, (4) brokerage accounts for which the decedent has made a "payable on death" designation and (5) life estate interests.

For example, a testator may say in a will that she wants all of her property to go to her husband. However, she has a life insurance policy naming Aunt Peggy as the beneficiary. When the testator dies, Aunt Peggy, not the husband, gets the life insurance proceeds.

An estate planning attorney will seek to coordinate the disposition of these non-probate assets with the estate plan so that the testator's wishes are respected.

May a Person Dispose of His or Her Property in Any Way He or She Wishes by a Will?

A testator, by his or her will, may make any disposition of his or her property not inconsistent with the laws or contrary to the policy of the state of Georgia. A testator may bequeath his or her entire estate to charities, strangers or in trust for beloved pets, to the exclusion of his or her spouse and children. In such cases, however, the disinherited spouse or children could seek to challenge the will if appropriate grounds exist for a competency or undue influence claim, or petition the court for a limited distribution to them regardless of what the will provides.

Does a Will Increase Probate Expenses?

For the reasons discussed above, a will can lessen the costs of probate. Typically, court costs are limited to filing and publication fees. Court costs are usually less than $500. Court costs do not include compensation to the executor or amounts charged by attorneys or accountants for the estate.

Should You Avoid Probate?

Probate is the process of administering an estate upon an individual's death. It includes validating the decedent's will (or making the determination that he left behind no will), appointing the person who is going to administer the estate, paying claims of the estate and transferring the assets out to the beneficiaries. In Georgia, we have the luxury of a modern probate code and probate judges who really want to move the process along, so probate is generally not a concern. In other jurisdictions, this may not be the case.