

Establishing A Will

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Agricultural Business Management

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What Is A Will?

A Will is a legal document which lists instructions regarding the distribution and management of your assets. A Will technically directs finances only, with the exception of guardianship. A Will is usually a first step in the estate planning process. However, because of the extra expense and complication of the eventual probate process, the emerging practice is to avoid using the Will as the primary tool for estate planning.

If you are of legal age and of sound mind, you can draft your own Will. However, a Will drafted by an attorney is much more likely to encompass all the estate law provisions, insuring a legal description of your wishes. A Will document from the Internet or a software package can fail you as well. The expense of having an attorney draft your Will is minimal compared to the potential tax liability or assets going where you did not intend them to go, if you make an error developing the Will on your own.

A husband and wife should each have a separate Will. A Will can be personalized and great latitude can be taken in how your individual Will is written. Consult with an attorney regarding this issue.

What Happens If You Have No Will At Death?

Each state generally has a succession law that dictates how assets are distributed if a person dies without a Will, referred to as dying "intestate". In Minnesota, property held in joint tenancy goes to the surviving joint tenant. Life insurance proceeds go to the designated beneficiaries. Any remaining property is distributed according to state law. The spouse and children or next of kin are allocated a portion of the estate based on their relationship, number of survivors and the composition of the estate. If there are multiple marriages involved, the state's plan becomes very complicated and fragments assets.

The issue with the state plan is that it is complex and is not at all flexible. It does not change as your family and financial situation changes. The state plan may provide inadequate income for the surviving spouse.

The state plan may unfairly treat a farming or business heir if assets are equally divided between all heirs. The state plan also allows a judge to

designate a guardian and conservator for minor children and caretakers for your property. The only way to prevent these issues is to establish a Will of your own and not rely on the state's intestate law.

Check with your attorney to determine how Minnesota intestate laws would impact your situation.

Typical Articles in a Will:

A Will typically contains various articles or sections that outline your wishes regarding a given issue.

Most contain a provision naming a guardian and conservator for minor children. The guardian oversees the day-to-day physical care of the minor children. The conservator manages and financial decisions on behalf of the minor children. The individuals you select for guardian and conservator should be consulted in advance and asked if they would be willing to care for your children in the event of your death. You can name separate individuals for their care and financial matters. This is a must for young couples with minor children.

Another article names a personal representative to manage and handle the administration of your estate and your Will. Most often a spouse or family member is named to this position. However, anyone may be named. The person or persons named should be someone you trust to handle your affairs fairly and in a business-like manner. The individual or individuals should be consulted in advance. Personal representatives can charge a fee for their services.

Most Wills have several articles which establish procedures for the distribution of property. These articles should take into account contingencies such as what if the spouse dies first, both spouses die together or the entire family dies. Similarly, the Will should address what happens if a married child dies or is divorced before your death. You can also insert "bloodline" protection in the event the surviving spouse remarries. This can prevent assets from leaving your family lineage.

Your Will requires signatures and must be notarized. Most Wills give special mention of the spouse. You cannot completely disinherit a spouse unless a valid prenuptial agreement has been previously executed

or the spouse signs documents agreeing not to accept the inheritance.

Some Wills provide special provisions regarding special family needs. Sometimes, impaired family members are given special attention or bequests. Friends and charities are also mentioned specifically in the Will. Often, farming or business heirs are given special privileges regarding the purchase of the business assets. They may receive a “first right of refusal” or special terms in the form of a buy-out provision or purchase agreement enabling them to pay off the non-heirs who have an ownership interest in the business. Sometimes, certain heirs are given an “amount off the top” to compensate for past inequities or previous gifts.

Types of Wills:

Simple or “Sweetheart” Will direct everything to the surviving spouse or to children if no spouse survives. For younger people, with small and relatively simple estates, the simple Will can be quite satisfactory. A critical aspect of the Will for the younger family is the naming of guardians and conservators if they have minor children. As families and finances grow and there is a need to protect the children further, a more complex Will or Revocable Living Trust may be required.

Complex Wills are used to create a trust or structure for estate planning purposes. The complex Will category includes both AB Trust Wills and Contingent Trust Wills.

Couples who have divided their property ownership somewhat equally between themselves often use Complex Wills. Upon the first death, this plan uses a Will to direct assets to the children via a trust with life use to the spouse. This is used when combined estates are valued over the federal and state Applicable Exclusion Exemption amounts and when definite provisions wish to be made for the children. Trusts created by this method are known by several titles: A-B Trusts, By-Pass Trusts, Testamentary Trusts or Credit Shelter Trusts. Any assets such as stocks, bonds, life insurance proceeds, mutual funds, real estate or cash can be set aside for the children. Willing a portion of the estate to the children, protects the children in case the spouse remarries or otherwise consumes the estate prior to death. It also prevents this portion of the estate from being taxed at the death of the spouse.

However, this process does not necessarily protect the children’s inheritance from law suit or other adverse actions. Special trust provisions must be put into place to do so. It also does not avoid the probate process upon the second spouse’s death. Due to recent changes in Minnesota Medicaid/Medical Assistance (MA) law, the value of life estates granted **on or after August 1, 2003** are subject to claim by the State of

Minnesota if Medicaid/Medical Assistance payments were made on behalf of an individual.

After You Have Written Your Will:

Keep it in a safe place - your safe or a safe deposit box. There is only one original so you need to keep that in a very safe place. Don’t forget to review your Will periodically. It is best to review it frequently, but particularly if any of these events have taken place:

- marriage/remarriage
- death of spouse or child
- birth of children
- inherit property
- estate growth
- estate law changes
- divorce
- health status changes
- move to another state
- children’s status changes

If you wish to change your Will slightly, you may use what is called a codicil (addendum) to make changes in the Will. If you wish to direct certain personal items to certain friends or relatives, a letter of instruction can be drafted and included with your Will. It is referred to in your Will and allows you to direct certain household or family items to whomever you wish. Consider making multiple copies of this document and share them with your children. By sharing your Will and your reasons for what you did with your assets, family discord may be avoided.

Summary:

A Will is the equivalent of a letter to the judge and court system which automatically starts the probate process. Probate can be costly, time consuming, and is a public process. A Will does not protect your family’s inheritance from adverse actions such as law suits unless you establish a “protected trust” within a Complex Will.

In order for you to protect your assets, avoid the probate process, and have your wishes implemented in the event you become disabled or incapacitated, you will need to do the following:

- 1-** Establish a Revocable Living Trust with “lifetime trust shares” to protect some assets from any adverse actions, **making sure the trust is funded** (assets with a title are titled in the name of the trust) once established,
- 2-** Develop a Health Care Directive including the listing of a disability panel consisting of your current physician, a specialist, and family members. HIPAA authorization, guardian and conservator designations can be included or placed in a separate document, and a Durable Common Law Power-of-Attorney, and
- 3-** Establish a pour-over Will to place any new assets into the trust if you forget to do so.

Caution: This publication is offered as educational information. It does not offer legal advice. If you have questions on this information, contact an attorney.