Do you need a will?

You Can't Take It With You

Death affects people in many ways. It never is timely. Death confronts the family with bereavement, with the need to readjust emotionally and financially, and often with an unknown future. Death is not only a personal issue but a legal one as well. A death certificate must be issued, and the estate of the deceased individual (the decedent) must pass to others.

An estate consists of the property, both real and personal, which the decedent owns at the time of death. Real property includes land and improvements located on the land. Real property also includes oil, gas, and other mineral interests. Personal property is all property other than real property, including cash and bank accounts, clothing and personal effects, household furnishings, motor vehicles, stocks and bonds, life insurance policies, and government, retirement, or employee benefits.

Upon death, title to the decedent's property passes immediately to the beneficiaries under the decedent's will or to the heirs-at-law if the decedent died without a will. However, there must be an actual transfer of ownership of the property by proving the will in court or, if there is no will, by having a court determine who are the decedent's heirs. The purpose of court involvement is to protect the rights of the family, those entitled to receive property, and the creditors of the decedent's estate.

Therefore, although title to property passes immediately at death, the assets of the estate are subject to the control of the executor or administrator of the estate for the purpose of settling the debts of and claims against the estate. After the payment of debts and claims, the remaining assets are distributed to the decedent's beneficiaries or heirs-at-law. If the decedent died with a legally valid will, then his or her property is distributed according to his or her wishes as expressed in the will. On the other hand, if the decedent died without a will or if the will is declared invalid, the estate is distributed to the decedent's heirs as determined under Texas law. The decedent's heirs may not be the persons to whom the decedent wished for his or her property to pass.

Dying Intestate (Without A Will)

When a person dies without a will, the law determines who are the heirs, and assets are disposed of according to whether they are community or separate property.

Disadvantages of Dying Without A Will

If a person dies without a will, the law disposes of his or her property. The public policy of statutes governing the intestate distribution of property is to provide for the orderly distribution of property at death. The law does not play favorites, so the distribution is determined by how closely the heir was related to the decedent, not by how wonderful one was to the decedent. Dying without a will may trigger undesired results and unexpected costs and delays.

Undesired Results

Because one usually has an idea of how he or she would like his or her property to pass to others,

undesired results can arise if he or she dies without a will. Dying without a will risks that the property will not be inherited as the decedent wished.

For example, very often one spouse may prefer to leave everything to the surviving spouse who will provide for and take care of the children, but this may not happen if there is no will. If a person dies without a will survived by a spouse and children, including one or more children who are not also children of the surviving spouse, the surviving spouse receives only his or her one-half share of the community property, perhaps including the family home. Further, under these circumstances, the surviving spouse inherits only one-third of any separate personal property and only a life interest in one-third of any separate real property. If there is any animosity between, for example, the surviving spouse and the deceased spouse's children by a prior marriage (who are now co-owners of property), conflicts or disputes may arise. Surely this is not what the deceased spouse wanted.

If the most special people in a person's life are not among those who would be his or her heirs-at-law, they will not share in the estate if he or she dies without a will. If an unmarried person dies without a will, friends and roommates will inherit nothing. Thus, a devoted friend, who perhaps cared for the decedent for years, will not inherit property, no matter how unfair it might seem, unless the friend is provided for in the decedent's will. Also, without a will, property cannot pass to a charitable organization, no matter how committed the decedent was to its purpose.

In Texas, there is no forced heirship. In other words, a parent is not required to leave property to his or her children. However, one cannot disinherit heirs if he or she dies without a will. Under the intestate distribution statutes, property may pass to undesired heirs instead of those the decedent would have chosen.

Costs and Delays

Dying without a will can tie up assets for an undetermined period of time. A court proceeding often is required to determine who are the heirs, although in certain limited circumstances it may be possible to clear title to the assets without an heirship proceeding. An administrator, who may be responsible to the court for settling the estate, may have to be appointed. The administrator may be required to post a bond to insure that the duties are performed properly. The administrator's duties include locating the heirs, inventorying the assets, paying off debts of and claims against the estate, and distributing the property to the heirs.

Transfer of ownership of some of the assets by legal documents, such as deeds and certificates of title, may be necessary. If the estate cannot be settled amicably, the court will resolve the disputes. Because of congested dockets, court proceedings often are slow. Legal fees and court costs may begin to mount. Depending on how difficult it is to divide the property and whether the heirs agree on the value assigned to it, court proceedings could be so lengthy and costly that the estate is depleted. The bottom line is that dying without a will costs time and money and causes frustration for the family of the decedent.

Executing A Will To Achieve Desired Property Distribution

What A Will Can Do

A testator is a person who leaves a will in force at his or her death. A will is a legal instrument which states how the testator's property is to be distributed at death. A valid will avoids many of the problems that may arise from dying without a will and allows a person to leave property to the persons he or she desires. In addition to naming the recipients of the testator's property, the will also designates the individual(s) who will manage the property and care for minor children.

A will can also set up a trust, a method by which property is held by one party (the trustee) for the benefit of another (the beneficiary). To establish a trust, the testator transfers property, with the specific intent to create a trust, to the trustee who manages and administers the property for the benefit of named beneficiaries. A testamentary trust arises under a will and becomes effective when the testator dies. A trust is an effective way of managing property for the benefit of minor or incapacitated persons or persons who are incapable of managing their own financial affairs. A trust also is useful to prevent a spendthrift child from immediately spending his or her inheritance by preserving the funds for the child's education or other important needs. Further, a trust may be used to protect the child's inheritance from the claims of his or her creditors because property placed in a trust generally may not be reached by a beneficiary's creditors until it is distributed to the beneficiary. There also are many other legitimate reasons to create a trust in a will.

Directive To Physicians And Family Or Surrogates(Living Will)

Texas law allows any competent adult, by signing a directive to physicians and family or surrogates(or "living will," as it often is called), to instruct his or her physician to withhold or withdraw artificial life-sustaining procedures in the event of a terminal or irreversible condition. The directive takes effect only after the patient's physician determines that death is expected within six months without application of artificial life-sustaining procedures.

The form and contents of the directive are prescribed by Texas law. The directive should be in writing, signed by the patient, and witnessed by two competent adults. One of witnesses cannot be the person designated to make a treatment decision for the patient, related to the patient by blood or marriage, the patient's heirs, the attending physician or an employee of the physician, a person who would have a claim against the patient's estate upon his or her death, or an employee of the patient's health care facility who is providing direct care to the patient or who is involved in the financial affairs of the facility. The directive need not be notarized.

The directive may include a designation of another person to make a treatment decision for the patient if the patient is comatose, incompetent, or otherwise mentally or physically incapable of communication.

If you desire that your life not be artificially prolonged in the event of a terminal illness, you should consult with an attorney to have a directive to physicians prepared for you. It may also be desirable to inform your physician of your wishes and to provide him or her with a copy of the directive. Failure to sign a directive may result in difficulties for your family in carrying out your wishes with respect to terminating artificial life-sustaining procedures.

Powers of Attorney

A power of attorney is an instrument by which one person (the principal) grants to another (the agent) the power to perform certain acts on his or her behalf. Two types of powers of attorney are common in the estate planning field, namely the medical power of attorney and the durable power of attorney.

The medical power of attorney grants the agent the power to make health care decisions for the principal if he or she is unable to make them. The agent may exercise his or her authority only if the principal's attending physician certifies that, in the physician's opinion, the principal lacks the capacity to make health care decisions. The principal can revoke the power of attorney at any time, orally or in writing, and regardless of the principal's mental state. The medical power of attorney must be signed by two witnesses, one of which is not:

1. the person designated as agent;

2. related to the principal by blood or marriage

3. an employee of the principal's health care facility who is providing direct care to the principal or who is involved in the financial affairs of the facility

4. the principal's attending physician or an employee fo the physician

5. the principal's heirs; or

6. a person who would have a claim against the principal's estate upon his or her death

The second type of power of attorney is the durable power of attorney. This instrument grants authority to a designated agent to manage the principal's property on his or her behalf. It can be distinguished from the medical power of attorney which relates to health care decisions rather than to decisions concerning the management of property. The principal can either grant the agent one or more specific powers or grant the agent all of the powers listed in the power of attorney form. In addition, the principal can elect to have the power of attorney become effective immediately upon signing it or only upon the principal's future disability or incapacity. The durable power of attorney must be notarized, but it need not be witnessed.

The forms of both the medical power of attorney and the durable power of attorney are prescribed by statute. You should consult an attorney if you desire to have either of these documents prepared for you.

Conclusion

If you die without leaving a will, you risk that your property will not be distributed as you desire. Even when the heirs at law are the same as you would have selected yourself, there is no advantage to letting the law take its own course. The advantage lies in dying with a will. With a well-drafted will you can avoid legal pitfalls, name an executor of your estate, name a guardian

for your minor children, establish trusts, and minimize probate-related costs by providing for independent administration. Although a will can be challenged in court, the grounds for contest in Texas are few, and the law favors carrying out the decedent's intent.

Executing a will is not as complicated or as expensive as you might think. You are encouraged to talk with an attorney about wills, trusts, and estate administration and to have a will prepared by the attorney.

If you desire that your life not be artificially prolonged in the event of a terminal condition, you should consider signing a living will. You should consult with an attorney and your physician to understand the full impact of the living will.

Finally, you should consult with an attorney regarding the advantages of signing a medical power of attorney and a durable power of attorney.

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This information is not intended to be a substitute for the legal advice of a licensed attorney. If you have any questions regarding a particular issue or topic we suggest you seek legal counsel.

The above information is adapted from the brochure "To Will or Not to Will" prepared by the Texas Young Lawyers Association and published by the State Bar of Texas. Contact Tammi Sweet at the State Bar of Texas at 1-800-204-2222 ext. 2610 for a copy of the publication.