Question & Answer

Estate Planning Essentials

What is a "will"?

A will is a document that disposes of your property upon death. It also names important parties, such as executors of your estate, trustees of trusts created under your will, and possibly guardians for your children.

What happens to my child if I die without a will?

You and your child's other parent are your child's natural guardians. If one of you dies, the other is automatically the child's guardian without any court involvement. The surviving parent is entitled to designate the person who will become the child's guardian upon that parent's death or incapacity. That designation may be made in a will or in a stand-alone document. Upon the surviving parent's death or incapacity, a court will appoint the designated person to oversee the child until the child reaches age 18, the age of majority in Texas. If the surviving parent has not designated anyone, then the court will appoint the child's grandparent, great-grandparent, or nearest of kin (adult children, siblings, etc.) in that order.

What happens to my property if I die without a will?

- Some of your property will pass according to beneficiary designations. That property ("nonprobate property") includes life insurance proceeds, retirement plans, IRAs, and assets owned as "joint tenants with rights of survivorship."
- The rest of your property – your "probate property" – will pass according to the laws of intestacy. In Texas, the laws of intestacy direct that your property generally passes to some combination of your spouse, your descendants, and possibly your parents, siblings, and other relatives. In order to determine that combination, a court will identify your "heirs" by appointing an attorney ad litem to investigate your family history and also to represent certain heirs (minors, for example).
- The court will then appoint your spouse (or an adult child) to administer your estate and distribute your property to your heirs. This court supervision of your estate's administration is quite costly and time-consuming.
- The absence of a will makes appropriate tax planning far more difficult, if not impossible.

What are the important decisions when considering my will?

- Who are the people I trust to care for my children (guardians) and my assets (executors, trustees) after my death?
- How much should I leave to my children? – In most cases, this is an easy decision for a person to make, and after the death of his or her spouse, everything passes to children. For those with significant wealth, however, the questions can become: "How much is enough?" and "How much is too much?" You will likely ensure that your children never want but may be concerned that too much wealth could affect their incentive to become productive members of society. You may want to structure your will in a way that gives children incentives to excel or give back to the community. This is a very difficult decision that varies person to person and possibly child to child.
- In what form should I transfer property to my children? – There are several factors that influence whether to leave children property outright or in trust. Leaving property outright gives the child total control, responsibility, and ownership in relation to the property. Of course, this means that the child cannot be protected from him- or herself or from the child's creditors. The benefit of a trust is that its assets are protected from creditors and can be administered by a person or entity that can ensure the proper administration of the assets. If it is important for the child to have a sense of ownership or self-direction, the child can be named as a trustee or co-trustee.

- How do I dispose of my property in the most tax-efficient manner? – This decision is made with the help of your attorney, who will tell you the way to achieve your goals in away that is sensitive to taxes.
- What is the best way for me to benefit the charities I am involved with? – From the charities' perspective, an immediate, outright gift is best. However, sometimes the charitable gifts under your will can be coordinated with your other goals in order to minimize estate taxes and allow the charities and your family benefit in the long run.

What is a revocable trust (sometimes called a "living trust")?

A revocable trust is an alternative to a will. Like a will, it disposes of the assets in the trust upon your death. It also, however, provides for the management of trust assets during your lifetime. Because a trust is effective only with respect to the assets it owns, you will commonly also execute a will to pour into the trust any assets that you did not contribute to it during your lifetime. Common factors considered when deciding between a revocable trust and a will include: privacy, ownership of real estate in multiple states or countries, uninterrupted management during incapacity and after death, probate avoidance, and the convenience and security of professional management.

What happens if I become incapacitated during my lifetime?

Under Texas law, you are considered an "incapacitated person" if, because of a physical or mental condition, you are substantially unable to provide food, clothing, or shelter for yourself, to care for your physical health, or to manage your financial affairs. In the absence of "disability" documents, a guardian of your person will be appointed to care for your personal needs and a guardian of your estate will be appointed to manage your assets under close court supervision.

If I become incapacitated, how do I avoid guardianship?

To avoid guardianship, you should execute a Medical Power of Attorney and a Statutory Durable Power of Attorney (a financial power of attorney). In those documents, you will designate anyone you wish to make decisions on your behalf regarding your medical and financial well-being. Those documents can be revoked at any time if you decide to change your appointed agents.

What is a "living will"?

A living will – more formally called a Directive to Physicians – is a document that states your wishes regarding whether or not you will receive life-sustaining treatments if you are suffering from a terminal or irreversible condition. If you have not signed a Directive to Physicians but you do have a Medical Power of Attorney, your agent under the Medical Power of Attorney will have the power to apply or withhold such treatments. If you have neither document, then that decision will be made by your spouse, your adult children, your parents, or your siblings (in that order).

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