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Wills

Wills and Estates

The property that you own at the time of your death is called your **estate**.

A **Will** is a written document you may prepare that directs how some or all of your estate is to be distributed at your death. That part of your estate that is distributed according to your Will is called your **probate** estate.

You may not be able to direct how all of your property will be distributed at your death. Some of your property will automatically transfer to another person at your death. For example, you may own real estate jointly with another person with the 'right of survivorship'. If the joint owner survives you, she would become the owner automatically and the property would not be part of your probate estate. Likewise, if you designate one or more persons as beneficiaries of your life insurance policies or your retirement plans (such as IRAs and 401(k)s), the proceeds from those policies or plans will pass directly to the person or persons you named as beneficiaries and will not be part of your probate estate.

If you had a Will prepared while you were living in another state or country and you have now moved to Virginia you should have a Virginia attorney review it to be certain it is valid under Virginia law or to see if you need to have a new will prepared.

Property Distribution

Distribution of your property if you do NOT have a Will ("intestate succession"):

If you did not prepare a valid Will, your probate estate will be distributed according to the state law that is in effect at the time of your death. This is called the intestate succession law. There is no way to know what the intestate law will be at the time of your death, but under current Virginia law the following persons would receive your

probate estate if you die without a will:

- All of your property would go to your spouse (your husband or wife) unless you are survived by any of your children (or their descendants) who are not your surviving spouse's children.
- If you are survived by your spouse and your child or children, or their descendants, who are not also your surviving spouse's children, your surviving spouse would receive one-third of your estate and your children, or their descendants would divide two-thirds.
- If you do not have a surviving spouse, all of your estate would go to your children or their descendants.
- If you have no surviving spouse, children, or descendants of your children, your estate will go to your mother and/or father.
- If you also don't have any surviving parents, your estate will go to your brothers or sisters or their descendants.

Example of intestate succession:

John dies with no surviving spouse or children. He is survived by his brother Frank, sister Jean and 3 daughters of brother Albert who died before John. Frank gets one third, Jean gets one third and each niece gets one-ninth (they divide Albert's third). Frank and Jean's children don't get anything.

Distribution of your property if you have a Will:

If you prepare a valid Will, your estate will be distributed to those persons whom you designate in your Will (the beneficiaries), with a few exceptions:

- There is no legal requirement that you leave property to anyone. However, if your spouse (husband or wife) survives you, she has certain rights in your estate as a surviving spouse unless you and your spouse have signed a premarital or marital agreement where your spouse gave up those rights. Under current Virginia law, your surviving spouse has a right to claim one-third of your estate, or one-half if you have no surviving children. A surviving spouse and minor children may also claim a family and homestead allowance in your estate. If your Will leaves your surviving spouse or minor children less than what they are entitled to by law, they can still claim a share unless you have a premarital or marital agreement to prevent the spouse from claiming her share. Virginia law does not give adult children any right to a share of your estate, so

they cannot challenge your will just because you didn't leave anything to them.

- Some of your property may pass directly to another person at your death no matter what your Will directs. The joint surviving owner will automatically own any of your property that is owned jointly with the 'right of survivorship'. Usually, the deed to real estate purchased by a married couple states that the real estate is owned with the 'right of survivorship'. Some bank accounts are owned jointly with the 'right of survivorship' or may be payable directly to another person on the death of the owner. Likewise, the proceeds of your life insurance policies or retirement plans go directly to the beneficiary you name. However, you **can** name your estate as the beneficiary of life insurance policies or retirement plans. If you name your estate as the beneficiary, the proceeds will be distributed as directed by your will.

Reasons to Have a Will

A Will allows more flexibility in distributing your estate. With a Will, you can designate not only who is to receive your property, but also when he will receive it. For example, you can create a trust under the Will that would allow for assets to be managed for a beneficiary until he reaches the age you designate. A Will allows you to leave property to non-family members, such as friends or charities, and a Will allows you to leave specific property to the person you designate (for example, my collection of baseball cards to Aunt Susie).

Preparing a Will can avoid problems and expenses for your beneficiaries. If a minor or severely disabled adult directly inherits property from your estate, a court will have to appoint a conservator to manage the property. The conservator will be required to file accountings with the court and may have to go back to court to get approval to spend money. This may cause delays and will certainly cause extra expense that can be avoided by setting up a trust or making other provisions in your Will to avoid this problem.

You can name the person who will manage your estate (your Executor) in your Will. If you do not have a Will, state law determines who will be appointed to manage your estate (the Administrator).

Lawyer's Role

A lawyer should be able to prepare your Will so that it is 'self-authenticating' or 'self-proving'. This means that the witnesses to your Will won't have to come to court to validate their signature.

Handwritten Wills can be valid under Virginia law but it is risky to try and write your Will this way. There are some legal requirements for handwritten Wills and if you fail to follow those requirements, a court may declare your will to be invalid. The Will must be entirely in your handwriting. It can't be partially handwritten and partially typed. Two disinterested witnesses (disinterested means the witnesses are not beneficiaries under the Will) must be willing to identify the handwriting as yours. It could be difficult to find such witnesses.

A lawyer who is familiar with Wills knows how to write your Will so that it will be clear what you want done with your property. Although it may seem easy to write a Will, it can get complicated, even with a small estate, when you consider such things as:

- Who should get the property if a beneficiary dies before you,
- What powers should be given to the Executor,
- Whether a trust should be created, or
- Whether a guardian may be needed.

A lawyer may be able to save your estate and beneficiary's fees and taxes.

A lawyer will charge you either a flat fee for preparing your Will or a fee based on her hourly rate. You should be able to find out how much the lawyer will charge before meeting with her.

Questions to Consider

Before meeting with the lawyer think about these questions:

- Who will be your beneficiaries?
- Do you want to leave all your property to one person or to more than one person? If you intend to leave your property to more than one person, what share will each person get?
- Do you want to leave certain items of property to specified people (baseball cards to Aunt Susie)? Or to friends or charities?
- Who should receive your property if one of your beneficiaries dies before you?

- Should any beneficiary's share be held in a trust for him until he reaches a certain age?
- What property do you own and is anyone a joint owner or designated as a beneficiary of a life insurance policy or retirement plan?
- Who do you want to serve as your Executor? The Executor's duties will include collecting your property, paying any debts, and distributing your property according to your Will. The person you name should be capable of handling these duties and should be someone you trust to carry out your wishes. A beneficiary can also be your Executor.
- Who should be the Executor if your first choice cannot do it?
- If you have minor children, who will be their guardian?
- Who will be their guardian if your first choice cannot be?

Changing or Revoking the Will

You can always change or revoke your Will because it has no legal effect until your death. You can revoke it by destroying it, but you should not try to make changes by writing on your Will because that may revoke it entirely. Review your will periodically to determine if you want to make any changes. Your lawyer should make changes for you.

Wills and Life Insurance

Proceeds of a life insurance policy are not part of your probate estate unless you name your estate as the beneficiary in the policy. If you name a person as the beneficiary rather than your estate, that person is entitled to the proceeds at the time of your death and is not legally required to pay any of the burial, funeral or other expenses of the estate unless he or she signed the contract for the burial, funeral or other debt.

After Executing the Will

You should discuss your Will with the person(s) you name as Executor to make sure that your wishes are understood. Keep your Will in a safe place and tell the Executor and other trusted persons where you will keep it so they will be able to find it. It will be presumed revoked if the original cannot be found at your death. If you keep the will in a safe deposit box you may want to give the executor access to the box. However, under Virginia law, the company or bank may permit limited access to the

box by your spouse or next of kin or by a court clerk or other interested person for the limited purpose of looking for a Will.

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