

13. Do You Have a Will Appropriate for Current Circumstances?

If not, get one. Yes, it will cost you something. A simple Will might cost \$100 to \$500, a more complex one considerably more. But it won't cost you anything like what it can cost your estate if you do not have a current Will.

Why is it that many people die each year without having made a Will? Fear of facing up to the certainty of death? Fear of lawyers? No one knows. A curious fact is that many who died "intestate" (that is, without a Will) had gone to the trouble of having a Will prepared but had not signed it. Why? Again, no one knows. Aside from contracting a fatal illness, the event that most often motivates people to write and sign a Will is planning a trip over a large body of water. There are more rational reasons for planning what happens to your wealth, property, and children after you die.

The main purpose of this article is to motivate you to get a Will if you have not done so. A secondary purpose is to introduce you to topics you will want to think about before you meet with an attorney. Doing so will save you time and money.

The Consequences of Dying Intestate

If you die without a Will, the courts, acting under Washington statutes, dispose of your estate. This is good in that it prevents an anarchic free-for-all. However, it can be costly, time-consuming, and, most importantly, will probably not result in the disposition you would have chosen. Here are a few of the problems.

You Might Not Approve of Your Estate's Administrator

For openers, anyone may petition the court to be the administrator of your estate—that is, to make the decisions of how your property is managed, how your affairs are settled, and when property will be distributed. Also, it is not uncommon for your relatives—who have priority to be appointed administrator—to squabble among themselves over that right. If none of the relatives or your creditors (who also have priority to be appointed) are satisfactory to the court, the court may appoint anyone to administer your estate.

Laws Determine the Specific Disposition of Your Property

These laws are not flexible. If, for example, your spouse survives you, one half of your separate property goes to your spouse and the other half is divided equally among your children. All of your community property goes to your spouse. Is that what you want? If you have no children and your spouse survives you by just a few hours (as might happen in an automobile accident), your spouse's parents become the beneficiaries of your estate. Is that what you want? To avoid untoward consequences at your death, have a Will prepared—and then sign it.

The Court May Appoint a Guardian

If you die intestate and have children under 18 who receive property, the court may appoint a guardian (or guardians) to hold and manage the children's property until they are 18. At that time your children take control of what is due them, without any further limitations or advice. A guardian must file an accounting with the court annually and must get the court's approval before spending funds or changing investments. This is a time-consuming and expensive process. Your Will can provide for a more rational way to handle property passing to your children.

What a Will Does

A Will can direct how your property and family affairs will be handled after your death. Before you see a lawyer to discuss the provisions of your Will, ask yourself these questions:

- Who will be your personal representative (also called “executor” or “executrix”) to take care of your affairs after you die?
- Who will receive your property after payment of debts and taxes that might be due? That is, who will be the beneficiaries of your estate?
- How do you want your beneficiaries to receive property? Outright, or in trust, in which case someone else (a “trustee”) looks after it for a period of time?

- If you have children under the age of 18, who will be their legal guardian if both you and your spouse are deceased?

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What Your Will Covers

Your probate estate would not include, for example, (i) bank or brokerage accounts held in joint tenancy *with* rights of survivorship or (ii) property, such as insurance benefits or retirement plan benefits, that is paid directly to a beneficiary you have designated. Under recent legislation, you can specifically provide in your Will for designation of a new beneficiary for a bank or brokerage "payable on death" or "transfer on death" account, or can designate a different post-death owner of a "JTWROS" bank or brokerage account. Your taxable estate for federal estate tax purposes, however, will usually include these assets.

What a Personal Representative Does

Your personal representative has both the duty and the legal authority to take possession of all your property. This duty includes finding property that may be difficult to locate. The personal representative also has the duty to settle any claims or debts against you or your estate and to pay any death taxes owing on account of your death from your probate estate or, in some cases, your nonprobate assets. The personal representative's goal is to complete these duties promptly so that your property can be transferred as soon as possible to your beneficiaries.

Who May Be a Personal Representative?

You may name any individual person, any bank or trust company authorized to conduct a trust business in Washington state, or any law firm that is a professional service corporation as personal representative. However, in Washington State, a surviving spouse has the absolute right to be personal representative with respect to your community property if he or she petitions to be appointed within 40 days of your death. Persons who are disqualified from serving include minors, persons who are not legally competent, persons convicted of any felony or of a misdemeanor involving moral turpitude, and, generally, corporations other than national banks, trust companies, or law firms that are professional service corporations.

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Choosing a Personal Representative

The personal representative should be reasonably competent in financial affairs and able to understand general business and money matters when working with professional advisors. In most circumstances you would simply name your spouse, an adult child, or a close relative or family friend. If complex property matters or large amounts of wealth are involved, a corporate personal representative may be more appropriate, such as a bank trust department or trust company. A corporate personal representative will also be impartial to and independent of your beneficiaries. Rather than naming the corporate personal representative alone, you might consider naming it as a co-personal representative with an individual. You should also name alternate personal

representatives who can serve if your first choice is not alive or cannot serve for any other reason. You should notify the individuals or entity you have chosen and make sure that they are willing to serve.

What About Fees?

A personal representative is entitled to a fee for acting as personal representative. This fee is subject to court approval for reasonableness and is primarily based on time spent in administering the estate. Very often, an individual personal representative will waive any fee, especially where much of the work is done by a corporate co-personal representative or the attorney of the estate.

Who Gets Your Property?

The main purpose of your Will is to designate specifically who will get your probate property after your death. You may name anyone you want as your beneficiary. However, your Will is the only way to make certain gifts of probate property—for example, gifts to charitable organizations or gifts to unrelated friends. Whether these are cash gifts or simply a specific piece of furniture or jewelry, you cannot be sure the gifts will be accomplished except by a Will. Likewise, if you desire to make unequal gifts of your probate property to your children, or nieces or nephews, you can do this only with your Will.

You can use a list, separate from your Will, to make gifts of certain tangible personal property not used in a trade or business. This is an easy way for you to give away jewelry, furniture, artwork, silver and gold coins or articles, and cars and boats, but only if your Will properly states that you are going to use such a list. If the list is not mentioned first in a valid Will, the list is not legally effective. This list need only be in your handwriting or signed by you. One real benefit of the list is that you can change it from time to time without having to change your Will.

How Your Beneficiaries Receive Property

Your Will also specifies how (and when) your beneficiaries will receive property. With no Will, your property simply passes outright to them. For any beneficiary under age 18 this normally requires a formal court guardianship, as described earlier.

You can resolve this situation by creating a trust under your Will. (A trust under a Will is called a “testamentary” trust.) This is particularly useful for children because it completely avoids the guardianship proceeding described earlier. The trust can specify what distributions will occur and when the trust will terminate; thus, you can delay the outright distribution beyond age 18 until the child is more mature. Testamentary trusts can also be used to provide for a surviving spouse, to plan for income or estate tax savings, to provide for management and preservation of property for the benefit of disabled children or parents needing special care, and in any number of other situations. (See related articles on trusts.)

Naming a Custodial Guardian for Your Children

If you are the surviving parent, you may name a “guardian of the person” for your minor children in your Will. This will avoid a family dispute over who should have legal custody to raise your children under age 18 at your death. You can also avoid having your children placed with a relative you would not want as guardian.

The guardian of your child’s person is legally obligated to see to the child’s proper upbringing. The guardian also determines all aspects of the child’s care, custody, and control. These include how the child is educated, where the child lives, what religious training and medical care the child receives, and all other matters relating to the child’s development.

Even Small Estates Benefit From Planning

Every person should have a Will, even if it is a simple one. Why? Because a Will covers so many important personal areas, and because every person has an estate, however small. Even small estates can require and benefit from proper, and often sophisticated, planning. Once you have a Will, review it periodically to make sure it is still current to meet your objectives and needs. Changes in your family circumstances, your financial situation, or applicable tax laws may necessitate changes in your Will.