ESTATE PLANNING FREQUENTLY ASKED QUESTIONS

Q: What is a will?

A: A will is a person's expressed intention of what should be done with his property after he dies.

Q: What are the requirements for a will?

A: The specific requirements depend on state law. Commonly, the will must be in writing, signed by the person whose will it is (the "***testator***") and witnessed by (usually) two persons. The exact number depends on state law.

The testator normally must have **attained the age of majority**, and must be of "**sound mind**" at the time the will is executed. A married minor is usually capable of executing a will.

The **witnesses** normally MUST be "**uninterested**," meaning they're not beneficiaries of the will. Witnesses also **must be competent persons**.

A will **normally doesn't need to be notarized**, but a document called a "**self-proving affidavit**" might be created to provide further legal strength to the will and to simply the probate process.

"**Holographic**" **(handwritten) wills** are still recognized in many states. Such a will must be **in the handwriting of the testator** and signed by the testator. Witnesses aren't normally required for a holographic will. State law might impose other conditions on a holographic will.

Q: Who needs a will?

A: Since most everyone dies possessing property, most everyone needs a will. State law decides what happens to property in the estate of a person who dies without a will. State law attempts to distribute the property according to what most people want, but it doesn't always work that way. The default plan normally distributes property to relatives.

Someone who leaves behind a girlfriend or boyfriend, or even a fiancé, will **not** be able to provide them with any inheritance unless there is a valid will. There is almost no exception in the law to provide otherwise.

Q: Who should draft my will?

A: Only an attorney can legally draft a will for a person, unless a person drafts his own will. Personally drafted wills are often incomplete, and therefore invalid under state law. **An invalid will is worthless**.

Kits for writing a will are normally not state-specific. If your will fails to follow state law, it will be invalid.

Q: Can a will be changed?

A: Yes, if the testator is competent. A new will or a "**codicil**" can be executed to create a new scheme for disposing of the testator's property.

State law can change a will also. This is commonly done when there has been a divorce. Usually a divorce terminates the ex-spouse's rights under a will, unless a contrary intent is clearly shown. A separation doesn't terminate a spouse's rights under a will. The specific impact of divorce on an existing will depends entirely on state law.

Q: Is joint tenancy a substitute for a will?

A: A **joint tenancy with right of survivorship** is a method of owning property with another person. At the death of one owner, the other owner becomes the full owner of the property. The property isn't part of the decedent's estate, and doesn't go into probate.

There are tax implications and simple ownership issues for a joint tenancy.

A joint tenancy is **not the equivalent of a will**. A will can do a number of other things. A joint tenancy creates a situation where the other joint tenant will get the whole property at the decedent's death. But if you give your brother Bob an interest in a joint tenancy on your home, Bob could sell his interest or his creditors could go after his interest.

Q: What happens if you die without a will?

A: State law has a **default will** for any person who dies without a will.

As part of the probate process, the **creditors of the decedent get first shot** at the estate property, after certain allowances for a spouse and children.

Q: Can I appoint a guardian for my children in my will?

A: Yes. This is another valuable benefit that a will can provide. However, **a court is not bound** by the naming of a guardian in a will. The court will certainly consider it, and it's often the **only** way to make your wishes known after you've died.

Q: What is a personal representative?

A: The **person who represents the estate** is called several different things, depending on state law. Traditionally, the person appointed by a will to represent the estate is called the **executor (or executrix, if female)**. A person appointed by a court to represent the estate of a person who doesn't have a will is called a **personal representative**, or **administrator**.

Q: Does the personal representative have to live in the decedent's state?

A: This depends entirely on the relevant state law, but it is common. Texas does not require the personal representative to reside in Texas, but rather an non Texas resident will be required to have a Texas resident appointed as registered agent.

Q: What are the executor or personal representative's duties and obligations?

A: The representative is charged with following state law in wrapping-up the decedent's affairs. This includes:

- Giving the proper notices to the proper parties
- Collecting all the decedent's property
- Receiving claims against the estate
- Paying just claims and disputing others
- Distributing the estate property according to the will or state law

Along the way there may be other necessary actions, like selling estate property to cover debts or allow for proper distribution.

Q: Can more than one person he named as personal representative?

A: Yes. You may appoint **co-representatives**, or a **secondary representative**.

Having more than one representative can create problems during probate, however. Normally they will have the same powers to act, and this can create conflict. The nomination of two or more executors/representatives should be carefully considered.

Appointing co-representatives might be an emotional reaction – not wanting to hurt someone's feelings. However, an emotional reaction is often not the best choice for a legal situation. If you nominate co-representatives, you need to believe that they will be able to cooperate in handling the estate.

Q: Can I dispose of my property in any way I wish?

A: Yes, for the most part. But if you indicated that all your property should be collected and burned, the law might not give effect to that part of your will.

You won't be able to avoid **protections given to others by act of law**, either. This can include your spouse's rights against the estate, community property protections, and special protections for children.

Q: Should I leave a separate list disposing of personal property?

A: Many states allow this. The benefit is that you can change the list rather than changing the will.

Q: How can a person contest a will?

A: A person contests a will by **filing the relevant documents with the probate court**. The person normally must be "interested" – that is, must be an heir under the will or at law. There are time limits for contesting a will, and they vary by state.

You **must have grounds** to have a chance of successfully contesting a will. Unhappiness with the proposed distribution of property is not a valid ground. Valid grounds depend on state law. **Incapacity, fraud, undue influence and duress** are the most common grounds.

Q: Must the will be read to the family?

A: This is a **Hollywood myth**. State law could require this, but it would be rather pointless. The representative of the estate normally must provide notice of probate to all interested parties, and they can obtain a copy of the will from the probate court. A "reading of the will" is used in movies to create drama, like when the decedent disinherits his wife and children and leaves everything to his mistress.

Q: Why must an estate go though court?

A: So that the decedent's **affairs can be <u>legally</u> concluded**. The court oversees the probate. If there is real property, someone will need legal authority to transfer the property to the heirs. If the estate is producing income, taxes will have to be paid. The creditors are to be paid from the estate property.

Many states (Texas included) have provisions for an "informal probate" or "simplified probate" which greatly reduces the time cost of the probate process along with the requirements of interaction with the court, but doesn't eliminate the court entirely. It is imperative that your will be properly prepared in order to take advantage of the "informal probate" or "simplified probate" process. Most every estate will have a piece of **property that passes by title or deed**, like a car or real property, and normally only someone with legal authority can legally transfer such property.

Q: When should I make a will?

A: A person should make a will **right now** because no one knows what tomorrow holds. A person **should review his estate plan occasionally**, especially after certain events, such as marriage, divorce and winning the lottery.