

# Do You Need a Will?

Do you have a written will? If not, you are not alone. Though most people recognize the need for a will, it is estimated that nearly two-thirds of Americans don't have one. Why is this the case? There are probably many reasons. Perhaps, for some of us, it is a reluctance to acknowledge our own mortality; others simply procrastinate. Another reason may be a lack of familiarity or understanding as to the importance of a will.

## The Importance of a Will

A valid written will is a relatively straightforward document setting forth a person's wishes for the distribution of his/her property (estate). Some advantages of having a well drafted will include:

Appointing an independent executor who functions free of court supervision.

Naming a guardian for minor children.

Assuring that a person's property goes where he/she desires.

Eliminating uncertainty as to the deceased's intentions.

Discouraging conflict among family members.

Avoiding legal pitfalls.

The ability to establish trusts.

Establishing evidence of the transfer of title to real and personal property.

## When There is No Will

When a person dies without a valid will (this is called dying intestate) it can, and often does, unnecessarily complicate things for his/her family members. This is true even for smaller estates.

For those who die without a will, Texas inheritance laws determine which family members receive the estate's property. While the state's method of descent and distribution of property may be consistent with some people's wishes, most of us would prefer to determine this for ourselves. Even when the heirs at law are the same as you would have selected yourself, the process of administering the estate is often less efficient and more costly than if there had been a written will.

## **Power of Attorney**

A power of attorney authorizes a person to act on someone else's behalf in a legal or business matter. The person authorizing the other to act is called the principal or grantor, and the one authorized to act is the agent or attorney-in-fact. As an agent, the attorney-in-fact has a fiduciary responsibility to the principal. This means that the attorney-in-fact must, by law, be completely honest with and loyal to the principal in their dealings with each other.

A power of attorney may be limited to specified types of transactions, or it may be general. It may also be for a limited duration. A power of attorney becomes ineffective if the grantor becomes incapacitated unless the grantor specifically states that the power of attorney will continue to be effective even if the grantor becomes incapacitated. This is called a durable power of attorney. Even durable powers of attorney, however, become ineffective upon the death of the grantor.

## **Medical Power of Attorney**

There is a chance that, in your lifetime, you may be seriously injured, ill, or otherwise unable to make decisions regarding your own health care. If this occurs, it would be beneficial to have someone whom you trust to make such decisions for you – someone who understands your wishes and your values. A medical power of attorney (formerly called a power of attorney for health care) is a document that appoints someone to make health care decisions for you if you later become unable to make these decisions yourself.

Although the medical power of attorney is effective immediately, the appointed agent may only make health care decisions on the principal's behalf after the attending physician has certified that the principal is incompetent. Even when a medical power of attorney is in effect, treatment may not be given to or withheld from the principal if the principal objects. In the medical power of attorney document, the principal may limit the agent's decision-making authority to certain types of decisions. The principal may also specify a specific termination date in the document and/or subsequently revoke the medical power of attorney altogether.

## **Living Will / Advance Health Care Directive**

An advance directive allows you tell doctors and those close to you what you wish to be done should you need life-sustaining treatment. If you do not have an advance directive, doctors may use machines, such as respirators, to keep you alive. An advance health care directive (sometimes referred to as a living

will) is a document that allows you to direct physicians either to continue, or to withhold/withdraw life-sustaining treatment. It becomes effective only when you have a terminal illness or an irreversible condition.

## **Living Trusts**

A living trust can be an appropriate estate planning tool for certain individuals. Some reasons for creating a living trust include estate tax planning, privacy, and avoiding probate in multiple jurisdictions. But you should first understand that most Texans' estates will face no death taxation at all. Therefore, living trusts are not necessary for many people.

Before purchasing a living trust, you should determine whether your estate is likely to exceed the federal estate tax exemption limits, and whether there are other compelling reasons to establish this type of trust. Because there has been a considerable amount of consumer fraud involved in living trust sales in the past, The State Bar of Texas has included some general information about such scams on its website at [www.texasbar.com](http://www.texasbar.com).

## **Probate**

Probate is the official proving of a will in court. Texas has adopted a simplified probate process under the Texas Estates Code allowing for the appointment of an independent executor in a will. These independent administrations normally involve only one court hearing and the filing of an inventory. The independent executor can usually function without further court intervention after the will has been accepted for probate. Independent administration can be accomplished through a properly drafted will, but is usually not available if there is no will. An independent executor can often carry out the necessary transactions of the estate in a timely and cost effective manner.

## **Some common questions and answers:**

**Q: Can I use a form off of the internet, and write my own will?**

Yes, it is legal to write your own will. But some home-made wills fail to adhere to the specific requirements set forth in the probate code. Since each state has its own unique laws governing wills and probate, be sure that your internet source is well-versed in Texas probate law.

**Q: I have minor children. Can my spouse and I designate a guardian for our children in our wills?**

Yes. Upon the unfortunate occurrence that both parents die before their children reach maturity, a will can provide for the appointment of a guardian. The will can also include a trust for the benefit of the minor children. Appointing a guardian and trustee for the benefit of minor children are important aspects of a will.

**Q: Do I need a will even if I'm not wealthy?**

The size of your estate is not as important as some other factors in determining whether you should have a will. Most people with average or even smaller estates can justify having a will. You do not have to be wealthy to own a home or rental property; to own a business or family farm; to have minor children; to be divorced and remarried; or to have unique preferences for how you would like your estate to be distributed. Yet each of these common events can affect your estate, often making a will worthwhile.

**Q: Is probate time consuming and expensive?**

Not usually. Texas has adopted a simplified probate process under the Texas Probate Code. Independent administration is often less costly and more efficient than court supervised administration.