

BASIC INFORMATION ABOUT WILLS

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Definition. A Will is a written document which states to whom a person's belongings, money and property are to be given upon death. A valid will may either be typed or handwritten (holographic).

Testator. The person who makes the will is commonly referred to as the "Testator". After he dies he is sometimes referred to as the "Decedent" in legal terminology.

Creation of Wills. A trust is created by a written document but it must be done in accordance with strict legal rules or else it is invalid. If the Will is invalid, then the Testator's money and property get distributed according to the laws of California found in the Probate Code. If the Will is typewritten, (also known as a witnessed will) then the Testator must sign it and date it and his signature must be witnessed by at least two persons. The Testator must intend and declare to the witnesses that it is his will. Those two witnesses must sign as well. If the Will is handwritten (also known as a holographic Will), the entire Will must be entirely in the Testator's own handwriting and signed and dated by him. For example, if a person typed his will and then signed and dated it without having it witnessed, then it would be invalid. There is also a third type of Will which is rarely used called a nuncupative will. That is a will by one who is in actual contemplation or fear of death by a soldier in the field, a sailor at sea, or by an injured person. The nuncupative will doesn't have to be in writing but is only able to dispose of personal property valued at \$1,000 or less.

Should you have an attorney prepare your Will? I of course recommend that any Will be prepared by an attorney. It is far cheaper to have the Will prepared by an attorney so that all of the issues that typically arise are covered and written in language that is readily understood by the Court system. Some of the largest legal fees are incurred in the Probate Court where there are disputes about Wills and inheritances arising from faulty or ambiguous Wills. The laws pertaining to Wills and Trusts have evolved over many centuries and as such the Will document needs to be properly written to carry out what the Testator truly wants to do.

Heirs. The persons who are to receive money and property upon the death of the Testator are known as Heirs. The Heirs are typically the persons named in the Will but sometimes persons who are not named in the Will have a right to be Heirs as well. A common situation where non-named persons are Heirs is where a child of the Testator has not been named in the Will. In that case, the legal presumption is that the Testator forgot that child so that child then legally becomes an Heir. Also, if the Will is invalid or if there is no Will, the Heirs are those persons entitled to inherit under the laws of California found in the Probate Code.

Executor. The person or institution that takes care of the money and property of deceased Testator is known as the Executor. The Executor is bound by law to follow the directions contained in the Will.

Guardians of the Estate and Person. Where a Testator has minor children, the Will can specify who is to care for his minor children. The person who has the physical custody and care of the children is the Guardian of the Person. Either the same or a different person can be designated to handle the money and assets that the children are inheriting from the Testator and is known as the Guardian of the Estate. Since

Guardianships only last until the children reach age 18, Testators often choose to establish some kind of trust to safeguard the money and assets after age 18.

Decedent's Estate. The decedent's estate is all of the money, property, assets and belongings that the Testator still owns at his death. The Will thus controls the disposition of the Decedent's Estate.

Effective date of the Will. A Will becomes effective when it is signed by the Testator.

What happens if there is no Will? If there is no will, then the laws of the State of California found in the Probate Code decide who gets what on the Testator's death. These are known as the laws of intestate succession. Basically, these laws provide a scheme of distribution to spouses and blood relatives. On the death of a married person, one half of the community property belongs to the surviving spouse and the other half belongs to the decedent's estate. The half belonging to the decedent's estate is then distributed to the surviving spouse if the decedent did not leave any surviving relatives. If the decedent has one surviving child or grandchild or has surviving parents or siblings, then from the amount belonging to the decedent's estate the surviving spouse gets half and the others get the other half. If the decedent has more than one child living or has one child living and one grandchild, or has grandchildren from two or more deceased children, then the surviving spouse gets one-third and the others get two-thirds. If there is no surviving spouse, then the entire estate goes to living children and grandchildren or if there are none of those, to surviving parents or if there are none of those to surviving siblings or if there are none of those to surviving grandparents or children of grandparents.

A primary reason for a will is so you can distribute unequally or to give to charities or non-relatives. If there is a Will, the Testator can choose how much to give, if any, to his Heirs. Also, with a Will, the Testator can give to charities or to friends or other persons who are not relatives.

Revocability. A Will is not permanent and can be changed or revoked at any time before the Testator's death, so long as the Testator is legally competent. Thus, one cannot assume that if something or some person is mentioned in a will as an Heir that the situation will remain the same. Testators can and often do change their wills. The main issue involving elderly or sick people changing their wills is whether they are legally competent to do so and/or whether there has been undue influence. Again, a lawyer should be involved with making any will changes and/or establishing Wills for people who are ill or elderly so that the changes are legally effective.

What does the Will really control? The Will only covers money and property WHICH IS STILL OWNED BY THE TESTATOR IN HIS OWN NAME AS OF THE DATE OF HIS DEATH. It does not control things which have been given away or sold before death and it does not control things which have been contributed into a living trust before death. For that reason, one needs to be careful about how the Will is worded to avoid disputes over the estate.

Testamentary Trust as part of Will. The law of Wills allows the Testator to establish a trust for some or all of his assets. This would be typically done to have some or all of the Decedent's Estate held and managed for Heirs who are under age 18 and also to be able to have them held and managed for the years after age 18. This can be an alternative to setting up a Revocable Trust particularly if there are not enough assets to justify a Revocable Trust. Refer to my separate articles on Trusts and on Revocable Trusts for more information on this subject.

Taxes, Debts and expenses of Administration. Before any of the Testator's money or property is distributed to the Heirs, the debts and unpaid taxes of the Testator must be paid. Also, the expenses of estate

administration such as the Executor's fees, attorneys fees and other professional fees must also be paid ahead of the Heirs. Some of these fees can be avoided by the Testator establishing a Revocable Trust during his lifetime.

Asset Protection/creditor protection issues. A Will does not provide any asset protection. The creditors of the Testator must be paid ahead of any distribution to the Heirs.

Estate taxation and Wills. The federal Estate Tax has been subject to much debate and legislation. For persons dying in 2007 or 2008, there is a \$2,000,000 exemption from estate tax. The exemption goes up to \$3,500,000 for 2009 and there is no tax for persons dying in 2010. However, the exemption goes back down to \$1,000,000 for 2001 and beyond. The way a Will is written can affect the Estate Taxes. For example, if the Will leaves all of the Testator's estate to his spouse, there is no estate tax on account of the marital deduction. Likewise, if the Testator leaves everything to charity, there is no estate tax because of the charitable deduction. The subject of estate taxes is beyond the scope of this article. If your estate is above the exemption amount, the attorney drafting the Will must take various factors into account to try to minimize estate taxes. Refer to my article on Revocable Living Trusts for more information on Estate Taxes.

Probate. The Testator's estate (Decedent's Estate) will be subject to Probate Court proceedings and Probate Court mandatory fees to the Executor and the Attorney for the Estate. The purpose of the Probate Court is to make sure the debts and taxes get paid and to make sure that the Heirs receive what they are supposed to receive according to the Will. The Executor in a Probate proceeding is required to file various reports with the court including an accounting and all of those things are typically mailed out to the Heirs to give them a chance to object. Ultimately, the Probate Court Judge orders the distribution of the Estate to the Heirs. There are some exceptions to having to have a probate for smaller sized estates so Probate Court is not always needed.

Avoiding Probate. Probate is not necessary for the Testator who dies without owning anything in his name. One way to do that is to simply give away all of one's money, property and assets before death. However, that procedure can have serious estate and gift tax consequences and also leaves the Testator without any control over anything. A commonly used way to avoid probate is for the Testator to transfer all of his assets into a Revocable (also known as Living) Trust. Since the Trust is recognized as a separate legal entity which does not die when the Testator dies, assets in a Revocable Trust are not required to be Probated. Unlike simply giving away all the assets to avoid Probate, putting the assets in to a Revocable Trust allows the Testator to still have control over those assets. Refer to my separate articles on Revocable Trusts for more information as to how this works.