

## ESTATE PLANNING

### INTRODUCTION

Although many people walk through life without ever executing a will, it is vitally important that all individuals conduct some type of estate planning, regardless of their health, age or financial status. It is common for people to wait until they become ill or leave on a long vacation to address estate planning issues, but the fact is that death is untimely, and it is never too early for one to take the appropriate steps necessary to secure their estate. Proper planning can give you the peace of mind that your property will pass according to your wishes and will also make the adjustment period much easier on your surviving family members. This section will describe some basic estate planning tools, including wills, trusts, general powers of attorney, medical powers of attorney, directives to physicians and probate.

### Types of property

An individual's estate consists of the real and personal property that he or she owns as of the date of death. Real property includes land and any improvements on land as well as oil, gas and other mineral interests. Personal property is all other types of property, including cash, cars, stocks, bonds, clothing, furniture, etc. If you live in what is called a "community property state," such as Texas, then all property, whether real or personal, is characterized as either separate or community. Separate property is that which is owned before marriage or acquired during marriage by gift or inheritance. Community is all other property that is acquired by either spouse during the marriage. A person can only control the distribution of his or her separate property and his or her half of the community property, if any, in a will.

The disposition of some types of property cannot be controlled by a will. These properties are called "non-probate assets." This type of property allows a person to name a beneficiary of the property upon his or her death, which will be carried out regardless of how the person's will reads. The most common types of a non-probate assets are life insurance policies, IRAs and employee benefit plans. Upon the death of the policy owner, the proceeds go directly to the beneficiary or beneficiaries named in the policy, and the owner's will has no bearing whatsoever on the disposition of the money. Another form of a non-probate asset is a bank account or certificate of deposit that is set up between two people and designated as "joint tenants with rights of survivorship." Anytime you see the "rights of survivorship" language associated with an asset, ownership of the asset automatically transfers in full to the surviving person, outside of probate.

**What is a will?**

A last will and testament, or a “will,” is a legal document, which, if executed properly, allows the testator (person signing the will) to direct how his or her property will be distributed at death. In the will, the testator names an executor who gathers all of the property, pays the debts of the testator and then distributes the property according to the testator’s wishes.

Formal wills (discussed below) include language that allows an executor to act “free of court” while handling the estate business, which makes the probate process much easier on everyone involved. A will also gives the testator the opportunity to name a guardian to take custody of any minor children that may survive the testator, in addition to allowing the testator to designate the individual who will manage the minor’s inherited property until reaching a certain age. Further, different types of trusts (discussed below) can be set up in a will, which allows property to be held by one party (the trustee) for the benefit of another party (the beneficiary). It is recommended to always name alternates to each position (executor, guardian, trustee) in the event that the primary agent has died before the testator, cannot serve or is unwilling to serve.

Most individuals leave “all of their estate, of whatsoever kind and wheresoever situated” to the person(s) named in their will. Also, a “specific gift,” where a particular item is given to a person, can be described in a will. Specific gifts are carried out before any other provision in the will. For instance, a father may leave his prize, antique rifle to his son and then leave all of the rest of his property to his wife, if he wants to ensure that the rifle ends up in his son’s possession instead of possibly being sold or given away.

**What are the different types of wills?**

Texas recognizes three kinds of wills: oral (nuncupative), handwritten (holographic) and typewritten (formal). To execute any of these wills, the testator must (i) be at least 18 years old, or married or serving in the armed forces; (ii) be of sound mind at the time of execution; (iii) not be fraudulently induced (forced or deceived) into executing the will; and (iv) have the current intention to give away their property when they die.

Oral wills, also called nuncupative wills, are not recommended as a good estate planning tool, but sometimes this is the only option for the testator. An oral will can only dispose of personal property – gifts of land (real property) cannot be made orally. Also, the only way that an oral will can be valid is if it is made during the testator’s last illness while at home, or unless he or she is taken away from home due to the illness and dies before returning home.

Probating (proving) an oral will is even more of a challenge. If the personal property gifted is worth more than \$30,000, then at least three credible witnesses must appear in court and testify to the details of the oral will. On top of that, an oral will cannot be probated (proved) more than six months after the testator's death, unless the substance of the will was reduced to writing within six days after making the will. As you can see, the law does not favor oral wills, but they are available if all conditions are met.

Handwritten wills, or holographic wills, are recognized in Texas. The will can be written on anything, must be wholly in the handwriting of the testator, must show an intent to dispose of property, and must be signed by the testator. Type-written words in a handwritten will are invalid due to the problem of not being able to prove who added the language, or when it was inserted. Handwritten wills do not need to be witnessed, although the law requires that at least two witnesses who are familiar with the decedent's handwriting must appear in court to prove the validity of the will. Problems often arise with handwritten wills due to their ambiguity. If the intent of the decedent is unclear then costly will contests are surely to follow, and the court must then decipher the disposition of the property. Although they are a bit more effective than an oral will, a handwritten will is still not as effective as a formal, type-written will drafted by an attorney, and is likely to be contested in a court of law.

Typewritten wills, or formal wills, are the best type of will to ensure that all of your wishes are carried out in a proper manner. Formal wills are typed in full and signed by the testator and two witnesses. For a typewritten will to be valid it must be signed by the testator, witnessed by two credible individuals above the age of fourteen, and then signed by the witnesses in the presence of the testator. A beneficiary named in the will should never also act as a witness to the same will, or he or she may be precluded from inheriting any property under the will. A "self-proving affidavit" is also part of most formal wills, which precludes the executor from having to bring the witnesses to court in order to prove the validity of the will at the beginning of the probate process. Although formal wills can be prepared by anyone, an experienced attorney should always draft the will.

Remember that wills are never final and can be changed at any time by the testator. Handwritten changes to a formal will cannot be honored and might result in the entire will being voided. If only one or two changes are being made to an existing will, it is common for one to prepare a codicil to the original will. However, a codicil must be executed in the same manner as a formal will (see above), so it is a better practice to just have a new will prepared if any changes need to be made.

For further information please visit [www.tyla.org](http://www.tyla.org) and request a copy of the brochure entitled, "To Will or Not to Will."

**What happens if I die without a will?**

If a person dies without a will, their property is disposed of according to state law, or what is called the “laws of intestate succession” and the decedent’s “heirs at law” inherit the property (dying “intestate” means dying without a will). The details of these laws are beyond the scope of this Guide, but they are very specific and the heirs have no choice but to follow the legislature’s inheritance guidelines in the absence of a will to indicate otherwise.

In some situations a person’s will may leave his property to the same people that would also be his heirs at law should he die intestate. However, it is very common that a person’s heirs at law are in fact not the same people that the testator would want to end up with his property, and the only way to avoid this problem is to execute a will.

Dying without a will can also cause many delays and end up costing much more than a standard probate. Instead of having an executor that can act free of court, an administration may have to be opened in court wherein a judge must approve every action taken on behalf of the estate by the administrator.

**Do I need a trust?**

A trust is the process by which a property owner (trustor/grantor/settlor) transfers legal title to an asset to a person or entity (trustee) who has the duty to hold and manage the asset for the benefit of one or more persons (beneficiaries). There are two major categories of trusts: those created in a will (testamentary trusts) and inter vivos trusts, commonly called living trusts.

Testamentary trusts are inserted into a will and become effective at the testator’s death. These types of trusts are usually created in order to provide for the management of assets on behalf of minors, disabled adults or irresponsible individuals. The testator can designate the age at which the beneficiary can take control of the assets in the trust language. These trusts are very common in most formal wills. Another type of trust placed in wills is the bypass trust or marital deduction trust. These trusts are utilized by married couples who have enough assets to be subject to federal estate tax. Estate tax is imposed if the decedent’s assets at death exceed the limitation imposed by law currently in effect for that year (i.e., the year of death). For instance, if you die anytime from 2006 until 2009, your estate will be subject to this tax if your assets total more than \$2,000,000.00 (any assets over this amount are taxed). In 2009, this amount will increase to \$3,500,000.00. A marital deduction trust is a tool that can allow the beneficiaries of a married couple’s estate to avoid or minimize estate tax and is very valuable if the estate is at risk of being taxed (at the time of writing this article in 2006, the federal estate tax rate was 46% and is expected to be 45% in 2007).

Living trusts are created during the life of the testator and can be revocable or irrevocable. These types of trust can provide for asset management during the testator's life in addition to disposing of the assets held in trust after the death of the testator. Although living trusts serve a definite purpose for some, most people do not need them. Individuals who benefit most from having a living trust are those who own property in numerous states or have a great deal of wealth. Beware of scam artists who contact you via telephone or place ads in the newspaper and try to convince you that a living trust will solve all of your estate problems. There are many common myths associated with living trusts. No matter what someone may tell you, a living trust will not reduce your tax liability, will not avoid the cost of settling your estate and will not protect your assets from creditors. A living trust will allow you to avoid probate, only if every asset you own is in the trust. Also, contrary to popular belief, a living trust can be contested by your heirs.

For further information please visit [www.tyla.org](http://www.tyla.org) and request a copy of the brochure entitled, "Living Trust Scams."

#### **What is involved in a probate?**

Probating a will simply means "proving" a will in court so that the testator's wishes can then be carried out by the executor. Before a judge will allow a will to be approved for probate, it must be established that the will meets the requirements of execution described above. Once approved by the court, the executor can begin gathering assets and passing the title from the testator to the beneficiaries. If the will is not proved in court then the decedent's property passes to his heirs at law, as if he died without a will.

Many people are under the impression that the probate process is costly and time consuming. This might be true for large estates or in situations where a will contest is filed, but most probates can be finalized quickly and efficiently. Many courts have established methods of proving the will without even having to appear before a judge.

#### ***Power of Attorney***

Powers of Attorney are an essential part of any estate plan and can enable a person (principal) to designate an agent (and alternate agent) to make business and health care decisions on their behalf. All adults, no matter what age, should have the proper powers of attorney in place in order to prepare for any type of situation wherein a person may become disabled yet still needs to conduct important business. A common misconception is that powers of attorney stay in effect after the principal's death. This is not true. A correctly executed power of attorney is only effective

while the principal is alive. Upon death, the executor named in the person's will takes over control of the estate.

A statutory durable power of attorney, sometimes called a general power of attorney or a business power of attorney, allows the agent to make most business decisions on the principal's behalf and sign the principal's name on most documents. Obviously, your agent needs to be someone who you highly regard and trust because that person will be able to act on your behalf in almost any situation. However, a general power of attorney is extremely useful in the event that the principal becomes disabled and cannot make decisions for himself. If disability occurs and no power of attorney is in place, then a guardianship will have to be opened in court, which is very costly and time consuming. As a matter of convenience, a general power of attorney can be drafted so that it is effective upon execution, regardless of whether or not the principal is disabled. Most married couples have their powers of attorney drafted in this manner, so that one spouse can take care of family business if the other spouse is out of town, for example. If so desired, the power of attorney can be drafted, so that it is only effective if and when the principal is declared to be in a state where he is unable to handle his personal affairs. A general power of attorney does not need to be witnessed but it must be signed in the presence of a notary and should be recorded with the County Clerk in the county of the principal's residence.

A medical power of attorney is a document which allows the principal to designate someone to make health care decisions on their behalf only if they cannot make the decision themselves. This is the key difference between the general power of attorney and the medical power of attorney (i.e., the medical power of attorney cannot be drafted so that it is effective immediately – the only time the agent can act is if the principal is unable to communicate with the physician). Further, this document only authorizes the agent to make health care decisions – no business activity can be conducted under a medical power of attorney. The medical power of attorney is discussed in more detail in the End of Life section of this Guide.

#### ***Directive to Physicians***

A directive to physicians, commonly referred to as a “living will,” or an “advanced directive” is a document that allows a competent adult to instruct his or her physician to withhold or withdraw life sustaining treatment in the event of a terminal or irreversible condition. Directives are best used and the most effective after fully informing your wishes to family members, who might contest the withdrawal of these actions. A complete description of the living will is discussed in the End of Life section of this Guide.