Questions & Answers

Estate Planning Essentials

What is a "will"?

A will is a document that disposes of your property held in your name upon death and names important parties, such as executors of your estate, trustees of trusts created under your will, and guardians for your children. That said, a will does not affect the disposition of property held in joint tenancy with right of survivorship or in the name of a trust or busines entity or assets subject to a beneficiory designation (unless the estate is the designated beneficiary).

What happens to my child if I die without a will?

You and your child's other parent are your child's natural guardians. If one of you dies, the other automatically becomes the child's sole guardian without any court involvement. The surviving parent is entitled to designate the person who will become the child's guardian upon that parent's death or incapacity, which may be made in a will or in a stand-alone document. Upon the surviving parent's death or incapacity, a court will appoint the designated person to oversee the child until the child reaches age 18 (the age of majority in Texas). If the surviving parent has not designated anyone, then the court will appoint the child's grandparent, great-grandparent, or nearest of kin (adult children, siblings, etc.) in that order.

What happens to my property if I die without a will?

- Some of your property will pass according to beneficiary designations, including life insurance proceeds, retirement plans, IRAs, accounts with a pay-on-death or transfer-on-death designation, and property held in joint tenancy with right of suvivorship.
- The rest of your property – your "probate property" – will pass according to the laws of intestacy. In Texas, the laws of intestacy direct that your property generally passes to some combination of your spouse, your descendants, and possibly your parents, siblings, and other relatives. In order to determine that combination, a court will identify your "heirs" by appointing an attorney ad litem to investigate your family history and also to represent certain heirs (minors, for example).
- The court will then appoint your spouse (or an adult child) to administer your estate and distribute your property to your heirs. This court supervision of your estate's administration can be quite costly and time-consuming.
- The absence of a will makes appropriate tax planning far more difficult, if not impossible.

What are the important decisions when considering my will?

- Who are the people I trust to care for my children (guardians) and my assets (executors, trustees) after my death?
- How much should I leave to my children? In most cases, this is an easy decision for a person to make, and after the death of his or her spouse, everything passes to children. For those with significant wealth, however, the questions can become "How much is enough?" and "How much is too much?" You will likely ensure that your children never want but may be concerned that too much wealth could affect their incentive to become productive members of society. You may want to structure your will or trusts in a way that gives children incentives to excel or give back to the community. This is a very difficult decision that varies person to person and possibly child to child.
- In what form should I transfer property to my children? There are several factors that influence whether to leave children property outright or in trust. Leaving property outright gives the child total control, responsibility, and ownership in relation to the property. Of course, this means that the child cannot be protected from him- or herself or from the child's creditors. The benefit of a trust is that its assets are protected from creditors and can be administered by a person or entity that can ensure the proper administration of the assets.

That said, if it is important for the child to have a sense of ownership or self-direction, the child can be named as a trustee or co-trustee.

- How do I dispose of my property in the most tax-efficient manner? This decision is made with the help of your attorney, who will tell you the way to achieve your goals in the most efficient and flexible manner.
- What is the best way for me to benefit the charities I am involved with? From the charity's perspective, an immediate, outright gift is best. However, sometimes the charitable gifts under your will can be coordinated with your other goals in order to minimize estate taxes and allow the charities and your family to share in the benefits.

What is a revocable trust or "living trust"?

A revocable trust is an alternative to a will. Like a will, it disposes of the assets in the trust upon your death. It also provides for the management of trust assets for your benefit during your lifetime. Because a trust is effective only with respect to the assets it owns, a will should be executed to pour your assets into the trust that you did not contribute to the trust during your lifetime. Common factors considered when deciding between the use of a revocable trust or a will as the primary estate planning vehicle include privacy, ownership of real estate in multiple states or countries, uninterrupted management during incapacity and after death, probate avoidance, and the convenience and security of professional management.

What happens if I become incapacitated during my lifetime?

Under Texas law, you are considered an "incapacitated person" if, because of a physical or mental condition, you are substantially unable to provide food, clothing, or shelter for yourself, to care for your physical health, or to manage your financial affairs. In the absence of planning for this contingency, a guardian of your person will be appointed to care for your personal needs and a guardian of your estate will be appointed to manage your assets under close court supervision.

If I become incapacitated, how do I avoid guardianship?

To avoid guardianship, you should execute a Medical Power of Attorney and a Statutory Durable Power of Attorney. In those documents, you will designate anyone you wish to make decisions on your behalf regarding your medical and financial well-being, respectively. Those documents can be revoked at any time if you decide to change your appointed agents.

What is a "living will"?

A living will – formally referred to as a "Directive to Physicians" in Texas – is a document that expresses your wishes with respect to whether or not you will receive life-sustaining treatments if you are suffering from a terminal or irreversible condition. If you have executed a Medical Power of Attorney but not a Directive, your agent under the Medical Power of Attorney will have the power to apply or withhold such treatments. If you have neither document, then that decision will be made (in the following order) by your spouse, your adult children, your parents, or your nearest relatives, or if no such parties are available, a physician who is not involved in your treatment and is a representative of the ethics or medical committee of the health care facility where you are a patient.

Will my heirs or beneficiaries be subject to estate or inheritance tax?

The U.S. federal gift and estate tax system is, for the most part, unified – that is, under the current law, each U.S. citizen or resident individual may pass—to non-spouse, non-charitable beneficiaries—a total amount of lifetime taxable gifts (in excess of the annual exclusion of $15,000 per donee, in 2020) and a net "taxable estate" of up to $11.58 million (in 2020) without incurring gift or estate tax; but any taxable transfers in excess of that "exemption" is subject to a tax rate of 40%. That said, it is worth noting that one's "taxable estate" generally includes pension and retirement plans, proceeds from any life insurance policy in which the decedent named his or her estate as beneficiary or maintained ownership or control within three years of death, and any trusts over which the decedent retained certain fiduciary or non-fiduciary powers within three years of death. Furthermore, this lifetime exemption amount is adjusted for inflation annually, but without future statutory changes, will decrease by half in 2026.

Although Texas and many other states have repealed their own death tax statutes, several states have retained an estate tax system that is based on the federal regime, but with a much lower exemption amount. Furthermore, a few other states impose an "inheritance tax" on heirs or beneficiaries under a will, which is based on the value and type of property received and the relationship of the heir or beneficiary to the decedent. As such, without careful planning, your heirs or beneficiaries could be subject to state death taxes even if your "taxable estate" falls under the currently generous federal exemption amount.

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