

LAW @ THE LIBRARY – LAW DAY 2013

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WHY DO YOU NEED A WILL?



GARDNER WILLIS
SWEAT & HANDELMAN, LLP
ATTORNEYS AT LAW

Kimberly L. Guthrie, Esq.

Gardner, Willis, Sweat & Handelman, LLP

2408 Westgate Drive

Albany, Georgia 31707

Telephone (229) 883-2441

Email: kimberly.guthrie@gwsh-law.com

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WHY DO YOU NEED A WILL?

I. What is a Will? Is it the same as a "Last Will and Testament"?

- A. A Will is a written document, generally prepared with the help of an attorney, that provides instructions for the disposition of a decedent's (dead person's) property. The term "Last Will and Testament" is simply a more complicated name for a Will.
- B. A Will is a legal document that disposes of your property upon death. Please note that a Will does not cover all of your property. For example, if you own pension plan assets, or 401(k) plan assets, or life insurance, or annuities, or property held through a "trust," such property and benefits would typically pass to the specific beneficiaries you have named with the manager of the pension plan, the company sponsoring the 401(k), each life insurance company, each annuity company, and in the trust. Of course, if the beneficiary of such assets is simply named as "my estate" then the Will would control who gets the property and benefits--although this very often creates bad tax consequences and major delays and expense for your beneficiaries.

II. Who should have a Will?

- A. Anyone who cares how his/her property is distributed upon his/her death, or who would handle matters for those she/he leaves behind, or who is to be guardian for minor children. After all, "you can't take it with you."

III. When should I execute a Will?

- A. Now. We all put things off until tomorrow, but in the case of a Will, procrastination can be potentially disastrous and have major consequences. First, many people don't know when the end is coming. It just happens in an instant, perhaps in an auto accident or plane crash, or with a sudden heart attack. Even if a person gets a critical illness, he/she may be reluctant to prepare a Will fearing doing so will be a jinx. Of course, illness or stroke, or medicine to relieve pain, may preclude a person from making a valid Will.
- B. A Will therefore needs to be prepared and properly executed while you still have legal capacity. Anyone who wants a Last Will and Testament should have one prepared, and sign it in accordance with the applicable state law while he/she is healthy and has full control over his/her mental functions.

IV. What can happen if I die without a Will?

- A. If you die without a Will, you have died intestate. Your property must go through the probate process in order to have

the legal title to the property transferred to your heirs at law. Your heirs at law are defined by applicable state statutes. In Georgia, your heirs at law include your spouse, children, parents, grandparents, aunts, uncles, nieces and nephews.

V. *How long is a Will valid?*

- A. A validly prepared and properly executed Will is valid until you intentionally revoke it or prepare and execute a new Will that revokes the previous Will. In addition, a change in marital status, such as a divorce, also may impact provisions in a Will and/or beneficiary designations.

VI. *What affect does moving to a different state have on a Will?*

- A. A Will that is properly made and properly executed in your former state of residence, that would be valid under the laws of your former state, will almost invariably be regarded as valid by the laws of your new state. However, as the laws of all states differ, if you move it makes sense to have your Will reviewed by a lawyer in your new state.
- B. For example, the new state may have different processes to "prove" the Will. Or the new state may permit probate matters to be handled on a less formal and less expensive basis, simply by adding to the Will reference to certain specific statutory provisions in the new state's laws.
- C. Occasionally, complications arise because different states have different classifications of property. For example, if your Will was executed in a state that does not have a community property system and you move to one of the nine community property states, you may wish to get in touch with a lawyer to determine whether your Will should be redrafted to achieve your intended result.

VII. *Can I disinherit my spouse?*

- A. Not completely, unless you and your spouse have waived the right to being included in the other's estate in a prenuptial or postnuptial agreement. Each state has laws that shield a surviving spouse from being completely cut off.
- B. In most states, the surviving spouse can choose between the property left in the deceased spouse's Will or a statutory share set by state law (usually 1/3 or 1/2 of the estate). Whether is it advantageous to elect the state's share--generous in some states, minor in others--depends on the rules for calculating the elective share, which rules and exceptions have a remarkable number of variations between the states.

- C. In a community property state, the surviving spouse already owns half of the community property at the death of the other spouse.

VIII. Can a parent disinherit a child?

- A. Generally yes. To do so, is it necessary to specifically state in the Will that the omission is intentional. Often Wills have language along these lines: "I have previously taken care of my daughter during my lifetime and have chosen to leave nothing to her in this Will. Similarly, I am leaving nothing to my son for reasons known to both of us".
- B. If a child is a minor, the states do provide an allowance to support the child until they reach the age of majority, typically 18.

IX. What reasons are there to change or update a Will?

- A. Typical reasons for changing or updating a Will are: (1) you marry or divorce; (2) birth or adoption of a child; (3) death of a family member or beneficiary; (4) changes in the federal estate tax laws or state tax laws; (5) substantial change in the value of your estate; (6) change in the nature of your property holdings--for example, if your Will leaves the farm to a son, and the ranch to your daughter, and half the balance to your son and daughter, and then you sell the farm, your daughter would wind up with more (the whole ranch plus $\frac{1}{2}$ of everything else) and your son (who would only get $\frac{1}{2}$ of the balance); (7) a guardian or executor or trustee moves away, dies, or is no longer willing or able to serve; (8) your children are no longer minors, or are old enough to handle financial matters on their own; (9) you move to another state; (10) and/or you wish to eliminate gifts to certain beneficiaries.

X. I am afraid someone will challenge my Will. How can I "bullet-proof" it?

- A. First, a Will is such an important document that you will want to have a lawyer draft it, even if you do not fear someone may challenge it. You'll want to make sure it does what you want it to do, without ambiguity, with the lowest expense possible when it comes time for probate, and that it helps you and your family avoid or minimize taxes. That's what good lawyers do.
- B. If you tell the lawyer you suspect challenges, they'll work extra hard. They may ask a physician to evaluate your mental competence--and perhaps serve as a witness when you sign it. They may video your execution of the Will. And they put in provisions that would result in anyone challenging the Will getting nothing at all should the challenge fail.

XI. What role does the personal representative play under a Will?

- A. The personal representative of your estate (also commonly referred to as administrator or executor) is responsible to gather and inventory all of your property at the time of your death, determine all of your outstanding debts, pay all of your legitimate debts and then distribute the remaining property in accordance with the instructions provided in your Will.
- B. The personal representative is appointed as part of the probate proceeding and has the responsibility for guiding the property through the proceeding, subject to established probate rules and procedures. In many states, the court has a considerable amount of control over the activities of the personal representative, and prior permission of the court is required for the personal representative to take action with respect to property and the probate estate. In Georgia, probate is straight-forward, easy and inexpensive.
- C. Since your personal representative is given access to all property in the probate estate, the selection of a competent and trustworthy person is very important. It is wise to nominate someone who has business experience, intelligence, and the utmost integrity and honesty to serve as your personal representative. Your nomination of your personal representative (along with alternates who are asked to serve in the event the prior nominee is unwilling or unable to act), should appear in your Will. This is your chance to tell the court who you think is best to do this job for you (since you can't speak to the court in person).
- D. Most states require the personal representative to post a security bond covering his/her actions. This requirement can be waived if your Will states that you want your nominated personal representative to serve without bond.

XII. When should a Last Will and Testament nominate a guardian and what role does the guardian play with respect to minor children?

- A. A guardian is the person who is responsible for the health, education and welfare of minor children. Technically, there is a guardian of the person and a guardian of the property of minor children (usually the same person serves in both roles). The guardian of the person has the responsibility for decisions regarding the health, education and welfare of the minor child, and the guardian of the property is responsible for the child's property and for handling all financial matters for the minor child.
- B. When one parent dies, generally the other parent is appointed as the guardian for minor children, whether or not the parents were married at the time. If someone besides the other parent of a minor child is nominated as guardian, the

other parent can contest the nomination. It is then necessary for the court to determine that the appointment of the other parent as the guardian would be detrimental to the best interests of the child (which is a very heavy burden of proof to establish).

- C. In the event of the deaths of both parents, however, it is important to have a guardian for minor children named to ensure the children will be well cared for by someone the parents trust.

XIII. What is probate?

- A. Generally, probate is the process by which legal title of property is transferred from the decedent's estate to his/her beneficiaries.
- B. If a person dies with a Will ("testate"), the probate court determines if the Will is valid, hears any objections to the Will, orders that creditors be paid and supervises the process to assure that property remaining is distributed in accordance with the terms and conditions of the Will.
- C. If a person dies without a Will ("intestate"), the probate court appoints a person to receive all claims against the estate, pay creditors and then distribute all remaining property in accordance with the laws of the state. The major difference between dying testate and intestate is that an intestate estate is distributed to beneficiaries in accordance with the distribution plan established by state law; a testate estate (after payment of debts, taxes and cost of administration) is distributed in accordance with the instructions provided by the decedent in his/her Will.