What You Need to Know About Wills and Estates

INTRODUCTION

I provide this booklet to you in order to help you know what your legal rights are, so you can protect those rights and assert them if necessary. Obviously, you should not expect this booklet to replace an in-office conference with me at which you will obtain specific advice for your unique situation. So you should use this booklet to alert you to the important issues you may need to discuss at a conference with me about your will or estate or the estate of someone of interest to you.

A number of years ago a client brought in a copy of his will to me to review for him. It was well written and appeared to handle all of the issues about which he had questions for me. After I finished reading the will I asked my client who had prepared the will for him. His minister had drafted it. I complimented the draftsmanship but then had to tell him, "I find only one problem; it hasn't been properly executed. If you had died with the will as it now is, the Court would not have allowed it to be probated. You would have died under the law without a will."

In reality, no one dies without a "will" if we mean, "without any direction as to how the deceased person's property is to be distributed to his or her heirs." If you do not have a formal, properly written and executed will when you die, the state of your residence has one for you. The laws in every state, including Tennessee, dictate how your property is to be inherited by your heirs if there is no will. If you are satisfied with what this law provides, then you may not need a will. However, if you want to alter the state's plan, you will need a will and probably other legal documents to effect your wishes. In the next section I will outline some of the reasons you need estate documents to carry out your specific wishes for your family regarding your property.

What Happens with My Property IF I Die Without a Will?

Tennessee, as do all states, has a "One Size Fits All" estate plan for those citizens who die without a will. Let me give you some examples to illustrate how the state's laws work where a person dies with no will.

Let's assume that you are married with minor children. Most of your property, real as well as personal property (non-real estate), may be owned jointly with your spouse with the right of survivorship. In other words, if you die owning this property with your spouse, your spouse would receive all of the interest in this property "by operation of law." But if your spouse and you did not, for example, own a bank account, a CD, farm, rental property or stock account together, then your spouse and your minor (or adult) children would own a joint interest in that property upon your death without a will.

This could create serious problems for your spouse particularly if the children are minors. If the children are minors, they cannot legally sign over their interests in the jointly held property to your spouse. Also, if the property needed to be sold, the minor children could not legally sign the deed to sell the property. To allow your spouse to sell the residence, for example, a lawsuit would have to be filed to separate the minor children's' interests from that of your spouse. That can be a time consuming and expensive proposition. I can explain the implications of this further at our conference. In addition, it may have been your desire that your spouse own that property outright at your death, however, under the law your souse would share ownership with your children

Or consider the situation where you have children from a prior marriage as well as children from your current marriage. Assume that your spouse dies with no will, owning a substantial 401(k) with no specifically designated beneficiaries being named in the 401(k) document. You and your spouse's children by this marriage together with your children from the prior marriage will all share in the proceeds of the 401(k). This often creates a very difficult issue to unravel legally as well as emotionally.

Let's take one more example to demonstrate another serious problem not having a will can create. You and your spouse have three minor children and a joint estate including life insurance of nearly $1,000,000 and neither of you has a will. You and your spouse are killed instantly in a common accident. What will happen with your $1,000,000 estate as it relates to your children and who will take care of them? Someone will need to be appointed legal guardian and physical custodian of the children. If you had a will you can suggest who should be the guardian and the trustee of the money. Without a will the net proceeds of your joint estate would be placed in the court registry (the bank account of the court) at a safe interest rate until each child reaches adulthood, i.e.18 years, at which time the child's proportionate share will be distributed to the 18 year old. Most parents don't want to have an eighteen year old receive a substantial amount of money with no control over how and when it is spent. With a will all of these issues can be addressed to your satisfaction.

The following is a summary of what happens under certain circumstances **if you die and have no will and your property is non-right of survivorship property:**

- Upon your death your property will be divided among your spouse and all your children whether your children are from your current marriage or a prior marriage.
- If you have no children then your spouse will receive all of your property not otherwise designated by a beneficiary designation for example.
- If your spouse has predeceased you then all of your children will share equally in your estate.
- If you have no spouse or children then your parents will inherit your estate.
- If you have no spouse or children and your parents have predeceased you then your brothers and sisters will share in your estate; or if a brother or sister has predeceased you, then the deceased sibling's child or children will receive that share.
- If you die with no spouse, no children, no living parents and no brothers or sisters, then your other living descendents will receive a share in your estate.
- If you have no legal relatives who survive you then the state will receive your estate, though this is very rare.

Now let's look at a few of the **things you can do with a will** rather than rely on the state's plan for your property:

- You can designate specifically who should and who should not receive any portion of your estate other than fully disinheriting a spouse.
- You can designate particular properties to specific people.
- You can place your properties into a trust through your will that will provide for the proper care of your spouse, your children, your parents and other people or even animals.
- You can establish a trust outside your will, called A Living Trust, into which you can transfer all or part of your property for distribution at your death or even management during your life.
- You can give certain family members more or less than the law might give them without a will.
- You can give money or property to charity.
- You can make certain that a specific person receives nothing from your estate.
- You can provide for the management of your business or property and the orderly sale of such assets.
- You can perhaps save on inheritance taxes through certain estate planning arrangements.
- You can name the guardian for your minor children.
- You can name who will be the personal representative of your estate.
- You can waive the personal representative's bond, the requirement of an inventory or interim accountings and save your estate the expense of such requirements.
- You can allow a specific person to reside in the residence.
- You can establish a memorial to someone you admire and fund its upkeep.
- You can fund for the care of pets and animals.
- You can set up a trust to provide for the care, maintenance, health and education of children or grandchildren.
- You can direct the disposition of your body, for example, for scientific use or transplants, etc.

No one likes to think about death even though we know it is inevitable. Yet we owe it to our families to consider what will happen if we don't do at least some planning for them for their future. If you do nothing more you should at least set a conference with me to discuss your current situation and to review the various "what if's" that could happen if you were to meet an untimely accident. I will walk you through what can occur if something tragic happens.

It should be clear that in most cases to rely on the will that the state provides to its citizen who die without a written will is not what most people want to have happen. It ought to also be obvious that serious thought and discussion with your spouse and family should precede the office conference with me.

Do I Need an Attorney to Write my Will?

You can write your own will. In fact, Tennessee allows a person to write his or her own will in their own handwriting and it does not require witnesses or notarization.
I must warn you that I have been presented with handwritten wills over the years by family members asking that they be probated. Unfortunately many of these wills created serious legal issues that ultimately cost far more money to correct that it would have cost to have an attorney properly write the will in the first place. Wills and estate issues are quite technical and demand that the wording be clear as to what the person writing the will wants to have happen. It is far better to allow a legally qualified person to make sure that your expectations will be clear and can be legally carried out.

There are numerous issues today about employee benefits, life insurance, pensions, real estate and blended families that the non-lawyer may not realize. Also, since we are so mobile, some states do not have the same rules about estates as does Tennessee. So what you create on your own in Tennessee may not be valid in the state to which you may ultimately move.

Generally, a person who relies on a non-lawyer to help them "for free" usually gets their money's worth. As I was told in law school, "Anyone who represents himself has a fool for a client." The typical cost of relatively simple wills, powers of attorney, healthcare directives (Living Wills) and related documents for both a husband and wife runs anywhere from $350.00 to $500.00.

Of course more sophisticated estate planning can cost more, but I will give you a cost estimate before I begin.

While I realize that for some people even $300.00 is a lot of money, I believe that the alternative is potentially far more expensive for your family later and it may be something that cannot be corrected after you are gone no matter what the cost.

At the very least, if you have written your own will, call me for an appointment to allow me to review your will and make certain it is properly drafted and is going to do what you want it to. The small fee for my time now will save your family much more money later on.

What Do I Do Before Coming to See You?

It is helpful if you compile a written inventory of all of your property (real estate, personal property, collectables, insurance, etc.), showing how it is titled, its fair market value, the balances on any mortgages against the properties, beneficiaries named on insurance and employment benefits, bank balances and so forth.

Next you should think through and discuss your goals with your spouse.
The following are suggested goals to consider:

- Determining who will be the guardians for the minor children.
- Providing for the care of parents in declining health.
- Avoid conflict among surviving children.
- Saving on income, estate and inheritance taxes.
- Providing a means of liquidating debts or providing sufficient resources and proper oversight of funds to care for children through college.

- Deciding who will operate or manage a family business.
- Provide for estate liquidity to pay for ongoing expenses such as real estate taxes, maintenance, and final expenses.

  Determining who will be the trustee of any trusts created for children or other purposes.
- Providing for charitable bequests.
- Choosing what professionals will provide counsel.
- Selecting who would be substitute guardians, trustees, managers if the ones selected can't serve.
- Selecting alternatives to forcing the sale of properties to pay estate or personal obligations.
- Determining how much life insurance is needed on whose life and who will own the policies.

Since most persons today have determined that they want to have a say in their health treatment in their final days, there needs to be a frank and clear discussion between spouses and the adult children as to your wishes. I can supply you with the healthcare plan also called a directive that has virtually replaced the Living Will in Tennessee so you can use it as a point of discussion among yourselves so that your wishes are abundantly clear to everyone.

What are Powers of Attorney?

A power of attorney (POA) is a written, legal document that names another person whom you choose to act on your behalf. In estate planning, generally each spouse names the other spouse as his or her "attorney in fact" to do certain designated things for the other spouse. The POA can be written so it is effective upon signing or it can be written to be effective only when the person establishing the power of attorney becomes physically or mentally incapable of acting and a physician certifies in writing that the person is incapacitated. The latter is called a "springing power of attorney" in that it "springs" into effect when the certification by the physician occurs.

You may have heard of a power of attorney being called a "durable power of attorney." A durable power of attorney is one which is drafted so that it survives the authorizing person becoming mentally incapacitated. Under the law a non-durable power of attorney would become useless upon the person becoming mentally incompetent because he or she could no longer direct the attorney in fact as to what action the attorney in fact is to take. Most people want the power of attorney to be in effect if they are incapacitated so they elect the durable power of attorney.

While a POA is an extremely helpful legal instrument, it does have its limitations and dangers. For example, there is generally no legal oversight by a court of the actions of the attorney in fact. There is no legal requirement to report to the court system any actions taken by the attorney in fact. What this means is, if the attorney in fact takes advantage of the person who appointed the attorney in fact, until those facts become known, no one would have notice to take action to protect the other person's interests.

I generally put it this way when speaking to clients even in long term marriages about executing powers of attorneys to each other: "This is the most powerful document an individual can sign because you are authorizing the other person to do virtually anything you could do for yourself. He or she can sell your car, transfer or close your

bank account, sell your interest in the residence. So if you trust him or her implicitly, then go ahead and sign it. If you have any doubt, then do not sign it."

While most spouses do execute POA's to each other, I have some who have agreed to wait. There is nothing wrong with that.

The other type of power of attorney is one in which the one establishing the POA authorizes the attorney in fact to make healthcare decisions if he or she is not capable expressing his or her desires at the time the decision needs to be made. This authorization can also be accomplished by the healthcare directive.

Do I Need a Living Trust?

There are organizations and attorneys who promote living trusts as doing far more than they are capable of doing. A living trust is written legal document in which a person establishes a revocable trust to actually hold title to property for the person establishing the trust or for another person. "Revocable" means that the trust can be abolished and the property being held by the trust can be transferred back to the prior owner. Under this type trust the beneficiary of the trust can also be the trustee thereby maintaining control of the property.

This type of trust does not protect the property from creditors. It may avoid a formal probate, but not in all cases. It does not avoid the taxability of an otherwise taxable estate. In spite of the hype that some promoters make of the revocable living trust that you can avoid probate and the expense of a will, you may still need a will because if you do not transfer all of your property of every type into the trust you will still need a will.

The value of a living trust is significant if an individual or couple own real property in two or more states. The revocable trust can pass the property without there having to be a probate of the will in every state where the deceased person owns property.

Another difficult issue in the use of such a trust is that if there is a mortgage on any property to be placed into the trust often the holder of the trust will not allow the transfer of the property into the trust or in extreme cases the mortgage holder will call the loan due if the property is transferred. We can discuss the strengths and weaknesses of such a trust at a conference.

How Do I Go about Selecting a Trustee for my Children's Trust?

Most parents with minor children or even with young adults want to protect their children's money or property that they inherit from their unwise life choices. I have previously discussed the use of a trust that postpones the outright control of the children's money or property until they are more mature and wiser.

Typically, the trust provision that is placed into the will provides that if both parents are gone a trust will be created with a fund for each child named in the will to provide for their health, care, maintenance, upkeep, education and well being of the child until the child reaches a pre-established age. Some clients opt for a college incentive clause to encourage their children to complete a college education. I can explain how this incentive works.

It is critical in this situation for the persons making their wills to select the proper person or the right trust department of a bank or financial institution to oversee the trust funds. Without question, the trustee must be honest and trustworthy.
One advantage in having a bank trust departments serve as trustee is that the bank will be obligated to stand behind the actions of their trust department. In addition, there are state and federal agencies that periodically audit the trust departments and will report any irregularities. Of course the bank trust department is generally skilled in the obligations of a trustee for which they are entitled to a fee. However, there is no obligation that you use a trust department to handle your estate funds. A trustee can be a family member or trusted friend.

In addition to being able to comply with the accountings required by the probate court, the trustee should have the skill to manage the investment of the trust assets in safe investments that will create value and income for your children or grandchildren. A trustee also needs the ability to say yes and no to a trust beneficiary. Let me explain.

Just as in an intact family the needs of the children covered by a trust change under various circumstances that are not always predicable. For example, a child that is involved in cheerleading or a sports activity my incur unanticipated expenses that the trustee should recognize as valuable to the child's development and say "yes" to the request for additional money.

On the other hand a trustee may be faced with a child saying that he has found the perfect car to haul him back and forth to school, a beautiful fire engine red Corvette for only $68,000.00 plus tax. At that point the trustee may need to say, "No," I have found you a very nice used Cavalier that will do very well, thank you very much."

What is the Process for you in Drafting My Estate Documents?

At your initial conference with me I will be asking you to tell me information about your estate, your family and your goals for what you have. I will be happy to answer your questions, describe the options you have and to guide you through the process of your estate plan.

Next we will begin to outline what you want to happen with your estate should one of you die; should both of you be killed in a common accident or if the two of you and your children should be tragically killed.

The initial conference generally lasts approximately an hour. I will have taken sufficient notes to be able to draft your wills for review at a second conference which is scheduled at your convenience generally within a week from the first conference.

At the second conference you will be given drafts of your wills and any other related estate documents such as the powers of attorney and healthcare directives. Any modifications or changes can be made quickly. Once the documents are prepared to your satisfaction they will be properly executed and witnessed. You will be given the original of each document along with a copy.

While the copies are being made I will discuss with you matters such as the use of the power of attorney, where to keep the originals of your documents, the care and protection of the originals and the process of probating a will. The second conference can also take as much as an hour.

What Is A Will Contest And How Can I Protect My Estate From A Legal Challenge?

Occasionally someone will file a legal challenge to the probate of a will called a "will contest." A will contest is a lawsuit in which someone with a potential interest in the estate claims that the deceased person id not properly make a will. There are only a few grounds on which to challenge a will. The most usual ground for challenge is that deceased person was not of sound mind at the time of the making of the will, that is, the decedent was senile, mentally incompetent or delusional at the time that the will was signed. Another challenge to a will is that the decedent was unduly influenced or coerced into making a will by someone else and that the will actually represents the wishes of the third person not the decedent. Rarer is a challenge based on fraud, a forgery or the failure to properly execute the will under the requirements of the law.

If you fear or suspect that someone may attempt to challenge your will you should let me know immediately. I will discuss with you what can be done to help protect your will and estate from a will contest.

How Much Can I Give My Family While I'm Living?

A spouse can give any amount of gift to the other spouse tax free. An individual can give $12,000.00 annually to a child, parent or any other person without incurring a gift tax. Generally the donor of the gift is the one who becomes liable for a taxable gift. A husband and wife can jointly give $24,000.00 to each child or other individual each year. For example, my wife and I could give together $24,000.00 on December 31 to each of our four children and an equal amount on January 1 of the next year.

Is There A Problem With Establishing Joint Bank Accounts With One Or More Of My Children?

Most joint bank accounts established with another individual are what are termed "survivor accounts." In other words, when one of the holders of a survivor account dies the money becomes the survivor's money "by operation of law." For example, Mom, a widow, sets up a $100,000.00 savings account in her and her eldest's son's name. Mom thinks that she is making it easier for her son to have access to funds should she become disabled. She does become disabled and dies of complications of surgery. Upon her death the son claims that the savings account is his since it was held in his joint name with his mother and it was set up by the bank as a survivor account.

Even though Mom's two other children protest, the elder son is entitled to all of the money because it was a joint account with right of survivorship. Even if the son wants to distribute one-third of the money to his siblings, it could create a gift tax for him since he would be giving over $33,000.00 to each of his siblings. (Remember any annual gift over $12,000.00 is a taxable gift to the donor.)

Please let me know if you have established joint bank accounts with someone other than your spouse so we can discuss the legal implications of this arrangement. Generally, a power of attorney is a better option to setting up joint accounts.

Will Establishing a Trust for Our Children Require Us to Change the Beneficiary Designations on our Insurance Policies and Retirement Benefits?

Most of us set up a first and second beneficiary on our insurance policies and retirement benefits. We generally name our spouse as primary beneficiary and our children as secondary. The problem with that arrangement comes after we write a will in which we establish a trust to take care of our children into their young adult lives. Under such an arrangement, even though we have a trust in our will, upon our death (assuming our spouse predeceased us) the insurance proceeds will be paid directly to our children when each turns eighteen and therefore bypasses the trust in our will.

The simplest way to avoid that undesirable consequence is to change your secondary beneficiary designation from named children to "Payable to my estate" or "Payable pursuant to my will." Once you have executed your will you should speak with your insurance agent, your employment benefits person or your financial planner so the trust in your will can be properly funded upon your death.

Should I Discuss My Living Will and Advance Care Plan with My Family?

Let me emphasize the importance of discussing these important documents with your family in advance of a crisis. Your family needs to hear it from you as to how you want your "last days" to be handled. It will help them deal with the stress of the illness of a parent. It will also prevent sibling squabbles over what to do for Mom or Dad.

Tennessee recognizes the Living Will and the Advance Care Plan for use in advising medical personnel what type of life prolong treatment is acceptable under what conditions and what treatment is not desired.

I recommend the use of the Advance Care Plan because it is far more specific in the definitions of the "Quality of Life" issues that would trigger the type of treatment one would desire at life's end and that which is not wanted. Moreover, it is far more direct in defining when certain treatment is to administered and when it is not.

I will supply you with copies of the Advance Care Plan form and the form for the appointment of the persons with healthcare decisions making authority if you are not able to make those decisions.

What Do I Do AFTER my Will and Related Estate Documents are Completed?

At the conference where your estate documents are signed I will give you a booklet called, "What My Family Needs to Know." Its purpose is to assist your family in knowing information about you to assist them in making arrangements should you become ill and need assistance and after your death. It is a fill-in-the–blanks-type booklet to keep with your important documents.

You also need to keep your documents in a safe place. If you already have a bank lock box that is a good place to keep your important papers including your will, powers of attorney and Advance Care Plan. If you don't have a bank lock box you

might purchase a fireproof lock box form Sam's, K-Mart or Wal-Mart to keep you papers in. Be sure to tell some family members where your documents are and let them know where your bank key is so it won't have to be drilled to open it.

Never write on the originals of your documents. You can invalidate them. You can make notes on a copy and bring it to me to make any changes you need.

You should review your will and related documents every two to three years to make certain that they still fulfill your needs. It is important to keep your will and related documents current.

A Word or Two about Conservatorships and Guardianships

As some people age they lose their ability to make sound decisions about their property, their money and their lives in general. Occasionally, these abilities become difficult before old age because of an illness, a stroke, brain injury or the mere lack of mental capacity.

In addition, children under the age of majority, i.e. Age 18, do not have the legal ability to make certain decisions for themselves, such as to sign a contract, to handle larger sums of money inherited by them, to purchase a home, and so forth.

In order to protect and assist people with these deficits the law provides for the establishment of conservatorships and guardianships whereby a responsible adult is placed in the position of Conservator or Guardian to help the person who is called "the ward" handle his or her financial matters, legal affairs, personal care and health issues.

The process of filing a conservatorship, for example, for an aging parent is very precise and technical. It involves filing a formal petition in the court system which is ultimately supported by a physician's sworn statement that the "ward" is physically or mentally incapable for caring for his or her own affairs. The Court will appoint a "guardian ad litem" for the ward who is generally an attorney whose job is to protect the interests of the ward during the court process and make certain that the ward's desires are made known to the Court. Notice of such a legal proceeding must be given to all "interested parties such as close family members.

Following a hearing the Court will grant the conservatorship if it appears from the testimony that the conservatorship is need and that the person seeking the conservatorship is appropriate. The Court will also approve a care plan for the ward using the ward's income and property as needed.

The process often takes anywhere from four weeks to several months from initiation to the granting of the Conservatorship. The attorney fees, which are approved by the Court for payment from the ward's money typically runs about $1,000.00 to $1,500.00. The guardian ad litem's fee is usually between $150.00 and $750.00 depending on the amount of work done by the guardian ad litem.

Under most conservatorship orders certain rights are taken away from the ward, such as, the right to contract, access to any bank accounts, the ability to make gifts, the right to vote, the right to drive a vehicle, and so forth.

Each year the Conservator is required to file a detailed accounting with documentation of all funds received and spent on behalf of the ward. The Conservator is entitled to a fee for services and reimbursement of expenses used on behalf of the ward which sums are approved by the Court.

Deciding on a conservatorship or guardianship is an emotional, stressful and difficult task. If you have any questions about the process or alternatives to consider, pleases contact me for an appointment to discuss the process in detail.

CONCLUSION

Statistics show that only about one-quarter to one-third of adults in America have a will. That means that an overwhelming majority of Americans are relying on the state of their residence to handle the distribution of their property when they are gone. While that may be adequate for some, most of us, once we realize what that can mean prefer to make a more personal arrangement through our will to carry out what we want, not what the state provides.

If you fall into the latter group of those who want to make specific provisions for their loved ones then don't delay any longer. Call for an appointment today to at least find out what would happen in your particular situation if you were to die without a will. Whether you allow me to draft your estate documents or not, please do take action right now by calling a qualified attorney to help you give reassurance to yourself and your family.

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