

# The Will To Give Property

*What You And Your Attorney  
Should Know About Wills*

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**"THE WILL TO GIVE PROPERTY"  
What You And Your Attorney Should Know About Wills**

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A *Will* is an essential element in your estate planning. It allows you to express your wishes as to how your property should be distributed and who should be the guardians for your children.

Because a well-written Will is so important for your family, creating it requires attention to detail. You should begin the process with knowledge as to what you need to put into your Will and how to do it.

**What Kind Of Property Can I "Will" Away?**

Only probate property is subject to distribution under the terms of your Will. Other property, non-probate property, passes outside of the terms of your Will. Non-probate property passes to beneficiaries according to the following special rules:

- If the non-probate property is a living trust, according to the terms of the trust;
- If the non-probate property is a life insurance contract, to the beneficiary named in the life insurance policy contract;
- If the non-probate property is in joint tenancy with right of survivorship, to the surviving joint tenant.

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**Example:** Byron owns his home in joint tenancy with his wife Anne. Byron also owns a life insurance policy of \$100,000 on his life. The policy names Anne as the beneficiary. Additionally, Byron puts his stocks and bonds into the living trust. The trust provides that the trust property will be distributed to Anne on Byron's passing. Byron also owns a vacation home, a certificate of deposit, some furniture, and a car.

In his Will, Byron leaves his property to Anne. When Byron passes away, his joint tenancy interest in the home will automatically pass to Anne, outside the probate process and Will. Likewise, Anne will receive the \$100,000 life insurance proceeds directly from the

insurance company, once she presents proof of Byron's passing. Also, Byron's trustee will transfer the stocks and bonds to Anne directly without need of probate. The rest of Byron's property, the vacation home, certificate of deposit, furniture and car goes into his probate estate. This property will eventually go to Anne, under the terms of Byron's Will.

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### **Can You Write Your Own Will?**

When there is a controversy about money, even among family members, matters can get ugly. A dispute about your estate almost always requires court intervention and is expensive to resolve. It causes long-lasting bitterness and hurt feelings among family members.

The best way to avoid these problems is to have a proper estate plan in place. An essential ingredient in this estate plan is a Will; or, as an alternative, a living trust and a Will.

You can create a Will by simply filling out a form available from your local library. But using a form Will is risky business. The form may overlook certain issues. It's safer to discuss your situation with a lawyer.

But not every lawyer is competent to design a Will. You should use someone familiar with Wills and the estate planning process. To determine upfront the ability of your attorney, discuss the following list of issues with him. If he can't discuss these intelligently, take your business elsewhere.

### **Guardianship**

An initial question to ask is how money should be managed for your minor children in the event that both you and your spouse pass away. You should expect a clear, direct response. Anything less is a bad sign.

Minor children should not hold money or title to the property left to them. Instead, the guardian of the minor's estate should hold the money or title. You can name in your Will the guardian of the estate for your minor children.

The guardian will not be able to give the funds to your minor children or use them for their benefit unless the court authorizes the guardian to do so. This court involvement results in a cumbersome and inefficient process.

A question to ask your lawyer is if there is any way to avoid this situation. The answer should be, "Yes, through use of a trust for the benefit of the minor children."

Here's how it works. Instead of having your money and other property passing outright to your minor children, you would create a trust under your Will for their benefit. Then, if your children are still minors when you and your spouse pass away, the property would go to the trustee of the trust. The trustee could then use the funds for the benefit of the children, as you have directed under the trust terms.

Because the property passes outright to the trust for the benefit of your minor children, there is no guardianship estate. As there is no guardianship estate, the courts would not get involved.

You would still name a guardian of the estate for the child, just in case there is ever a need for a guardian of the child's estate. For example, if there were a gift from a grandparent to that child, the child would need a guardian of his estate. But, in most cases, the guardian would never have any funds under his control.

### **The Terms Of The Child's Trust**

Another question for the lawyer is what the terms of this trust should be. You have a great deal of flexibility in structuring the trust, and your attorney should be able to explain the options available to you.

For example, you have an option to set up one trust for the benefit of all your children or instead use separate trusts for each of your children's benefit. If you use one trust, you might want the property distributed when your youngest child reaches a certain age, say 25. If you use a multiple trust approach, you have more flexibility. You might have the trust property

distributed over time when the child reaches certain ages, say one-third at age 25, one-third at age 30, and one-third at age 35.

Also, a knowledgeable lawyer should be able to tell you that your children's trust is typically created under, and described in a separate part of, your Will. There does not need to be a separate trust document.

Because the trust is in your Will, you can change the trust terms at any time. Since the Will is revocable, so is the trust. If properly written, the trust would not actually take effect until both you and your spouse pass away.

The terms you put into the trust should depend on your particular situation and what you believe desirable for your family. An attorney who persists in recommending an approach that you believe does not take into account your situation may be pushing you into a form Will. The attorney may be uncomfortable designing a custom Will because he is unknowledgeable in estate planning.

#### **I Thought A Guardian, Executor And Trustee Were All The Same!**

Another issue to discuss with your attorney is the naming of a guardian, an executor, and a trustee. The attorney should know that the functions of the guardian, executor and trustee often differ. And he should be able to explain those differences to you in a concise and understandable fashion.

For example, the guardian of the person is responsible for the upbringing of your children. That person might have no say in financial matters bearing on the children. Instead, a trustee or guardian of the estate would take care of the children's financial needs.

#### **Beware Of Taxes**

You also need to discuss the estate tax. At a minimum, your attorney should know that:

- There is a gift tax, and the gift tax and estate tax are part of a unified system.

- The estate tax does not generally apply unless you die with an estate over \$600,000.
- Your probate estate and your estate for estate tax purposes are not the same thing.
- Your estate is a separate taxpayer and may have to pay income taxes.

### **If My Estate Does Owe Money, Who Should Pay?**

Another matter to discuss with your attorney is payment of taxes, expenses, and debts of your estate. Under the terms of your Will you can direct how these should be paid.

Options abound. You could specify that payment be made out of your estate assets without regard to any particular beneficiary. Or you might direct payment out of the property left to a particular beneficiary. Still another choice is to direct payment out of property left to a number of beneficiaries.

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**Example:** Lance passes away in 1992 with an estate worth \$500,000. Under the terms of his Will, Lance directs that his assets be distributed one-half to his wife, Laurie, and one-fourth each to his adult daughter, LeAnne, and adult son, Larry. Taxes, expenses, and debts of Lance's estate total \$100,000.

If Lance's Will says that these payments are to be made without regard to any particular beneficiary, \$400,000 would be left to distribute to his beneficiaries. This is the estate assets of \$500,000 less the payments of \$100,000. Laurie would receive one-half of the \$400,000, or \$200,000. LeAnne and Larry would each receive one-fourth of the \$400,000, or \$100,000 each.

If Lance's Will instead specifies that the payments be made solely out of the property left to his wife, Laurie, the distribution amounts would change. Laurie would receive \$150,000. This is one-half of the \$500,000 estate assets, \$250,000, less the payments of \$100,000. Because all of the payments would be made out of Laurie's share, LeAnne and Larry would each receive one-fourth of the \$500,000 estate assets, or \$125,000 each.

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You should consider whether the beneficiaries of your non-probate property should be responsible for paying any of these items. This can be an important concern.

Suppose you own an insurance policy in which you name a relative as primary beneficiary. If you owe estate taxes, the policy would increase your estate taxes.

Logically, the beneficiaries of the insurance proceeds should pay the increased estate taxes. But whether you should worry about this issue depends on your situation. So you should discuss the matter with your attorney.

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**Example:** Charles owns an \$800,000 insurance policy on his life, which names his nephew as the primary beneficiary.

Charles also owns other assets worth \$200,000 which, under the terms of his Will, he leaves to his wife. He also has a \$1,000,000 insurance policy in which his wife is named as primary beneficiary. Charles has directed under the terms of his Will that all taxes be paid out of his probate estate.

At his death, there is no tax on the property left to his wife. But the tax on the \$800,000 insurance policy will be \$74,000. Since the probate estate pays all the taxes, the \$74,000 tax is payable from the \$200,000 otherwise passing from his probate estate to his wife.

The insurance policy is not part of his probate estate. Most likely, Charles would want his nephew, who receives the benefits from the \$800,000 insurance policy, to pay this tax. Charles' planning should be revised to achieve this result.

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### **Gifts To Charity May Be Tricky**

Another area that needs to be discussed with your attorney is charitable gifts. If you make gifts to charities during your lifetime, you should be entitled to both an income tax deduction and a gift tax deduction as long as certain requirements are met. Likewise, if certain requirements are met, your estate should be entitled to an estate tax deduction for charitable gifts made at your death. Your attorney should be able to clearly explain the following two requirements for the estate tax deduction.

First, for a gift to be free from estate tax, the gift must be made to a charitable organization that is qualified for estate tax purposes. An organization will tell you whether it is qualified.

Second, the gift must be made by your Will or other document which passes property at your death, such as a living trust. If you die without a Will or living trust, your estate will not be entitled to exclude a charitable contribution even if your family makes one on your behalf.

### **Spousal Gifts In Trusts Provide Another Test**

Another area to test your attorney's knowledge is gifts to your spouse. Outright gifts to your spouse, not in trust, generate no estate tax.

Spousal gifts in trust may or may not result in estate tax depending on how the trust is structured. You have to be careful about what the trust provides, the *terms*, to make sure that the trust does not result in an estate tax. You can ask your attorney to describe the terms the trust must have for the gift to be free of estate tax.

The following are the most typical trust terms needed to make sure that a gift in trust will not result in an estate tax:

- All income must be paid to the spouse during her lifetime.
- Only the spouse can receive trust property during her lifetime.
- The spouse must have the ability to require that property be invested so that it generates income.
- The spouse must have the right, in certain cases, to withdraw any of the property from the trust during her lifetime, or to specify where the property goes at her death.

### **What Happens If I Don't Have A Will?**

If you die without a Will, a common belief is that your property will go to the state. This is not a concern. In the overwhelming majority of situations your property will not pass to the state.

What is a concern is that you no longer have control as to how your probate property is distributed. That property will be given to your closest relatives according to the *intestacy* (meaning without a Will) laws of the state governing the probate of your property.

These laws control the distribution of property if an individual passes away without a Will. In most states, your spouse and children would be the first people entitled to your probate property. Under one common intestacy approach, equal shares of your probate estate are given to both your surviving spouse and to your children.

This distribution scheme may frustrate your true intent. For example, if you do not believe your surviving spouse is good at managing money, then you probably would want a trust set up for her.

But if you pass away without a Will, at least some of your probate estate will go outright to your surviving spouse. A court couldn't step in and impose a trust, even if the court were to agree with your concern over your spouse's inability to manage assets.

As another example, you may not want any of your property to go to your children until your spouse passes away. But if you pass away intestate, up to one-half of your probate property will most likely go to your children.

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**Example:** Larry and his wife Jean have three adult children. Larry owns the family home outright. Larry has not made out a Will.

When Larry passes away, his state's laws provide for his probate estate (his family home) to be split equally, one-half to his wife, and one-half to his children, as a group. As a result, Jean would then own a one-half interest in the house, while the children, as a group, would also own one-half of the house.

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A further concern arises if your children are minors when you pass away intestate. As to the one-half portion of your property that goes to your children, it should be held for their benefit by a guardian of the estate. But the guardian may not use the property for the benefit of your children without court order, even if the guardian is your spouse.

The intestacy laws may also raise estate tax concerns. Property passing directly to your spouse does not generate an estate tax. But if your property passes to your children and spouse under intestacy laws, the property passing to your children may be enough to generate an estate tax. With a Will, all of the property could have been left to the spouse and estate tax avoided.

Difficulties also arise if an individual passes away without having a surviving spouse or children. A single person, for example, may not be that concerned about where his money goes at his passing, and so may fail to do a Will.

Under the intestacy laws his property may be distributed to his brothers, sisters, and parents. Without a Will, this distribution will occur even though it might have been very objectionable to the decedent.

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**Example:** Darryl is a wealthy bachelor. He has two sisters, Ann and Chris, with whom he is very close. Darryl also has a brother, Charlie. Darryl and Charlie despise each other and have not spoken in many years. Darryl has no other relatives.

Darryl passes away without a Will. Under the laws of Darryl's state, Darryl's probate estate will be split equally among his siblings. Even though Darryl undoubtedly did not want Charlie to get anything, Charlie gets one-third of Darryl's estate.

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