Wills

Wills

What is a will?

By definition, a will is the legal declaration of your intentions which you desire to be performed after your death. Although this definition has withstood the scrutiny of lawyers and judges for two centuries, it does not adequately portray the function of a will.

A will should be thought of as one part of an estate plan, a plan which represents the culmination of a person's life — his or her work, hopes and dreams. It is not easy to accumulate an estate in this day of high taxes, rising costs of living and of educating children. An estate represents what is left after a lifetime of work, and generally it is accumulated in the hope of passing on some measure of support to your family.

The best way to carry out your hopes and dreams is through careful estate planning. Your will is the most important part of an estate plan, and perhaps the most important document you will sign in your lifetime. It serves as a substitute for what you would do for your family if you were still alive.

What are the requirements for a will?

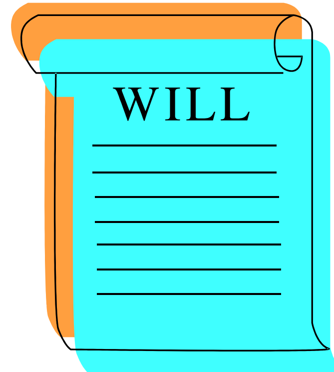
1. You must be 18 years of age, except that a married person of any age may make a will.
2. You must be of sound mind.
3. The will must be in writing, either typewritten or handwritten.
4. The will must be signed by you and should be witnessed by two or more competent persons, who must sign the will in your presence and in the presence of each other. (Witnesses should not be persons who have been named as beneficiaries in the will.)
5. In Nebraska, the law also allows "holographic" wills. These are handwritten wills, which are not witnessed. To be valid, the material provisions of the will, the signature and the date of signing must all be in the handwriting of the person making the will. A holographic will can be difficult to prove and is not a recommended way of disposing of property.
6. A will is not required to be notarized, but a notarized statement called a "Self Proving Affidavit" can be added, which makes the will easier to prove in court if the will is challenged.

Who needs a will?

Every man or woman, married or single, of age for making a will should have an estate plan, including a properly drafted will. A person does not need to have a large estate to warrant careful planning. Indeed, the smaller the estate the greater need for care, including a well-planned will, since each dollar wasted in unnecessary taxes and other expenses hurts that much more.

Even when a husband and wife are joint owners of all of their property, each should have a will. This is necessary to control disposition of the property upon the death of the surviving spouse, since neither knows who may survive, or if the survivor will live long enough to write a will There is also the possibility of each individual inheriting money or property from some unexpected source. Those assets would also be subject to the terms of that individual's will.

Very few people die without leaving some type of property, which could be controlled by a will. However, property, which is **NOT** controlled by a will (such as property held in joint tenancy, property that has been placed in trust, life insurance and other property), should also be taken into consideration in planning your estate.



Who should draft my will?

Your lawyer should draft your will. Although you can write your own will, "do-it-yourself" wills are often the cause of litigation, will contests, and problems with the title of real estate. Developing an estate plan, including a properly drafted will, involves making decisions requiring a professional skill. These capabilities are acquired through training, experience and study of state probate laws and state and federal taxes.

Forms and kits for making your own will do exist, but these cannot take into account your own personal circumstances and relationships. Even a minor error in a will could alter the way in which your property is disposed of. Remember that your heirs would be the ones to suffer the results of an improper will.

Can a will be changed?

A will can be changed or revoked, at any time and as often as you wish, as long as you remain competent. A will does not become final until your death. Changes might be advisable in case of marriage, birth, death of a beneficiary, a change

regarding your personal representative or the guardian of your children, or the purchase or sale of a business or other property. You should review your will periodically.

In the event of divorce, the will is automatically revoked as to the former spouse, unless the will expressly provides otherwise. A decree of separation, which does not terminate the legal status of husband and a wife, does not automatically revoke a will. If you divorce or separate, you should review your will and decide what changes you wish to make.

Is joint tenancy a substitute for a will?

Two or more persons may own property together in such a way that upon the death of one of them, the property goes to the survivor(s) without going through probate. This form of ownership is called "joint tenancy."

In some cases, and for certain kinds of property, joint tenancy is a useful legal device, but a number of problems may arise from its indiscriminate use. There are tax hazards in joint tenancy, which you may not be aware of, as well as other complications and expenses.

In any event you cannot escape inheritance tax or estate tax by owning property in joint tenancy. It is not an adequate substitute for a will. See the NSBA brochure on joint tenancy for more information.

What happens if you die without a will?

If you die without having made a will, the law (not you) provides for the disposition of your property, and that disposition may not be what you want.

Before an estate is distributed, debts and taxes must be paid. In addition, certain allowances are made to the surviving spouse so that he or she will have sufficient funds to use while the estate is being settled. These include a Homestead Allowance, an Exempt Property Allowance, and a Family Allowance up to a reasonable amount. After these allowances, debts and taxes have been paid, the property is distributed as follows:

1. If you leave a spouse, but no children and no parents, your spouse will receive all of your property.
2. If you leave a spouse and no children, but you have a surviving parent or parents, your spouse will receive the first $50,000 of your estate plus one-half of your remaining property. Your parent or parents will receive the other half.
3. If you leave a spouse and one or more children, and your spouse is the parent of all of the children, your spouse will receive the first $50,000 plus one-half of your remaining property. Your children will receive the other one-half divided equal shares.
4. If your spouse is not the parent of all of your children, your spouse will receive one-half of your estate and your children will receive the other one-half in equal shares.
5. If you leave no spouse, your children will receive all of

your property in equal shares. If you leave no spouse or children, then your grandchildren will receive your property in equal shares. If you have no grandchildren, your parents will receive your property.
6. If you leave no spouse, children, grandchildren, or parents, your estate would go to your next of kin, as defined in Nebraska law. The portion of your estate that a relative would receive would depend upon how closely he or she is related to you.

The laws provide only a rigid formula, and make no exceptions for those in unusual need. The failure to make a will could mean hardships and added expense for your immediate family, and benefit some relatives you may not even know.

The laws make no provisions for friends, business associates, charitable institutions, schools or churches, and they treat all types of property the same. There are no special provisions for family heirlooms or jewelry or a family business, for example. They also fail to consider the different needs of different beneficiaries, some of whom may need protection against their own spending habits or the exorbitant demands of a husband or wife. The only way to handle these special situations is through a carefully planned will.

Can I appoint a guardian for my children in my will?

You may designate in your will the person or persons you would like the court to appoint as guardians of your minor children. While this is not binding on the court, the wishes expressed in a will are usually followed, provided that the persons named are willing to serve as guardians, and that the court finds the appointment to be in the best interests of the children. If you die without a will, the court may appoint a guardian for your minor children without knowing your wishes.

What is a personal representative?

"Personal representative" is the name now used for what once was called an executor or an administrator. You can designate in your

will who is to be the personal representative of your estate. If you do not designate a personal representative, your surviving spouse has first priority for appointment as your personal representative. Next in order of priority would be other heirs. If no personal representative has been appointed within 45 days after your death, any creditor can apply for appointment. Any person appointed as personal representative must be at least 19 years of age.

Does the personal representative have to live in Nebraska?

It is not required by law that the personal representative is a resident of Nebraska, as long as the person named is otherwise qualified by age and suitability.

What are the personal representative's duties and obligations?

In general the duty of the personal representative is to settle and distribute the estate of the decedent. More specifically, the personal representative must give notice of his or her appointment to interested persons, prepare an inventory of property owned by the "decedent" (the person who died), take possession and control of the decedent's property, pay the taxes, claims and expenses of administration and distribute the property according to the will or according to the laws if there is no will.

Can more than one person be named as personal representative?

You may appoint one or more persons as co-personal representatives or you can appoint successors to take over in the event your first choice for some reason cannot perform the duties of the personal representative.

Can I dispose of my property in any way I wish?

Yes, except that you may not be able to prevent your spouse from receiving a portion of your estate. Additionally, a joint tenant cannot prevent the surviving joint tenants from becoming owners of jointly owned property by rights of survivorship.

Should I leave a separate list disposing of personal property?

You can leave a separate list, dated and signed, disposing of personal property. To make that separate list effective, however, you must have a will and the will must make specific reference to that separate list. The advantage of such a list is that it can be changed without actually having to change the will.

How can a person contest a will?

A will contest is commenced by an interested person filing objections to the probate of the will with the court. The will contest must be commenced within three years after death or within 12 months after an informal probate of the will.

How can a will save money?

A properly written will can reduce taxes, thereby leaving more of your estate for your family. It also gives you the choice of appointing a competent person as the personal representative. In addition, your will can provide that the personal representative need not post bond, which saves the estate the expense of paying the premium on the bond. A will can authorize your personal representative to sell real estate without the necessity of going through a court hearing to get authority to sell.

Must the will be read to the family?

This is a popular misconception. There is no requirement in the law for a "reading of the will." When a will is filed with the court, it becomes a public record and anybody may see it. The law does require that notice be given to all interested persons of the probate of a will so that they have an opportunity to protect their interests. Interested persons may request advance notice of any order entered by the court or of the filing of any document pertaining to an estate.

Why must an estate go through court?

Not all estates are probated. Some small estates may be handled by summary procedures. But talk to your lawyer about this.

Upon your death, your debts must be paid out of the property you leave. There must be a determination of whether there are debts to creditors or taxes due to the state or federal government. The law

provides for time limits in which creditors may take claims against an estate, and upon proper procedure through court, claims not filed are no longer a legal debt.

When should I make a will?

You should make a will now. A prudent person does not wait for a catastrophe or other compelling reason to begin planning his or her estate. You can always make changes in your will later if circumstances change.

In any event, you should review your estate plan with your attorney periodically. Changes in your property holdings, your family (marriage, death, divorce) and simply inflation in values can change results of your intent which has been expressed in the will. Changes in the tax laws can substantially affect the intent that you had when making the will. Review your own will annually; review it with an attorney when family changes occur or at least every three years.

This pamphlet, which is issued to inform, not to advise, has been prepared and published by the Nebraska State Bar Association. It is distributed by those who want to help you obtain your rights under the law.

Nebraska State Bar Association
635 South 14th Street
P.O. Box 81809
Lincoln, NE 68501-1809
(402) 475-7091
www.nebar.com

This pamphlet may be reprinted with the written permission of the Nebraska State Bar Association.

© 2001 Nebraska State Bar Association. All rights reserved.

Revised and Reprinted 2001