

Back to Basics Estate Planning **Why A Will?**

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The center piece of any estate plan is the Will. The first question that is always asked is "Do I need a Will?" The answer is an emphatic "Yes" if you have heirs or charities that you care to protect. The topics that we will cover will be:

1. Who will receive your Probate Assets if you die intestate (without a Will)?
2. Who will serve as the administrator of your estate if you die intestate (this could be a large number of individuals)?
3. Will your administrator need to post a bond for the faithful performance of his or her duties as executor, and what is the amount of the bond?
4. Will the administrator need to go to court more often if I do not have a Will? For example, if the administrator needs to sell my home, will he or she need to obtain the court's permission?
5. If I have my minor children who will inherit my estate, when will the minors receive their inheritance and who supervises the use of the funds while they are minors?

Before we answer these (and other) questions, let's define some basic terms - *Probate Assets* and *Non-Probate Assets*. *Probate Assets* are assets that you own in your individual name at the time of your death (bank accounts, stocks, bonds, mutual funds, real estate, etc.). Probate Assets pass to the beneficiaries named in your will.

Non-Probate Assets pass outside of your will by beneficiary designation or by operation of law. Non-Probate Assets that pass by beneficiary designation are generally retirement assets (401k's, IRA's, etc.) and life insurance. When you complete a beneficiary designation form, the individual(s) that you name will receive these benefits without even looking at your Will.

Non-Probate Assets that pass by operation of law are jointly owned assets. If property is owned jointly with a spouse or others, the co-owner will normally receive the property without the need for a Will.

Many married couples own property (particularly the principal residence)

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jointly. This is referred to as a tenancy by entireties. Upon death of one spouse, the joint property passes to the surviving spouse.

What happens to your Probate Assets if you do not have a Will and also, what happens to jointly owned property if both husband and wife die in a common disaster and if you do not name a beneficiary of retirement assets or a life insurance policy?

When spouses own property jointly and they die together as a result of a common accident, one-half of the jointly owned assets would pass through each spouse's estate - to the beneficiaries named in the Will. Similarly, if you fail to name a beneficiary of a retirement plan or life insurance policy, under normal circumstances, the benefit would pass to your estate to be distributed to the heirs named in your Will. Finally remember that all Probate Assets will pass in accordance with the terms of your Will.

The problem then arises if you do not have a Will. Again, this is called dying Intestate and the beneficiaries of your estate become those individuals named by your State's laws. This is generally called intestate succession. The Commonwealth of Pennsylvania provides a schedule for determining intestate succession. If you are aware of this schedule, you may be satisfied that the legislature has adequately provided a plan for you. A word to the wise, however - generally the intestate descent schedule is not what you want, so everyone should have a Will to ensure that the beneficiaries of your estate are who you want.

A common example of intestate succession in Pennsylvania is the case where you are married and have children who survive you (all of whom are children of the surviving spouse). In this instance, your spouse would receive the first \$30,000 of your estate and one-half of the balance. Your children would receive the remaining one-half of the estate.

Most individuals have two problems with the distribution provided for by the intestate succession statutes. First, the spouse is sometimes not adequately provided for since children will receive one-half of the estate. Second, if you have minor children, the minors' shares will be held in a court supervised guardianship account that provides little room for good investment management and distributions without court intervention.

Based upon the foregoing, the existence of the intestate schedule of distribution is the single greatest reason to have a Will - the individuals that *you* want to receive your estate should be the beneficiaries - *not* the individuals named by some statute you have never read.

If you do not have a Will, problems may arise in the administration of your estate. The first administration issue associated with dying intestate is who will be the executor (or administrator) of your estate. Initially, if you do not have a Will, you technically will not have an executor. In the Commonwealth of Pennsylvania, if you do not have a Will, the person who will administer your estate is called an Administrator, not an executor.

Pursuant to Pennsylvania law, the person(s) entitled to serve as the Administrator are (in the following order): (1) those entitled to the residuary estate under the Will, (2) the surviving spouse, (3) those entitled under the intestate law as the register, in his discretion, shall judge will

best administer the estate, (4) the principal creditors of the decedent at the time of his death, or (5) other fit persons. As you can see, the Administrator of your estate can be anyone from a beneficiary to a creditor of your estate.

Moreover, if beneficiaries of your estate are minors, then this will further complicate the decision as to who will be granted the right to serve. Also, you, personally, may feel that one or more of the potential administrators should not be placed into that type of fiduciary position due to "limitations" or other "shortcomings" of that individual.

A Will solves all of these problems since it allows you to name the appropriate individual(s) and/or bank or trust company to administer estate, and to also not include those individuals with the shortcomings.

Another problem that arises when you do not have a Will is the creation of an unnecessary expense - the posting of a fiduciary bond. Pennsylvania law provides that unless your Will specifies otherwise, an administrator of your estate could be required to post a bond for the faithful performance of the administrator's duties.

Some counties require a bond equal to 125% of the value of your Probate Assets - and the charge is an annual charge for each year the estate is opened. For example, if your Probate Assets are valued at \$500,000, the bond would need to be issued for \$625,000 and would cost around \$1,650 per year.

Another issue of not having a Will is the additional costs and problems encountered in the administration of an estate - specifically how much court intervention is required when no Will exists and how do your heirs receive your assets?

Generally speaking, Pennsylvania's laws provide that an individual is permitted through his or her Will to provide powers to an executor over and above those basic powers provided by statute. It is always advisable to have a Will prepared that grants these additional powers so that the executor of an estate can perform his or her duties with minimal additional costs and without court involvement.

An example can be used to illustrate this point. Let us assume a "normal" estate where there is cash, a balanced portfolio of securities and the decedent's principal residence, and that the decedent dies intestate.

With regard to the balanced portfolio of securities, Pennsylvania law provides that the administrator of an estate may invest estate assets, but only in the following investments: (1) obligations of the United States, the U.S. Treasury, the Commonwealth, or any political subdivision of the Commonwealth, (2) an interest-bearing deposit account in any bank located in the Commonwealth that is FDIC insured (and with a maturity date not exceeding one year), (3) a savings account of any Pennsylvania savings association or Federal savings and loan association if the account is FDIC insured, or (4) a money market mutual fund affiliated with a corporate (e.g., bank) personal representative.

Given these very restrictive investments that an administrator may make, the balanced portfolio

and principal residence will need to be turned into cash. If, however, the administrator wants to distribute the balanced portfolio "in-kind" to the beneficiaries, it will be necessary to obtain the court's permission to do so - even if the administrator is the sole beneficiary of the estate. This could easily have been avoided by having a Will that allowed the executor to invest in stocks, bonds, mutual funds, etc. Again, without the proper Will, additional costs (broker charges and commissions) will be incurred and court involvement may be necessary.

There are numerous other instances that can increase the costs of administration and the number of visits to the court that can be avoided by having a properly crafted Will such as some of the problems with selling real estate, settling litigation or controversies among beneficiaries and making payments of various taxes.

The final (and perhaps most important) consequence of dying without a Will (intestate) is how your heirs will receive their inheritance, especially if minors or incapacitated beneficiaries are involved.

In Pennsylvania, minors (generally those under 18 years of age), are not able to be outright beneficiaries of estates, life insurance policies or retirement plans. Since minors are not allowed to receive inheritances, etc., Pennsylvania law dictates how these beneficiaries will receive assets to which they are entitled.

In most cases, where there is no Will and a minor is a beneficiary of an estate, insurance policy or retirement plan, the assets to which the minor is entitled will be held in a sequestered bank account for his or her benefit. The consequences of such an account to the minor are numerous and undesirable.

First, the account is just what was stated - a bank account. This means that the funds deposited into the account will earn interest at current rates (1.5% or less). Sequestered accounts are not permitted to invest in stocks, bonds or mutual funds, so the return on the investment for the minor is minimal - it does not even keep pace with inflation.

Second, most withdrawals from a sequestered bank account cannot be made without prior court approval. As a result, someone will be running to the court quite frequently in order to be able to access funds that you intended to leave to support the minor.

Lastly, when the minor attains 18 years of age, the assets are given to the minor in one lump sum. If you left even a modest estate and a life insurance policy to a minor, the minor could receive hundreds of thousands of dollars when he or she turns 18 years of age - a scary thought to most adults.

A carefully crafted Will, along with correct beneficiary designations, can eliminate all of these problems by creating a trust for the benefit of the minor. The trust can allow the trustee to invest in securities, allow the trustee to use the trust assets for the minor's benefit without having to run to court, and delay the minor's outright receipt of his or her inheritance until older ages (e.g., 25, 30, 50, etc.). This solution allows for greater returns on the investments, easier and more efficient

access to funds for the minor's benefit and the reduced chances that inheritances will be squandered.

To ensure the intended results, however, the Will must create the trust and you must coordinate the payment of Non-Probate Assets (e.g., life insurance and retirement plans) with the new Will by using proper wording on beneficiary designation forms.

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