

# To Will Or Not To Will

## You Can't Take It With You

Death affects people in many ways. It never is timely. Death confronts the family with bereavement, with the need to readjust emotionally and financially, and often with an unknown future. Death is not only a personal issue but a legal one as well. A death certificate must be issued, and the estate of the deceased individual (the decedent) must pass to others.

An estate consists of the property, both real and personal, which the decedent owns at the time of death. Real property includes land and improvements located on the land. Real property also includes oil, gas, and other mineral interests. Personal property is all property other than real property, including cash and bank accounts, clothing and personal effects, household furnishings, motor vehicles, stocks and bonds, life insurance policies, and government, retirement, or employee benefits.

Upon death, title to the decedent's property passes immediately to the beneficiaries under the decedent's will or to the heirs-at-law if the decedent died without a will. However, there must be an actual transfer of ownership of the property by proving the will in court or, if there is no will, by having a court determine who are the decedent's heirs. The purpose of court involvement is to protect the rights of the family, those entitled to receive property, and the creditors of the decedent's estate. Therefore, although title to property passes immediately at death, the assets of the estate are subject to the control of the executor or administrator of the estate for the purpose of settling the debts of and claims against the estate. After the payment of debts and claims, the remaining assets are distributed to the decedent's beneficiaries or heirs-at-law. If the decedent died with a legally valid will, then his or her property is distributed according to his or her wishes as expressed in the will. On the other hand, if the decedent died without a will or if the will is declared invalid, the estate is distributed to the decedent's heirs as determined under Texas law. The decedent's heirs may not be the persons to whom the decedent wished for his or her property to pass.

## Dying Intestate (Without A Will)

In Texas, property is characterized as separate or community. Separate property is that which is owned before marriage or acquired during marriage by gift or inheritance. Damages awarded during marriage from a personal injury lawsuit, except damages representing the loss of earning capacity, also are separate property. Community property is all property, other than separate property, which is acquired by either spouse during marriage. Thus, there can be separate real property, separate personal property, community real property and community personal property. When a person dies without a will, the law determines who are the heirs, and assets are disposed of according to whether they are community or separate property.

## Distribution of Community Property

Community property, whether real or personal, is distributed in this manner:

1. If the decedent is survived by a spouse and children (or descendants of deceased children):
  - A. If all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse, all of the community property passes to the surviving spouse.

- B. If any surviving child or descendant of the deceased spouse is not also a child or descendant of the surviving spouse, the deceased spouse's one-half of the community property passes to his or her children (and the descendants of any deceased child), and the surviving spouse retains the one-half of the community property he or she owned prior to the other spouse's death. However, the surviving spouse has the right under Texas law to use and occupy the homestead during his or her life and may have the right to use or own certain items of personal property that are exempt from creditors' claims.
- C. Example 1: Husband (H) dies without a will. H is survived by Wife (W) and by his three children (A, B, and C). A, B, and C also are the children of W. In this case, all of the community property passes to W.
- D. Example 2: Same as Example 1, except H is survived by a child (D) who is not also a child of W. Now, A,B,C, and D share equally in H's one-half of the community property, and W simply keeps the one-half of the community property that she owned prior to H's death. To illustrate, let's apply this rule to a community bank account with \$1,000 in it. The \$1,000 is distributed as follows:

W: \$500 (Many people incorrectly think that W gets the entire \$1,000.)

A, B, C, and D: Each receives \$125 (1/4 of \$500)

- E. Example 3: Same as Example 1, except W has a child (E) by a prior marriage. E is alive at H's death. All of the community property still passes to W. It does not matter that W has children who are not also H's children.
2. If the decedent is survived by a spouse but not by any children or descendants, all of the community property passes to the surviving spouse.
  3. If the decedent is not survived by a spouse, all property is separate property because the community estate terminates at the death of the first spouse. The following section discusses the intestate distribution of separate property.

### **Distribution of Separate Property**

The distribution of separate property of a person who dies without a will depends on whether it is real or personal property. Separate property is distributed in this manner:

1. If the decedent is survived by a spouse and children (or descendants of deceased children), then subject to the surviving spouse's rights with respect to the homestead and exempt personal property:
  - A. Separate personal property passes one-third to the spouse and two-thirds to the children (and the descendants of deceased children).
  - B. Separate real property passes to the children (and the descendants of deceased children) subject to a life estate in one-third of the property in favor of the surviving spouse. This means that the surviving spouse is entitled to use one-third of the real property during his or her lifetime, and upon his or her death, the children (or descendants) will have full title to the separate real property of the decedent.

2. If the decedent is survived by a spouse but not by any children or descendants, then subject to the surviving spouse's rights with respect to the homestead and exempt personal property:
  - A. All separate personal property passes to the spouse.
  - B. Separate real property passes one-half to the spouse and one-half to the decedent's parents or collateral relatives, such as brothers and sisters or their descendants. If no parents, brothers, sisters, or their descendants survive, then all separate real property passes to the surviving spouse.
3. If only children or their descendants survive, all separate personal and real property passes to the children or their descendants.
4. If both parents survive, but not the spouse or children or children's descendants, all separate personal and real property passes one-half to each parent.
5. If only one parent and brothers or sisters survive, separate personal and real property passes one-half to the surviving parent and the remaining one-half is divided equally among the brothers and sisters or their descendants. However, if no brothers or sisters or their descendants survive, then all separate property passes to the surviving parent.
6. If no spouse, children or children's descendants, or parents of the decedent survive, all separate property is divided equally among the decedent's brothers and sisters or their descendants.
7. If none of the above relatives survive, then all separate property passes generally to the decedent's grandparents. If no grandparents survive, the law provides for distribution of separate property to more distant relatives. In Texas, no matter how remotely related one is to a person who dies without a will, potentially he or she is an heir-at-law. Notice that the decedent's property passes to the State of Texas only if none of his or her heirs, including very remote heirs (such as uncles, aunts, or cousins), are living. Indeed, the State rarely benefits from the estate of an intestate decedent.

Examine the rules above to see how your community and separate property would be distributed if you died without a will.

### **Disadvantages of Dying Without A Will**

If a person dies without a will, the law disposes of his or her property. The public policy of statutes governing the intestate distribution of property is to provide for the orderly distribution of property at death. The law does not play favorites, so the distribution is by degree of kinship to the decedent, not by how close or wonderful one was to the decedent. Dying without a will may trigger undesired results and unexpected costs and delays.

### **Undesired Results**

Because one usually has an idea of how he or she would like his or her property to pass to others, undesired results can arise if he or she dies without a will. Dying without a will risks that the property will not be inherited as the decedent wished. For example, very often one spouse may prefer to leave everything to the surviving spouse who will provide for and take care of the children, but this may not happen if there is no will. If a person dies without a will survived by a spouse and children, including one or more children who are not also children of the surviving spouse, the surviving spouse receives only his or her one-half share of the community property,

perhaps including the family home. Further, under these circumstances, the surviving spouse inherits only one-third of any separate personal property and only a life interest in one-third of any separate real property. If there is any animosity between, for example, the surviving spouse and the deceased spouse's children by a prior marriage (who are now co-owners of property), conflicts or disputes may arise. Surely this is not what the deceased spouse wanted.

Another example of unintended results of dying without a will relates to the treatment of lifetime gifts to heirs. Texas law presumes that a gift to an heir is not an advancement of his or her inheritance. This may present a problem where a parent with two children makes a lifetime gift of a sizeable part (say, one-half) of the estate to one child (perhaps to help the child start a business or purchase a home) with the understanding that the gift is an advancement of his or her inheritance. If that parent then dies without a will and is not survived by a spouse, the remaining one-half of the estate is divided equally among the two children. The child who received the lifetime gift in effect takes three-fourths of the total estate, and the other receives only one-fourth instead of one-half, unless an advancement of the one child's inheritance can be proved in court.

If the most special people in a person's life are not among those who would be his or her heirs-at-law, they will not share in the estate if he or she dies without a will. If an unmarried person dies without a will, friends and roommates will inherit nothing. Thus, a devoted friend, who perhaps cared for the decedent for years, will not inherit property, no matter how unfair it might seem, unless the friend is provided for in the decedent's will. Also, without a will, property cannot pass to a charitable organization, no matter how committed the decedent was to its purpose.

In Texas, there is no forced heirship. In other words, a parent is not required to leave property to his or her children. However, one cannot disinherit heirs if he or she dies without a will. Under the intestate distribution statutes, property may pass to undesired heirs instead of those the decedent would have chosen.

## **Costs and Delays**

Dying without a will can tie up assets for an undetermined period of time. A court proceeding often is required to determine who are the heirs, although in certain limited circumstances it may be possible to clear title to the assets without an heirship proceeding. An administrator, who may be responsible to the court for settling the estate, may have to be appointed. The administrator may be required to post a bond to insure that the duties are performed properly. The administrator's duties include locating the heirs, inventorying the assets, paying off debts of and claims against the estate, and distributing the property to the heirs.

Transfer of ownership of some of the assets by legal documents, such as deeds and certificates of title, may be necessary. If the estate cannot be settled amicably, the court will resolve the disputes. Because of congested dockets, court proceedings often are slow. Legal fees and court costs may begin to mount. Depending on how difficult it is to divide the property and whether the heirs agree on the value assigned to it, court proceedings could be so lengthy and costly that the estate is depleted. The bottom line is that dying without a will costs time and money and causes frustration for the family of the decedent.

## **Children and Intestacy**

### **Adopted Children**

The inheritance rights of adopted children are protected when a parent dies without a will. Under the Texas Probate Code, an adopted child is treated the same as a natural born child. Therefore, the adopted child can inherit from his or her adopted parents and

vice versa. The adopted child can also inherit from his or her natural parents, but the natural parents cannot inherit from the child if the child dies without a will. This is an important consideration today when often an adopted child seeks and discovers the identity of a natural parent and then establishes a relationship with that parent.

### Illegitimate Children

An illegitimate child (one born out of wedlock) can inherit from his or her natural mother and vice versa when either dies without a will. By contrast, the illegitimate child cannot inherit from the natural father or the father's family members who die without a will, except upon the occurrence of one of certain specified events, including:

- a. The father consents in writing to be named as the child's father on the child's birth certificate.
- b. Paternity is established in a paternity suit brought generally before the child's twentieth birthday.
- c. The father legally adopts the child.
- d. The father voluntarily signs a written notarized statement of paternity acknowledging that the child is his.
- e. After the child's birth, the father marries the biological mother and either signs a written acknowledgment of paternity, consents to be named and is named as the child's father on the birth certificate, or is obligated under a written voluntary promise or by court order to support the child.
- f. After the father's death, the probate court determines that the father was the child's biological father.

This means that even if a father maintains ties with his illegitimate child, that child will not inherit from him if he dies without a will, except under limited circumstances such as those discussed above.

### **Stepchildren**

The stepchild does not inherit from a stepparent who dies without a will because he or she is not considered to be legally related to that stepparent. This is unfortunate where the stepchild was raised by a natural parent and/or a stepparent. A stepchild can inherit from a stepparent who dies without a will only if the stepparent adopted the stepchild or if the stepchild proves in court the existence of a written or oral agreement to adopt which was not executed. This latter method often is used when foster parents do not adopt a child even though they had an agreement with the natural parent(s) that they would adopt.

### **Children of the Half-Blood**

Half-blood children share the same natural mother or father, but not the same two natural parents. A half-blood child inherits only half as much as a whole blood child. For example, if a decedent's only heirs are a half-blood brother or sister and a whole blood brother or sister, the half-blood heir takes one-third of the estate and the whole blood heir takes two-thirds.

### **After-Born or After-Adopted Children**

After-born or after-adopted children are children who are born to or adopted by a person after he or she executed a will in which such children were not provided for or mentioned at all. After-born or after-adopted children in this situation inherit only under limited

circumstances, so it is best to execute a new will or an amendment to the existing will to provide for the after-born or after-adopted children.

## **Executing A Will To Achieve Desired Property Distribution**

### **What A Will Can Do**

A testator is a person who leaves a will in force at his or her death. A will is a legal instrument which states how the testator's property is to be distributed at death. A valid will avoids many of the problems that may arise from dying without a will and allows a person to leave property to the persons he or she desires. In addition to naming the recipients of the testator's property, the will also designates the individual(s) who will manage the property and care for minor children. In larger estates, the will often contains provisions that minimize estate taxes.

A will can also set up a trust, a method by which property is held by one party (the trustee) for the benefit of another (the beneficiary). To establish a trust, the testator transfers property, with the specific intent to create a trust, to the trustee who manages and administers the property for the benefit of named beneficiaries. A trust is an effective way of managing property for the benefit of minor or incapacitated persons or persons who are incapable of managing their own financial affairs. A trust also is useful to prevent a spendthrift child from immediately spending his or her inheritance by preserving the funds for the child's education or other important needs. Further, a trust may be used to protect the child's inheritance from the claims of his or her creditors because property placed in a trust generally may not be reached by a beneficiary's creditors until it is distributed to the beneficiary. There also are many other legitimate reasons to create a trust in a will.

### **Requirements for Execution**

For a will to accomplish any or all of these results, it must have been properly signed. Texas recognizes three kinds of wills:

- a. handwritten (holographic); and
- b. typewritten (formal).

To execute any of these wills, the testator must meet the following requirements:

- a. be at least 18 years of age, married, or serving in the armed forces;
- b. be of sound mind at the time of execution;
- c. not be unduly or fraudulently induced (forced or deceived) to make the will;  
and
- d. have testamentary intent (present intent to bequeath property at death).

Additional requirements as noted below must be met for each type of will.

### **Handwritten (Holographic) Will**

Under the Texas Probate Code, a valid handwritten will must be wholly in the handwriting of the testator and signed by him or her. It does not need to be witnessed and can be written on anything, including stationery. Typewritten words may not be incorporated into the will. The wording must reflect a present intent to dispose of

property at death. The words, "This is my last will and testament," generally are sufficient to show testamentary intent.

While executing a handwritten will sounds easy enough, problems can arise from its interpretation, especially when written by a lay person. If the instrument does not dispose of all of the decedent's property, the undisposed property will pass according to the statutes regarding intestate distribution. If the handwritten will disposes of more property than the testator owns, complications may arise.

Remember, a spouse has only one-half of the community property to give to anyone because the other spouse owns the remaining half. If a will attempts to give all the community property to one or more persons, the surviving spouse is placed in the awkward position of having either to accept whatever bequests are made to him or her in the will or to renounce the entire will and instead claim his or her one-half community share. If the bequests in a handwritten will are not written in clear language, then it may be necessary for the court to construe the meaning of ambiguous terms. As a general rule, the less clear the language and the more property and heirs involved, the more likely the will may be contested in court. Contesting a will is usually a very lengthy and costly process and may result in defeating the testator's intent.

Further, if the handwritten will does not contain the proper language allowing the executor to serve without court supervision and waiving bond, the executor may be required to obtain court approval of many actions and to post an executor's bond. This causes unnecessary delays and expenses in administering the estate. For these reasons, although a handwritten will is better than an oral will, the best approach is to have an attorney prepare a typewritten (or formal) will.

### **Typewritten (Formal) Will**

A typewritten will sometimes is referred to as a formal will. A well-drafted typewritten will is more apt to carry out the decedent's intent. Although a typewritten will may be prepared by a lay person, an experienced attorney should draft the will.

For a typewritten will to be valid, it must meet these requirements:

- a. be signed by the testator or another person at his or her direction and in his or her presence;
- b. be attested by two credible witnesses above the age of 14; and
- c. be signed by the witnesses in the presence of the testator.

A beneficiary under a typewritten will should not serve as a witness to the execution of the will because this may preclude the beneficiary from receiving any property under the will.

### **Will Revisions**

Executing a will that stands up in court is only one aspect of "getting your affairs in order." After execution, the document should be safeguarded so that it is not lost, destroyed, or mutilated, which might result in complications in probate court as to the proof of its contents. Further, a will should be updated when there are changes in the testator's heirs, property, or marital status. This can be accomplished by executing a proper amendment (a codicil) to modify the existing will or by canceling (revoking) the existing will and then executing a new one. It is not advisable to update a will by writing or making changes on it because such revisions may be totally ineffective. Be aware that

a will can also be canceled to some extent if the testator is divorced after making the will. In such a case, gifts to the ex-spouse in the will, as well as appointments of the ex-spouse as executor or trustee, are void and will not be recognized. Similarly, an ex-spouse who was designated during marriage as a beneficiary under the decedent's life insurance policies generally is not entitled to the life insurance proceeds upon the decedent's death. A temporary order issued by a divorce court prohibiting a party to a pending divorce case from changing his or her will until the divorce is final is unenforceable.

The subsequent marriage of a single testator will not cancel his or her will. If a person who signs a will before marriage wishes to give all or any portion of his or her property to the new spouse, he or she should sign a new will. Otherwise, the property will pass according to the provisions contained in the will that was signed before marriage, and the new spouse will receive no portion of the deceased spouse's property.

### **Nonprobate Assets**

Only property owned by the decedent at death can be disposed of by a will. A will cannot dispose of "nonprobate assets" -- assets which pass at death other than by will or intestacy. The principal types of nonprobate assets include property passing by contract, property passing by survivorship, and property held in trust. Property passing by contract includes life insurance proceeds, IRAs, and employee benefit plan proceeds, such as the proceeds payable under a pension, profit-sharing, or employee retirement plan. These assets pass outside the will to the persons named by the decedent in the appropriate beneficiary designations. Thus, it is important to periodically review the beneficiary designations with respect to these type of assets and to update them as necessary.

Property held by the decedent and another person as joint tenants with right of survivorship passes outside the will directly to the survivor. Survivorship assets typically include certain types of bank accounts, certificates of deposit, stocks and bonds, and certain savings bonds issued by the United States Government, such as Series EE savings bonds.

Another category of property that passes outside of probate is property held in a trust for the benefit of the decedent. The trust may have been created by the decedent during his or her lifetime for property management purposes or by someone else, such as a parent of the decedent. Trust assets pass under the terms of the trust rather than under the terms of the decedent's will.

It is important to determine the extent of one's nonprobate assets when planning the disposition of one's property at death. If a substantial portion of the assets are nonprobate assets that do not pass under the will, even a well-drafted will may be insufficient to carry out the testator's intent in disposing of his or her property.

### **Tax Considerations**

Depending upon the value of the decedent's property, a will may be necessary to avoid, minimize, or defer federal estate taxes. These taxes generally are imposed if the value of the decedent's property exceeds \$5.43 million (in 2015) reduced by the amount of any lifetime taxable gifts. For these purposes, the decedent's property includes his or her separate property and one-half of all community property. Life insurance and other nonprobate assets are considered in determining the total value of the decedent's property unless certain steps were taken during life to prevent such assets from being subject to estate tax at death (e.g., placing life insurance in a trust).

The federal estate tax rate is a flat 40 percent. Thus, without proper planning a significant portion of the decedent's property may go toward the payment of death taxes rather than to the decedent's intended recipients. Estate planning techniques are available to minimize death taxes and, in the case of a married individual, to defer payment of any taxes until after the death of his or her spouse. The ability to take full advantage of such techniques is not possible without a will.

## **Probate of Wills**

Whether you have a handwritten or typewritten will, it has no effect or validation unless it is filed and approved in court. This procedure is known as probate, and it generally must take place within four years after death.

To probate a will, it must be established in court that the will meets the requirements of execution (see earlier discussion) and that the will was not canceled or revoked. Additionally, unless the will is "self-proved," proof of a handwritten will requires the testimony of two witnesses to the testator's handwriting and proof of a typewritten will requires the testimony of one of the attesting witnesses.

A self-proved will is one that has attached a specific form of affidavit containing certain required statements which is executed before a notary public at the time the will is signed or anytime thereafter but before the testator dies. A standard notary acknowledgment alone is insufficient to make the will "self-proved." A self-proved will is admitted to probate on the basis of the self-proving affidavit and there is no need to call witnesses.

A will that is not proved in court is denied probate. In this event, the decedent's property passes to his or her heirs as if he or she died without a will. Again, this further emphasizes how important it is to execute a will which meets all legal requirements so that property will pass as the testator wishes. After proving the validity of a will, the next step in the probate process is the administration of the estate.

## **Estate Administration**

Estate administration is the management and settlement of an estate by a personal representative approved by the court. Estate administration may not be necessary when the decedent's estate is so small that no action is necessary to distribute the property to the beneficiaries or heirs. However, estate administration is required in most other circumstances.

Estate administration involves the following steps:

- a. collection of the decedent's assets;
- b. payment of debts and claims against the estate;
- c. payment of estate taxes, if any;
- d. determination of heirs if the decedent died without a will; and
- e. distribution of the remainder of the estate to those entitled to it.

If the will names an individual to carry out these duties, he or she is called an executor. If the court appoints such a person because the will does not name an executor or the decedent died without a will, that person is called an administrator. Either way, the executor or administrator has to be approved by the court and has legal obligations and duties to the court and those who receive property from the estate. If the executor or administrator acts improperly, he or she may be held liable for any resulting damages

and his or her appointment may be terminated by the court. In Texas, there are several different methods of administering an estate, some of the more common of which are discussed below.

### **Independent Administration**

Texas is one of the states that provides for independent administration--administration free of court supervision. This means that after an independent executor or administrator is approved and an inventory of estate assets is filed with the court, the executor or administrator can simply take care of the administration of the estate without any further court involvement or supervision. The independent executor or administrator is free to settle with creditors, set aside the homestead and other exempt property, manage the property of the estate, sell assets for payment of debts or taxes, and distribute the remaining estate to those entitled to it. Thus, independent administration avoids the costs and delays associated with a court-supervised estate administration in which the executor or administrator must seek court approval before doing any of these acts.

A testator can provide for independent administration of his or her estate by inserting in the will a clause such as the following:

"I appoint \_\_\_\_\_ as independent executor of my estate to serve without bond, and I direct that no action shall be had in the county court in relation to the settlement of my estate other than the probating and recording of this will and the return of the statutory inventory, appraisalment, and list of claims of my estate."

If the decedent did not provide for independent administration in the will but all distributees under the will agree to it, independent administration may be created upon court approval. If the decedent died without a will, independent administration may be created when all heirs agree. Although a court usually permits independent administration, it has the power to deny the request. If the court denies independent administration, many of the actions of the executor or administrator will require court approval, resulting in unnecessary costs and delays in administering the estate.

### **Muniment of Title**

If there is no need for the appointment of an executor or administrator and the only reason for probating a will is to clear title to property, a will can be admitted to probate as a muniment of title. Under this procedure, there is no executor or administrator appointed. It is a somewhat more simplified method of administering an estate than the traditional formal administration. It is generally used only when there are no debts of the estate to be paid and no other actions that require the appointment of an executor or administrator.

### **Small Estate Affidavit**

If a person dies without a will, and if the value of the estate, excluding the homestead, exempt personal property, and nonprobate assets, does not exceed \$50,000, no formal administration is necessary if the heirs file an affidavit with the court showing that they are entitled to receive the property of the estate. As mentioned, the values of the homestead are not included in the \$50,000 figure. Up to one acre of land with improvements qualifies as an urban homestead of a family or single adult person regardless of its value. Up to 200 acres with improvements for a family or up to 100 acres with improvements for a single adult person qualifies as a rural homestead

regardless of its value. Exempt personal property includes items of tangible personal property valued at up to \$60,000 per family or \$30,000 per single person. The law specifies the extent to which certain types of personal property are exempt. For example, there is no limit up to the maximum on household furnishings, tools, or clothing, but only two firearms are exempt.

In sum, the small estate affidavit is not necessarily limited to small estates, and may be a useful alternative to a formal administration in certain estates where, for example, the residence and nonprobate assets comprise the majority of the estate and the remaining assets are valued at less than \$50,000.

In addition to the \$50,000 ceiling, the small estate affidavit procedure is available only if the assets of the estate, excluding the homestead and exempt personal property, exceed the known liabilities of the estate.

One limitation on the small estate affidavit is its general ineffectiveness to transfer title to real property. The small estate affidavit is effective to transfer title to a homestead if the homestead is the only real property in the estate. However, if the estate contains any real property other than just the homestead, the affidavit will not clear title to any of the real property, including the homestead.

### **Collection of Final Paycheck**

The Probate Code provides for a relatively quick and inexpensive procedure for a surviving spouse to collect the final paycheck of the deceased spouse by affidavit of the surviving spouse when there is no administration pending of the deceased spouse's estate. This procedure is useful where the only asset of the estate is a final paycheck.

### **Informal Family Settlements**

Informal family settlements are permissible where the estate is small and consists only of personal property, such as personal effects and household furnishings, but generally not where the estate includes bank accounts, stocks, and bonds. If a motor vehicle is involved, a new certificate of title may be applied for by filing an affidavit of heirship with the Texas Department of Public Safety. The heirship forms are available at a county tax assessor's office.

### **Directive To Physicians (Living Will)**

Texas has enacted the Natural Death Act which allows any competent adult, by signing a directive to physicians (or "living will," as it often is called), to instruct his or her physician to withhold or withdraw artificial life-sustaining procedures in the event of a terminal condition. The directive takes effect only after two physicians determine that the patient is terminally ill and the patient's attending physician determines that death is imminent or will result in a relatively short time without application of artificial life-sustaining procedures.

The form and contents of the directive are prescribed by Texas law. The directive should be in writing, signed by the patient, and witnessed by two individuals. The witnesses cannot be related to the patient by blood or marriage, the patient's heirs, the attending physician or an employee of the physician, a patient in the patient's health care facility, a person who would have a claim against the patient's estate upon his or her death, or an employee of the patient's health care facility who is providing direct care to the patient or who is involved in the financial affairs of the facility. The directive need not be notarized.

The directive may include a designation of another person to make a treatment decision for the patient if the patient is comatose, incompetent, or otherwise mentally or physically incapable of communication.

If you desire that your life not be artificially prolonged in the event of a terminal illness, you should consult with an attorney to have a directive to physicians prepared for you. It may also be desirable to inform your physician of your wishes and to provide him or her with a copy of the directive. Failure to sign a directive may result in difficulties for your family in carrying out your wishes with respect to terminating artificial life-sustaining procedures.

## **Powers of Attorney**

A power of attorney is an instrument by which one person (the principal) grants to another (the agent) the power to perform certain acts on his or her behalf. Two types of powers of attorney are common in the estate planning field, namely the power of attorney for health care and the durable power of attorney.

The power of attorney for health care grants the agent the power to make health care decisions for the principal if he or she is unable to make them. The agent may exercise his or her authority only if the principal's attending physician certifies that, in the physician's opinion, the principal lacks the capacity to make health care decisions. The principal can revoke the power of attorney at any time, orally or in writing, and regardless of the principal's mental state.

The power of attorney for health care must be signed by two witnesses, neither of whom are:

1. the person designated as agent;
2. the principal's health or residential care provider or an employee of a health or residential care provider;
3. the principal's spouse;
4. the principal's lawful heirs or beneficiaries named in his or her will or a deed; or
5. creditors or persons who have a claim against the principal.

The second type of power of attorney is the durable power of attorney. This instrument grants authority to a designated agent to manage the principal's property on his or her behalf. It can be distinguished from the power of attorney for health care which relates to health care decisions rather than to decisions concerning the management of property. The principal can either grant the agent one or more specific powers or grant the agent all of the powers listed in the power of attorney form. In addition, the principal can elect to have the power of attorney become effective immediately upon signing it or only upon the principal's future disability or incapacity. The durable power of attorney must be notarized, but it need not be witnessed.

The forms of both the power of attorney for health care and the durable power of attorney are prescribed by statute. You should consult an attorney if you desire to have either of these documents prepared for you.

## **Conclusion**

If you die without leaving a will, you risk that your property will not be distributed as you desire. Even when the heirs at law are the same as you would have selected yourself, there is no advantage to letting the law take its own course. The advantage lies in having a will. With a well-drafted will you can avoid legal pitfalls, name an executor of your estate, name a guardian for your children, establish trusts, and minimize probate-related costs by providing for independent administration. Although a will can be challenged in court, the grounds for contest in Texas are few, and the law favors carrying out the decedent's intent.

Executing a will is not as complicated or as expensive as you might think. You are encouraged to talk with an attorney about wills, trusts, and estate administration and to have a will prepared by the attorney. If you decide not to use an attorney, at least this handbook should give you a general idea of what will happen to your property if you die without a will.

If you desire that your life not be artificially prolonged in the event of a terminal condition, you should consider signing a living will. You should consult with an attorney and your physician to understand the full impact of the living will. Finally, you should consult with an attorney regarding the advantages of signing a power of attorney for health care and a durable power of attorney.

This information is not intended to be a substitute for the legal advice of a licensed attorney. If you have any questions regarding a particular issue or topic we suggest you seek legal counsel.

The above information is adapted from the brochure "To Will or Not to Will" prepared by the Texas Young Lawyers Association and published by the State Bar of Texas. Contact the State Bar of Texas at 1-800-204-2222 for a copy of the publication.