WILLS – FREQUENTLY ASKED QUESTIONS

February 5, 2015

A last will is a document that you create to direct the management and distribution of your property and provide for the care of your minor children after your death.

The importance of a last will cannot be overstated. A last will is arguably the most important legal document that the average person will ever sign, and yet over 70% of American adults do not have a last will.

What is a last will?

A last will is arguably the most important legal document that the average person will ever sign. It is an instrument that, on your death, controls who gets your property, who will be the guardian of your children, and who will manage your estate.

What makes a last will legal?

The court will not enforce your last will unless the following criteria are met:

- **Soundness of Mind**: You must be of sound mind.
- **Free Will**: You must be acting of your own free will without undue influence or duress from others.
- **Witnesses**: At least two people must watch you sign the last will. They cannot be related to you and cannot be entitled to receive anything under the last will.

In addition to these provisions, the law also requires that a last will's appearance be uniform: all important sections should be entirely typewritten or computer-generated. Although some states allow last wills that are entirely handwritten, this option is not recommended (See section immediately below.). Typically, you do not have to get your last will notarized. However some commercially available wills allowyou to "self-prove" your last will (when allowed by state law). For self-proving last wills, you must have a separate affidavit notarized. The advantage of self-proving last wills is that witnesses do not have to be located after your death.

What happens if I pass away without a will?

If you do not make a last will, state law will determine who gets your property. This process is called "intestate succession." In most states, your property would first be divided between your spouse and your children. If you are not married and have no children, your property would be distributed to your closest living relatives. If the administrator of your estate cannot find a living relative entitled to your property under the law, the property would go to the state.

What is probate?

Probate is the legal process through which the court decides how an estate will be divided. The court will look to your last will to decide how to distribute your property and will follow the will, unless it is successfully contested by your heirs.

Generally, if an estate includes real property, a formal probate action is required. However, in many states, if the estate is of minimal value or consists solely of personal property, probate is not required and other legal remedies are available.

Can I make a handwritten last will?

A handwritten last will is called a "holographic last will." It is valid in about 25 states if *all* of its material provisions and clauses are handwritten. However, because most handwritten last wills are not as in-depth as professionally prepared will and because they are often not properly written, they are not generally recommended. Courts can be unusually strict in determining whether a holographic last will is authentic. More importantly, it is not recommended that people *revise* their last wills by hand.

Do I have to file my last will with a court or in public records?

You do not have to file your last will with a court or other governmental authority after you sign it. After your death, however, your last will must be filed with the court. It will then become public.

Can I disinherit someone?

You can leave anyone out of your last will, subject to certain limitations. Many laws have been enacted to protect spouses and minor children. Be sure to read the section "Marriage, Divorce, and Children" in the "Wills Law Library" for more information.

If you wish to disinherit one of your children or to give one child less than another, you should clearly state that intention in your last will.

What should I do with my last will after I sign it?

After you sign your last will, you should keep it in a safe, easily accessible place. Be sure that the person whom you have appointed as your executor knows exactly where you stored your last will. You do not have to file it with the court or place it in the public record. However, some courts may permit you to deposit your last will with them, depending on how busy or crowded they are.

Can I change or revoke my will after I make it?

You can revoke a last will any time before death by making a new last will that states that all prior last wills are no longer valid. To revoke a last will without making a new one, all you have to do is intentionally tear it up, deface it, burn it, or destroy it. If this is done accidentally, the last will is not revoked.

What happens if you make a new last will (which revokes all prior last wills) and then decide that you like your old last will better? You need to make an entirely new last will that replaces the new one and mimics the old one. The old last will is invalid and cannot be revived after it has been revoked.

One way to make changes to a last will, without revoking it entirely, is to make a codicil, which is an amendment to a last will. However, a codicil must be signed and witnessed just like a last will, so it may be easier to make an entirely new last will.

Be sure not to make changes to your last will after it has been witnessed and signed. If you cross out a person's name or add clauses to a last will that has already been signed, you risk making the whole last will invalid.

What happens to my debts after I die?

The general rule is that all debts must be paid before any assets are distributed. Your outstanding credit card balances, for instance, are generally paid before any money or gifts are distributed to your heirs.

An exception to this general rule is for "secured debts," that is, debts that allow the lender to take possession of a specific piece of property if the debt is not repaid. Examples of such secured debts are mortgages or auto loans. If a piece of property is collateral for a secured debt, that property can be distributed, but the debt will generally go with it. For instance, say you have a car worth $10,000 and a loan on the car of $5,000. You can leave the car to someone in your will, but it will be that person's obligation to pay off the loan.

What happens if you owe more than you own? In general, people cannot inherit another person's debts. If there is not enough cash in the estate to pay debts, all property of the estate will be sold to pay the debts and no one will inherit anything. For example, if someone dies owing $12,000 in credit card debt, but has cash and property worth only $10,000, the property will be sold and the $10,000 will be paid to the credit card issuer.

Where can I find a notary?

You can usually find a notary at The UPS Store, Inc. and similar stores. Financial institutions such as banks also offer notary services. The Yellow Pages has lists of traveling notaries.

Please be advised that the notary will only be signing the "Self-Proving Affidavit" and the "Statement of Interment." These documents should not be stapled to your last will; they are separate documents. The last will does not itself have to be notarized.

What Happens if You Die Without a Will?

If you die without a last will (known as dying "intestate"), the state in which you reside will decide how your property is distributed. In community property states, this means that your community property will be given to your spouse (or domestic partner in some states). Separate property will generally be distributed according to these rules, with variations depending on state law:

If you have a spouse or domestic partner, he or she will receive:

- All of that property, if you leave no children, descendants of a deceased child, parents, siblings, nieces, or nephews
- Half of that property, if you leave one child or children of one deceased child
- One-third of your property if you leave two or more children, or one child and descendants of one or more deceased children

Any property that is not given to your spouse will be distributed to the following people, in this order:

- Your children, or if they are not alive, their children
- Your parents
- Your brothers and sisters or, if they are not alive, their children
- Your grandparents or, if they are not alive, their children (i.e., your uncles and aunts)
- The children of your deceased spouse
- Any relatives of your deceased spouse
- The state of your legal residence

You do not have to get your last will notarized, but it is a wise idea to overcome any question about who actually signed the document. In some states, you can "self-prove" the will, if allowed under state law. A "self-proving" last will is one that has an attached notarized affidavit stating that the will was properly signed and witnessed, and that it is the last will of the person signing it. If your last will is self-proving, the witnesses will not need to be located after your death to show that the document was properly executed: the affidavit serves that function. Since the expense of locating witnesses would be paid by your estate, self-proving your last will can allow more of your property to pass through to your heirs and not be eaten up by administrative costs.

In addition to these requirements, the last will should be typewritten or computer-generated. Some states allow last wills in which all of the important sections are entirely handwritten (called "holographic" wills). Handwritten last wills are **not** recommended because most are written improperly and are not as thorough as one drafted by an attorney. Also, courts can be unusually strict in determining whether a holographic last will is authentic.

Last Wills and Probate Court

Probate is the legal process through which the court decides how your property will be divided. If you have a last will, the court will review that document to determine your wishes and will follow those wishes unless the last will is successfully contested by your heirs. If you do not have a last will, the court will assign someone to manage your estate and its distribution.

Some people think that having a last will allows them to avoid probate. This is not true. A last will is used in probate to determine who receives what property, who is appointed as guardian to any minor children, and who will be responsible for carrying out the last will's requirements. Probate will not be required in many states **if the value of the estate is less than $50,000**. However, if a last will includes real estate or provides for minor children, a formal probate action is generally required.

Probate can become very expensive. For example, if you die without a last will, the court will appoint an administrator. The administrator will inventory and collect your property, pay any debts and taxes owed, and distribute any remaining property according to the laws of your state. Each of these steps takes time and money, and the expenses will be reimbursed out of your estate. In addition, the court may approve hefty fees (sometimes between 5-15% of the total value of your property) to fund the probate process.

If you are looking to avoid probate entirely, you may want to explore other estate-planning devices. Some common devices used to avoid probate are joint tenancies, pay-on-death accounts, and living trusts.

Leaving Property to Heirs in a Will

A typical last will contains two types of gifts: specific and general. **Specific gifts**, which leave a particular object or dollar amount to a particular person, are optional, but are generally the first items of property that are distributed from a last will. A specific gift might read: "I leave to my daughter, Cynthia, my engagement ring."

A **general gift** is a share of the property that remains after specific gifts are made. The people who receive these general gifts are known as "principal beneficiaries" because they usually receive the bulk of the estate after smaller gifts and valuables are disbursed. A principal beneficiary is often the last will maker's spouse or closest relative. Each last will must have at least one principal beneficiary. For example, the principal beneficiary clause might be framed as follows: "All the rest of my property I leave to my spouse, Sarah."

Who is the Executor?

The personal representative whom you nominate in your last will (known as the "executor") is responsible for dividing up the gifts and ensuring that your wishes are carried out.

Note that there are certain types of property and accounts that are typically not distributed through a last will. Instead, beneficiaries are named directly in their governing documents, and provisions in your last will that name different beneficiaries will have no effect. These include:

- **Life Insurance**: The proceeds from a life insurance policy go directly to the beneficiary named in the policy.
- **Retirement Plans**: Many people designate a beneficiary directly in their 401(k) and IRA accounts. On the death of the account holder, the funds go to the named beneficiary.
- **Pay-on-Death Bank Accounts**: If your bank account has a designated beneficiary upon death, then that person will generally become the owner of the account after the passing of the depositor.
- **Real Estate Held in Joint Tenancy or Community Property with Right of Survivorship**: If the deed to your real estate indicates that title is held in "joint tenancy" or as "community property with right of survivorship," it means that two co-owners hold identical interests in the property at the same time. Joint tenants and owners of community property, with right of survivorship, each have a "right of survivorship" to the other's share. This means that if one joint owner dies, his or her share automatically goes to the surviving joint owner.

If you have questions or would like to change beneficiaries for your life insurance, retirement plans, or bank accounts, please contact a representative from your insurance company, brokerage, or bank.

Nominating Guardians in a Will

One of the most important considerations in drafting your last will is determining who will serve as guardian for your minor children. Typically, if one parent dies, the surviving parent remains responsible for the children. However, complications arise if both parents die simultaneously or if one parent has remarried. Unless you name guardians for your minor children in your last will, the court decides who will be given custody after your death.

If your spouse is legally the mother or father of your child, you typically name your spouse as guardian in your last will. If you choose to nominate someone else, the court will consider your spouse’s parental rights, your wishes, and other relevant factors when appointing a guardian. For example, if you have remarried and want your current spouse (and not the natural parent of the child) to be the guardian, you may want to explain why you think your current spouse would be a better guardian. Consult an attorney to include the option of writing these instructions in a Special Directives Clause.

Guardians are responsible for a child's health, education, and other daily needs. They are also responsible for managing a child's property (unless a testamentary trust or other trust has been created for the child – see "Creating a Testamentary Trust in Your Will".)

Resolving Debts in a Will

After a person dies, his or her property is used first to pay probate and funeral expenses and then to pay debts. Generally, all debts must first be paid before any assets are distributed. For instance, your outstanding credit card debts will be paid before any gifts are distributed to your beneficiaries.

Can a Will Distribute Secured Debts?

An exception to this general rule is made for "secured debts;" that is, debts that allow the lender to take possession of a specific piece of property if the debt is not repaid. Examples of secured debts are home loans or auto loans. If a piece of property is collateral for a secured debt, that property can be distributed, but the debt will go with it. For instance, say you have a car worth $10,000 and a loan on the car of $5,000, you can leave the car to someone in your last will, but it will be that person's obligation to pay off the loan.

What Happens if You Owe More than You Own?

In general, people cannot inherit another person's debts. If there is not enough cash in the estate to pay debts, all of the estate property will be sold to pay the debts. No one will inherit anything. For example, if someone dies owing $12,000 in credit card debt but has cash and property worth only $10,000, the property will be sold and the $10,000 will be paid to the credit card issuer.

You can imagine a situation where some property is sold to pay off debts but there are assets left to distribute. This can lead to some difficult decisions. The executor that you name in your last will must decide which pieces of property will be sold. Most wills created by attorneys contain a clause that directs your personal representative to pay all debts and obligations as soon as practical, including any estate and gift taxes.

Receiving and Forgiving Debts in a Will

What if someone owes you money? This money will be collected and added to your overall estate. However, you can always choose to forgive a debt in your last will. This is similar in principle to granting a specific gift, but instead of leaving property, you provide forgiveness of a specific debt.

Creating a Testamentary Trust in Your Will

If you are leaving property to minor children, you may want to consider transferring the property to them through a testamentary trust. A testamentary trust is created when you die, and is used to hold property for someone else's benefit. For instance, if you leave $10,000 to your 12-year-old child, you could have the property placed "in trust" and name someone to take care of that property for your child until certain conditions are met (e.g., your child reaches a certain age).

The person you name to take care of the property is called the trustee and your child is called the beneficiary. Many rules govern a trustee's behavior. For example, the trustee must act in the best interest of the beneficiary. The trustee cannot mishandle the property or use the property for his or her own benefit.

Amending a Will

You can make changes to your last will or revoke your last will at any time. However, there are some very important rules to follow. One way to make changes to a last will is to make a codicil, which is an amendment to a last will. Another way is to make an entirely new last will that states that the new last will revokes and takes precedence over any older last wills. A codicil is a separate document and must be signed and witnessed just like a regular last will. Because of these formalities, it may be easier to make an entirely new last will.

Do not make changes to, or put markings on, your last will after it has been witnessed and signed. This is essential. If you cross out someone's name or add other writing to a last will that has been signed, you risk making the whole last will invalid.

Revoking a Will

To revoke a last will without making a new one, all you have to do is tear it up, deface it, burn it, or destroy it. If this is done accidentally, the last will is not revoked.

An old last will cannot be revived once it has been revoked. If you make a new last will (that revokes all earlier last wills) and then decide that you like your old one better, you need to make an entirely new last will that replaces the new one and mimics the old one. Your old last will is invalid.

Marriage and Wills

Certain events automatically change your current last will. These events include:

- getting married
- getting divorced and
- having or adopting children.

If you get married after making a last will and do not rewrite it, your new spouse automatically gets a share of your estate. The share is the same as if you had never written a last will. If you have a prenuptial agreement, made a provision in your last will for your spouse, or wrote in your last will that you intended not to mention your prospective spouse, this rule does not apply. None of these provisions are considered in the LegalZoom Last Will and Testament. As a result, you should create a new last will using LegalZoom or seek the advice of an attorney if any of these events occur in your life.

Divorce and Wills

If you get divorced after you write your last will, your ex-spouse is automatically removed from your last will. However, you should probably not rely on this and should rewrite your last will to reflect your changed family and any new arrangements you want to put into effect. If you don't do this, your ex-spouse may contest the last will and your estate will bear the cost of defending against this challenge.

Children and Wills

Generally, if you have a child after making your last will and you do not rewrite that last will, the child will nonetheless receive a share of your estate: it will be as if the last will had never been written.

Credit Shelter Trusts

One of the main purposes of a credit shelter trust is to limit estate taxes when the surviving spouse dies. Tax law changes have made the federal estate tax inapplicable to nearly all Americans. A certain amount of each person's estate is exempted from taxation by the federal government. The estate tax exemption is $5,000,000 per person. This means that if the total value of your property is less than $5,000,000, you will not owe federal estate taxes. In addition, if one spouse does not preserve his or her estate tax exemption amount by creating a credit shelter trust, the surviving spouse can add the deceased spouse's exemption amount to his or her own. This means that $10 million dollars (the total value of both exemptions) is protected from federal estate taxation without complex estate planning.

Who Benefits from a Credit Shelter Trust?

The beneficiaries of a credit shelter trust are the deceased spouse's other beneficiaries -- usually the children. These trust beneficiaries cannot be changed after his or her death. This ensures that the property in the deceased spouse's credit shelter trust will be distributed to his or her beneficiaries after the surviving spouse's death, estate-tax free. However, the surviving spouse retains a life estate in that property, which means that he or she can use it during his or her lifetime. In addition, the surviving spouse can use all net income generated by the assets, and can even use the principal for heath and maintenance.

State Requirements for a Last Will

A Last Will and Testament basically has the same function no matter where you live, but there may be state variations. That's why it's important to abide by state regulations when filling out your will or you may have an invalid will. Fortunately, when you create your Last Will and Testament with a California attorney, he/she makes sure your will conforms to your California's regulations. However, you may be interested in exploring how a will works in California – BELOW:

Creating a will is an important step in planning the distribution of your estate (assets including real and personal property) following your death. California wills allow for any children, your spouse, other family members, and pets to be provided for after your death. We work with the testator (or the person making the will), to create valid California wills and to assign a person (called the executor in most states) to administer a California last will and testament after the death of the testator.

Requirements

Basic Requirements for a California Last Will and Testament:

- **Age**: The testator must be at least 18 years old.
- **Capacity**: The testator must be of sound mind (capable of reasoning and making decisions).
- **Signature**: A California last will and testament must be signed:
  - ✓ By the testator
  - ✓ In the testator's name by some other person in the testator's presence and by the testator's direction
  - ✓ By a conservator, pursuant to a court order to make a will
- **Witnesses**: A California last will and testament must be signed by at least two persons each of whom (1) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (2) understand that the instrument they are signing is the testator's will.
- **Writing**: A will must be in writing to be valid.
- **Beneficiaries**: A California last will and testament may make a disposition of property to any person, including but not limited to any of the following:
  - ✓ An individual
  - ✓ A corporation
  - ✓ An unincorporated association, society, lodge, or any branch thereof
  - ✓ A county, city, city and county, or any municipal corporation
  - ✓ Any state, including California, the United States or any instrumentality thereof
  - ✓ A foreign country or a governmental entity therein
- Other types of recognized wills:
  - ✓ Holographic Wills: A handwritten will is valid if the signature and the important sections of the will are in the handwriting of the testator. Although California law recognizes a handwritten will, state laws can be very particular regarding handwritten wills.

Purpose
Distribution of Property:

A will may direct the distribution of assets to family, friends or charitable organizations as the testator desires. The testator may provide for specific gifts as well as the distribution of the "residue" of the estate (the remaining assets) using our California wills form.

Other Purposes of Wills:

- ✓ Our California wills form allows you to nominate a person who will have the responsibility to care for minor children.
- ✓ You may also appoint a guardian to manage the assets given to a minor child.
- ✓ You may also name an executor in your will. The executor collects and manages your assets, pays your debts and expenses and any taxes that might be due, and then, distributes your assets in accordance with the provisions of your will.

Notable exceptions to the ability to distribute property:

- ✓ Generally speaking, your will only affects assets that are in your name alone at your death. Some assets that are not affected by a will include:
  - Life Insurance: cash proceeds from an insurance policy are paid to the designated beneficiary of the policy no matter who the beneficiaries under your will may be
  - Retirement Plans: assets held in retirement plans, such as a 401(k) or an IRA, are transferred to the person you have named as beneficiary in the plan documents
  - Assets Owned as a Joint Tenant: assets such as real estate, bank accounts and other property held in joint tenancy will pass to the surviving tenant upon death, and not in accordance with any directions in your will
  - Living Trusts: assets held in a revocable living trust at death are distributed pursuant to the provisions of that trust document
- ✓ The community property of the testator's spouse is not affected by a will. In California, any assets acquired by spouses from earnings during marriage are community property. The testator and spouse own equal shares of those assets.

Changing and Revoking

Changing a California Will and Testament

- ✓ A California will and testament may be changed whenever the testator desires. The State Bar of California recommends that testators review their wills periodically because, if it is not up to date when the testator dies, the estate may not be distributed as desired.
- ✓ A California will and testament can be changed through a codicil, which is an amendment to the will. Codicils must be executed in accordance with the same state laws which apply to wills.
- ✓ A California will and testament must not be changed by crossing out words or sentences or making notes or written corrections on it.

Revoking a Will

A California will and testament, or any part thereof, can be revoked by any of the following:

- ✓ A subsequent will which revokes all or part of the prior will expressly or by different terms in the subsequent will; or
- ✓ Being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by either (1) the testator or (2) another person in the testator's presence and by the testator's direction.

Probate

Probate is the court-supervised process by law which has as its goal the transfer of assets as set forth in your California last will. At the beginning of a probate administration, a petition is filed with the court, usually by the person or institution named in your will as executor. After notice is given, and a hearing is held, your will is admitted to probate and an executor is appointed.

If your California last will provides that assets shall pass to your surviving spouse at your death, then those assets can be transferred to your surviving spouse through the filing in the probate court of a "spousal property petition," which is a simpler and less expensive procedure than a formal probate administration. If the assets in your name alone at your death do not include an interest in real estate and have a total value of less than $100,000, then generally the beneficiaries under your will may follow a statutory procedure to effect the transfer of those assets pursuant to your will, subject to your debts and expenses, without involving the probate court.

Intestacy

It is extremely important to make a California will if you want to control the distribution of your estate. If you die without a valid will, you are said to have died "intestate" and your property will be distributed according to strict California state laws.

The following is a very basic summary of California's intestacy laws.

Intestate Descent and Distribution:

- ✓ With a surviving spouse: Spouse receives all of decedent's community property and part of separate property. The remaining separate property will be distributed to children, grandchildren, parents, grandparents, siblings, nieces, nephews or other close relatives.
- ✓ If not married: Assets will be distributed to children or grandchildren, if any, or to parents, siblings, nieces, nephews or other close relatives.

If you make a California will, your valid will prevents the laws of intestacy from deciding the distribution of your estate.