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WILL FACT SHEET

A will is a legal document that allows you to name a personal representative (also known as executor or administrator) to take care of probating your estate after death. It also describes how you want your estate (money, real estate, tangible personal property, etc) distributed at your death. Only probate assets pass through the will. Probate assets are those that are owned in your name only with no beneficiary. Non-probate assets include assets owned in joint ownership, assets that are payable on death or transfer on death, assets that have a named beneficiary or any assets that “automatically” go to a person other than the person making the will. A will can also be used to nominate a guardian for minor children and to establish trusts.

Who are the people involved in a will?

- Testator: the person making the will.
- Beneficiary or devisee: the person, people or charity to whom you are leaving something in your will.
- Personal representative or executor or administrator: the person who handles carrying out the provisions of your will (pays the bills, liquidates the assets and distributes according to the terms of the will).
- Witnesses: the two people who witness the testator signing the will.

What is required to create a will?

The will must be in writing and signed in the presence of two witnesses. The witnesses must also sign the will. The testator and witnesses must be 18 years of age or older. The testator must have “testamentary capacity” to sign the will. This means that the testator understands the nature and extent of the testator’s property and knows who his/her heirs and relatives are. The testator must intend that the document operate as a will.

Who needs a will?

Not everyone needs a will. In some cases a will might not be necessary because the estate is too small. If all of the assets in the estate are non-probate, you don’t “need” a will. However, it is usually advisable to have a will as a backup. If you die without a will, the estate passes to your heirs-at-law (relatives) pursuant to Minnesota law. If your wishes exactly track the laws, there is no need for a will. One advantage to having a will in this situation, however, is that you can name the personal representative. This can save time and money when it comes to probate. If your estate is valued at less than \$50,000, the estate may be handled by an Affidavit for Collection of Personal Property. An attorney can help you prepare the Affidavit. A trust will avoid the necessity of a will, but all assets must be put in the trust to pass pursuant to the trust. A “pour-over” will is generally prepared along with a trust to make sure any assets not in the trust will be put into the trust if a probate is necessary.

How is a will changed or revoked?

- Changes can be made to a previous will by revoking the previous will and making a new one.
- A will can be revoked by destroying it. Be sure all copies are also destroyed as copies of wills can be probated in certain instances.

- A will can also be changed by making a codicil to the will. The codicil refers to the original will and states the changes that are desired. A codicil must be executed in the same way as a will and is read along with the original will.
- Crossing out or writing on an old will is not advisable and will not be effective to change the will.

Common questions.

- *Do I need a lawyer to write a will?* The law does not require that a lawyer write a client's will, but it is highly advisable. Many times a person will use language that he/she doesn't understand and that has ramifications that are not intended. There are many "will forms" that encourage people to write their own wills. The problem with such forms is their "one size fits all" nature. The forms do not ask pertinent questions that could affect how the will is drafted. There is a likelihood that a person will improperly execute a home-made will. It is well worth a reasonable fee to have a will properly drafted by an attorney.
- *Why can't I just put all of my assets into my son's name and let him divide it up according to my wishes?* In theory this could work, but the law presumes that the asset belongs only to the person whose name is on the asset. That person could fail to follow your wishes, could die before distribution, could have the asset attached by creditors, and the list goes on. It would be better to list all beneficiaries or to divide up the assets and list beneficiaries on each, but that approach has problems as well (e.g., you cash out one account to pay bills and then die before re-arranging the accounts to be "even"). Having a will creates more certainty that your estate will be distributed according to your wishes.
- *Having a will means my estate doesn't have to be probated, right?* Wrong. Having a will means your estate will be distributed according to your wishes. There are other ways to avoid probate, each with its own set of pros and cons.
- *Where should I keep my will?* The original will should be kept in a safe place. Some people keep their wills at their county probate court for safekeeping. Others keep them in safety deposit boxes at the bank. However, unless the personal representative has access to the box after the testator's death, a special process is needed to get the will out of the box.
- *Can I make a will for someone else?* No. In certain limited situations a guardian may make a will for a ward with a court order. Otherwise, only an individual may make her own will.
- *Can I exclude family members by leaving them \$1 in my will?* It is not necessary to leave someone \$1 in order to exclude them from the will. However, if children are being excluded, they should be named in the will with a statement that they are being excluded. Spouses have a right to a portion of the decedent's estate even if they are excluded in the decedent's will.
- *Can my will be challenged?* Yes, but the challenger would have to prove that the testator was either unduly influenced or did not have the capacity to make a will.
- *My will is old/my spouse died. Do I need a new will?* Maybe. It is advisable to review the will any time there are changes in the family situation. The will may or may not cover the current situation. An attorney can check to be sure your wishes are still being met by the old will.
- *My will was made in another state. Is it good in Minnesota? Is my Minnesota will good in other states?* It is advisable to have an attorney review the will if another state is involved.
- *Can I have my personal representative pick a charity for me after I am deceased?* No. Devises in the will must be stated with specificity.
- *Can I prevent my ex-husband from getting custody of our minor child when I die by nominating a guardian in my will?* No. You can name a guardian for your minor child in your will, but a living parent whose parental rights have not been terminated will have priority for custody if appropriate.
- *If I don't have a will, will my estate go to the State?* No. Estates are distributed to the heirs of the decedent as defined by Minnesota law.