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Last Will and Testament
(Yours and the one the state has for you)

Without a will, or some other form of estate planning, your property will pass by intestate succession. In other words, if you don't have a will, the state has one for you. The problem is that the state may not do things the way you would have done them yourself. Also, any property not provided for in your will or through other planning, will follow the state's intestate succession laws, so even if you have a will, the state may decide where some of your property goes.

Here is what Arizona has planned:

1. If you are married, all of your separate property and your half of the community property will pass to your spouse, as long as you have no children (or no descendants - grandchildren, great grandchildren, etc.). If all of your children are also the children of the surviving spouse – the kids you've had together – then all of your separate property and your share of community property still passes to your spouse. The idea is that the kids will eventually get it. (A.R.S. 14-2102 (1)).

2. If you have children who are not also the children of your spouse, your spouse will get half of your separate property and none of your half of community property. (A.R.S. 14-2102 (2)).

3. If there is no surviving spouse (or any property that does not pass to the surviving spouse under number 2, above), property flows, in this order, to:

   a. Your descendants – children, children's children, etc., through the generations.

   b. If no descendants, your parents.

   c. If no descendant or parent, to the descendants of your parents (your siblings, nieces and nephews, etc.)

   d. If no descendant, parent or descendant of a parent, then grandparents or descendants of grandparents (your uncles, aunts and their kids, etc.).

(A.R.S. 14-2103)

4. Then to the state. (A.R.S. 14-2105).

It is very rare that property would pass to the state – usually, there is somebody among parents or grandparents and their descendants – all your siblings, nieces, nephews, cousins, etc. Still, your property is likely to pass to people you hardly know, don't know, or even worse, people you were not particularly fond of. The law also defines how shares are to be distributed and requires that relatives of half blood (step-relatives) inherit the same as if they were whole blood relatives. (A.R.S. 14-2107).

Some people say they are not concerned with distribution because they do not have much money, property or other material assets. Keep in mind that this situation can change after death. The younger you are, the more likely the death will be accidental. If so, there may be someone else liable, in an automobile accident for example, and such liability could result in a large payment to your estate. There are cases of medical malpractice or product liability that cause serious illness or death and result in large awards to estates of deceased people. In that event, your will or the state's will control distribution.

Another problem with not having a will involves minor children. In a will, a parent can appoint a guardian of an unmarried minor. If both parents are dead, or one is dead and the other incapacitated, the appointment will become effective upon filing the named guardian's acceptance with the court. A minor over the age of 13 can object to the appointment of the guardian. (A.R.S. 14-5202 and 14-5203).

Without a will naming a guardian, it is possible that Child Protective Services would become involved, or that relatives and friends could become involved in a contested guardianship proceeding in court.

It is important to note that the naming of a guardian in a will is only effective if both parents are dead or one is dead and the other incapacitated. This raises additional issues for single parents and divorced parents of minor children. It is not unusual that the custodial parent feels the surviving parent is not an appropriate person to gain custody. In such a situation, it is important to seek legal counsel to try to avoid that result.

Wills can be simple or complex. It is possible to build trusts into wills (testamentary trusts), to do tax planning and to provide for distributions to be made over time. Even a simple will, however, can be fraught with perils. For example, courts will follow the statutes very carefully as to how a will must be drafted and executed. If formalities are not followed, the court is unlikely to consider a will valid, especially if someone contests it. Formalities include things like how the will is signed and witnessed. Issues such as the capacity of the person making the will or undue influence by others may arise. And Arizona law contains some exceptions, exemptions and allowances that cannot be avoided by writing a will. This is not a do-it-yourself

project. Your estate plan deals with everything you own and everyone you care about. It makes sense to do it right to make sure you get the result you expect. An attorney, knowledgeable of Arizona statutes, should be consulted to make sure that what you want can and will happen after your death.

Ronald Zack is a Tucson Estate and Elder Law Planning attorney in Tucson, AZ. In addition to wills, trusts, powers of attorney and other planning documents, Ronald Zack can help with any actions in Probate Court - guardianships, conservatorships, probate administration. Please call for a comprehensive evaluation that will focus on your needs and your particular situation.

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