

Basic Estate Planning

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Wills, Trusts and Probate: Planning Ahead to Avoid Problems



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I. WILLS

A. What is a will?

A will is a written direction controlling the disposition of property at death. The laws of each state set the formal requirements for a legal will. In Florida:

- i. You, the maker of the will (called the testator), must have testamentary capacity.

Testamentary capacity = you must be of sound mind and 18 years old or older or an emancipated minor at the time you make a will.

- ii. Your will must be written.

Holographic wills (handwritten by the testator and signed but not properly witnessed) and oral wills are ***not recognized*** in Florida.

*This is true even if they were validly executed in another state. About half of the states recognize holographic wills.

- iii. Your will must be witnessed and notarized in the special manner provided by law for wills.

In Florida, a will must be signed at the end by the testator in the presence of two witnesses, who must sign in the testator's presence and in the presence of each other.

- iv. You, the testator, must have the ***present intent*** that the instrument operate as his will.

*Promises to make a will in the future and ineffective deeds are not given effect as wills.

- v. To be effective, your will must be proved in and allowed by the probate court.

B. How do I show the will was made under undue influence?

To establish undue influence, the contestant must establish that:

- i. Influence was exerted
- ii. The effect of the influence was to overpower the mind and free will of the testator
- iii. And the product was a will that would NOT have been executed but for the influence.

II. INTESTATE SUCCESSION

A. What happens when there is no will?

If you die without a will (this is called dying “intestate”), your property will be distributed to your heirs according to a formula fixed by law. Your property does not go to the State of Florida unless there are absolutely no heirs at law, which is very unlikely.

When there is no will, the court appoints a personal representative, known or unknown to you, to manage your estate. The cost of probating may be greater than if you had planned your estate with a will, and the administration of your estate may be subject to greater court supervision.

B. What is the surviving spouse’s share of an intestate decedent?

The surviving spouse of an intestate decedent takes:

- i. The first \$60,000 plus one-half of the remaining estate if the decedent was survived by the spouse and descendants, all of whom are also descendants of the surviving spouse; or
- ii. One half of the estate if the decedent was survived by the spouse and descendants, some of whom are not descendants of the surviving spouse; or
- iii. All of the estate if there are no surviving descendants.

<u>Decedent Survived By</u>	<u>Spouse’s Share</u>	<u>Descendants’ Share</u>
Descendants, All of Whom Are Descendants of Surviving Spouse	First \$60,000 plus one-half of the remaining estate	One-half of the estate remaining after the spouse takes the first \$60,000
Descendants, Some of Whom Are Not Descendants of Surviving Spouse	One-half of the estate	One-half of the estate
Spouse But Not Descendants	The entire estate	
Descendants But Not Spouse		The entire estate

C. What effect does divorce or legal separation have on right to inherit?

The right of a spouse to inherit from the decedent is conditions on the existence of the marital relationship at the time of death. Divorce severs this relationship; legal separation does not.

D. Special Cases

- i. Adopted Children

For the purposes of intestate succession, adopted children are treated the same as natural children of the adopting parents. There is no inheritance in either direction between adopted children and their natural children, except where an adopting parent marries one of the natural parents or the child is adopted by a close relative.

ii. Stepchildren and Foster Children

Generally, stepchildren and foster children have no inheritance rights unless adopted by the stepparent or foster parent. However, the doctrine of ***adoption by estoppel*** applies when legal custody of a child is gained under an (unfulfilled) agreement to adopt him.

iii. Non-marital Children

Children born out of wedlock are heirs of the mother but not of the father, ***unless*** he marries the mother, is adjudicated the father before or after his death, or acknowledges paternity in writing.

iv. Half Bloods

Half bloods are brothers and sisters who have only one common parent. For purposes of inheritance by collateral kin, Florida provides that half bloods take ***half as much*** as whole bloods, except where ***all*** collateral kin are half bloods. Most states and the UPC make no distinction between half bloods and whole bloods.

III. TRUSTS

A. What is a revocable trust?

A revocable trust is a document (the “trust agreement”) created by you to manage your assets during your lifetime and distribute the remaining assets after your death.

“Grantor” or “Settlor” = The person who creates a trust

“Trustee” = The person responsible for the management of the trust assets

You can serve as trustee, or you may appoint another person, bank or trust company to serve as your trustee.

*The trust is “revocable” since you may modify or terminate the trust during your lifetime, as long as you are not incapacitated.

B. How does a revocable trust avoid probate?

A revocable trust avoids probate by effecting the transfer of assets during your lifetime to the trustee. This avoids the need to use the probate process to make the transfer after your death. The trustee has immediate authority to manage the trust assets at your death; appointment by the court is not necessary.

IV. LIFE ESTATE

A. What is a life estate?

A life estate is the right to use or occupy real property for one’s life. Often this is given to a person (such as a family member) by deed or as a gift under a will with the idea that a younger person would then take the property upon the death of

the one who receives the life estate. A life estate on any deed which transfers property from one person to another helps the grantor to stay in the property until death even though the property is transferred to his children. As long as the grantor holds a life estate on the property, he is responsible for paying the maintenance costs including property taxes. Upon death, the life estate exists no more and the children own the property.

V. PROBATE PROCESS

A. What is probate?

Probate is the court-supervised administration of a decedent's estate. It is a process created by state law to transfer assets from the decedent's name to his or her beneficiaries. A personal representative is appointed to handle the estate administration. The probate process ensures that creditors, taxes and expenses are paid for before distribution of the estate to the beneficiaries.

“Probate” = the proceeding in which an instrument is judicially determined to be the duly executed last will of the decedent (or, if there is no will, the proceeding in which the decedent's heirs are judicially determines).

VI. LIVING WILLS/ADVANCE HEALTH CARE DIRECTIVES

A. What is a living will?

Florida recognizes a statutory form of a living will which can be signed by a person to state whether or not his or her life should be prolonged if he or she is incapacitated and has a terminal condition or end-stage condition or is in a persistent vegetative state and his or her physicians determine there is not reasonable medical probability of recovery. Many individuals state that they would not want life sustained in this situation, but some individuals prefer to sign a living will specifying maximum treatment as their preference.

B. What is an advance directive?

It is a written or oral statement about how you want medical decisions made should you not be able to make them yourself and/or it can express your wish to make an anatomical donation after death. Some people make advance directives when they are diagnosed with a life-threatening illness. Others put their wishes into writing while they are healthy, often as part of their estate planning.

VII. POWERS OF ATTORNEY (POA)

A. What is a POA?

A POA is a legal document delegating authority from one person to another. In the document, the maker of the POA grants the right to act on the maker's behalf. What authority is granted depends on the specific language of the POA. A person may make it very broad or may limit it to certain specific acts.

“Principal” = the maker of the POA (the person who is delegating authority to another)

“Attorney-in-fact” = the recipient of the POA (the party who is given the power to act on behalf of the principal.

B. What are some uses of a POA?

A POA may be used to give another the right to sell a car, home or other property. A POA might be used to allow another to sign a contract, make health care decisions, handle financial transactions, or sign legal documents for the maker of the POA.

VIII. HEALTH CARE SURROGATE DESIGNATION

A. What is a HCSD and how does it differ from a POA?

A HCSD is a document in which the principal designates someone else to make health care decisions if the principal is unable to make those decisions. Unlike a POA, a health care surrogate decision-maker has no authority to act until such time as the attending physician has determined the principal lacks the capacity to make informed health care decisions.

IX. HEALTH CARE SURROGATE FORM

X. QUESTIONS AND COMMENTS



DESIGNATION OF HEALTH CARE SURROGATE

In the event I have been determined to be incapacitated to provide informed consent for medical treatment and surgical and diagnostic procedures, I wish to designate, as my surrogate for health care decisions:

Name: _____

Address/Phone: _____

If my surrogate is unwilling or unable to perform his or her duties, I wish to designate as my alternate surrogate:

Name: _____

Address/Phone: _____

I fully understand that this designation will permit my designee to make health care decisions and to provide, withhold, or withdraw consent on my behalf; or apply for public benefits to defray the cost of health care; and to authorize my admission to or transfer from a health care facility

I further affirm that this designation is not being made as a condition of treatment or admission to a health care facility. I will notify and send a copy of this document to the following persons other than my surrogate, so they may know who my surrogate is.

IN WITNESS WHEREOF, the parties hereto have executed these presents in a form to bind themselves.

Witnesses:

Print:

BY: _____
Print:

Print:

Date: _____