

WILL

Requirements of a Will.

A Will is a document where certain requirements must be followed exactly. If not followed exactly, the Will is likely to be determined by a court to be invalid. In that case, the deceased person will have assets distributed pursuant to state law as if that person had died without a Will. There is no half-way measure that validates some provisions and invalidates others. If the minimum requirements are not met, the entire Will is going to be considered invalid. Requirements include the following:

- A written document.
- Executed by a person 18 yrs. of age or older.
- Executed by a person of sound mind.
- Signed and witnessed as required by Minnesota law.

Why prepare a Will?

A Will is an opportunity to express your wishes regarding the distribution of certain of your assets at the time of your death. A party receiving assets from you need not be a family member. It can be any person or institution you wish to benefit. It can be a non-profit organization.

A Will can distribute specific items. A Will can also distribute your estate generally to any number of individuals or institutions, providing a percentage or specific amount to each.

If you have a child under the age of 18 and wish to indicate who you would like to be the guardian, the Will is the place to do so.

In your Will, you have the opportunity to name a person who is going to oversee the handling of your assets upon your death. This person today is called a “Personal Representative”. In the past, the term executor or executrix was commonly used. This person is responsible to determine what assets you have, see that appropriate bills are paid, and then see to the distribution of those assets as you have provided in your Will. The personal representative only has authority after appointment by the probate court.

Is there anyone I must include in my Will?

If you are a married individual and if you did not sign a valid antenuptial (marriage) contract prior to becoming married, your spouse has a right to a share of your estate. This is usually going to be between 50% of your estate and 100% of your estate, depending upon a number of factors.

You can leave out a child. You should specifically state that intention in your Will. Minnesota law makes the assumption that if you do not mention a child, that you have simply forgotten to include that child. You need not leave \$1.00 to the child. You can simply indicate you are intentionally excluding that particular child.

If you die without a Will.

Minnesota has laws dealing with the disposition of your assets should you not make a Will. The statutes apply in a general manner to distribute assets to your spouse and descendants if there are any. If there are none, the statute generally then provides for a distribution to your parents first, then brothers and sisters, and so forth. If no relatives can be found of yours who fit into the categories provided by Minnesota law, your estate assets will eventually pass to the State of Minnesota.

How is a Will involved with probate?

Having a Will does not avoid probate and it does not cause probate. Having a Will really has nothing to do with whether or not there is going to be a probate. Probate is a process which allows a judge to determine who is to receive your assets. In Minnesota, there are currently two general tests which are in most circumstances going to determine whether or not there is going to be a probate.

The first test concerns ownership of real estate. If you own any real estate in your own name alone, not joint with another party, not as a life tenant with a provision for distribution upon your death, not in a transfer on death deed, not in a corporation or other legal entity, there is going to be a probate at the time of your death affecting that real estate.

The second test has to do with all other property usually described as personal property. This test is similar to the test regarding real estate except that it applies only to property having a certain value, which you own in your own name only. In the year 2009, that value is \$50,000.00.

Which of my assets do not get included in my Will?

Most Wills are prepared in a generic fashion to apply to all property which you have that may be subject to probate (property held in your name only). Most Wills do not, for example, specifically mention a particular home or lake property, unless for some reason it is going to be transferred to a particular person to the exclusion of certain other persons.

Some individuals choose to have a trust prepared and then go through the process of actually changing their ownership into the name of the trust. In other words, your cabin would not be owned by you, but would be owned by your trust.

Property which you own as a joint owner with another person, be that real estate or personal property, is not normally going to be affected by what your Will provides.

Similarly, life insurance where there is a beneficiary designated already, does not pass by your Will unless the beneficiary named on that life insurance policy is yourself or your estate.

Retirement plans, such as IRA's and 401K's, again are instruments commonly drafted with a beneficiary named and would not be affected by your Will.

Many people have accounts, or investments, in their name with a POD provision. This type of titling of an account means that it is payable on death to another individual and consequently this would not be covered by a Will.

Miscellaneous related items.

- An individual in Minnesota can purchase real estate in his or her own name alone whether or not married. To sell real estate, it usually takes the signature of both spouses involved in a marriage.
- Life estate transfers. People will sometimes transfer real estate to one or more of their children keeping the right to have that property for as long as they live. This procedure does avoid probate and is therefore useful. This property will not pass according to your Will. There are many potential problems that may arise from this transfer and a complete discussion of the possible negative aspects of this type of transfer with your attorney is important prior to making this transfer.
- Wills do not become invalid because of the passage of time. There are, from time to time, changes that allow things to be done with Wills that were previously prohibited. Significant life events should trigger a review of the Will. Some of these events are the following:
 - a. Permanent move to another state.
 - b. Significant change in financial situation.
 - c. Significant change in health.
 - d. Marriage or divorce.
 - e. Desired change of nominated guardian for minor children, or personal representative named in your Will.

Taxes

Minnesota no longer has an "inheritance" tax. This was a tax that was paid by a person who received something from the estate of a person who had died. Minnesota now has instead, what is called an "estate" tax. Now the estate of a decedent is taxed first, then distributions from the estate are transferred to the recipients without tax. In Minnesota there is a tax for estates exceeding \$1,000,000.00 for people who die in the year 2006 and thereafter.

There is a federal tax on estates exceeding \$3,500,000.00 in the year 2009. Under current law, there is no estate tax for a person dying in the year 2010. In the year 2011 and thereafter, the federal estate tax deduction reduces to \$1,000,000.00. It is reasonable to assume that this will change very soon.

Income taxes may be due and may be the responsibility of recipients. Income taxes are different than estate taxes.

This pamphlet was prepared by Cope & Peterson, Ltd. and contains general information, not legal advice. It is based on Minnesota law in effect at the time of writing and is always subject to change.