



I Don't Want to Talk About It! Why you should know about Will's

I reckon one of the hardest conversations we have as adults is about our demise, or the demise of our loved ones. It seems most of us put off creating a will or providing any kind of estate planning, it is just too uncomfortable a subject. Well you shouldn't feel alone. A search of the internet will reveal estimates here in the United States showing that up to 55% of Americans pass away without a will.

Why is this really a concern to you or your loved ones? That is a tough question to answer, because it depends. Every person's situation is unique, seriously. We all have different needs or desires that are specific to each of us and our families, so answering why it is important to you is difficult to provide a one size fits all answer. Wills and other documents created in estate planning are extremely important and you should seriously consider getting legal counsel in creating the documents. This article is just something to get you thinking about why you may need a will. Let's start with some basic understandings.

There are two situations that can occur when a person passes away; they pass intestate, or they pass testate. Intestate means simply a person passes without a will, and testate means that they passed having a will.

Let's discuss what occurs if a person passes away intestate, without a will. The State of Texas provides rules for intestate distribution. Intestate distribution is simply who gets what property or assets a person owns at the time of their passing. It may surprise you that the property may not go to who you think it should. A couple of examples might be of some help but before we discuss these example there are two types of property you need to be aware of; community property and separate property. Community property is property obtained during the marriage. It includes real property such as land and buildings and all other personal property such as sources of income, cash, cars, stocks etc. Separate property is property that was acquired before the marriage or acquired by Gift, Inheritance, Mutation (Changed its form), Personal Injury, or possible Credit related income. It is the same types of property found in community property, only it was owned prior to the marriage.

Our first example is a married couple with three children all from the same marriage. When one spouse passes away the other spouse gets all the community property, which is all property obtained during the marriage. The spouse gets 1/3 of the deceased spouse's Separate personal property, with the children getting 2/3. The surviving spouse gets a 1/3 life estate in the real property with the children getting a 2/3 interest in fee simple. A life estate is where the person who holds it can remain on the property or use the property for the rest of their life; they have no legal title to sell the property though. A fee simple is where a person holds title to the property and can sell the property.

Our second example is a married couple with two kids from outside the marriage. The spouse that passes away is the one who had kids outside the marriage. For sake of this example this couple had been married 24 years and the kids hated the surviving spouse and never even saw the deceased spouse. This couple bought property, built their dream home to live in until they both passed away. They both worked hard and had many nice vehicles, boats, and investments. The deceased spouse had owned a beautiful vacation home in the hill country prior to the marriage which they both enjoyed throughout their marriage.

Intestate distribution has an adverse affect on the surviving spouse. The community property is divided 1/2 to the surviving spouse and 1/2 to the kids outside the marriage. The separate property is divided 1/3 of the personal property goes to the surviving spouse, and 2/3 to the kids outside the marriage. The real property is divided as a 1/3 life estate to the surviving spouse and 2/3 fee simple to the kids outside the marriage.

In example one passing without a will may seem to be not such a terrible thing. Now for a moment imagine two of the kids were really bad apples and that the deceased spouse had one million dollars in separate property in the form of stocks and that the deceased spouse wanted all the stock property to go to his spouse and his one good child. The Intestate distribution will give 1/3rd to the surviving spouse and 2/3 of the fortune to the kids. The wife gets on \$333,333.33 and each child will get \$333,333.33 each. So this means the two bad apples who the deceased spouse did not want to get anything, received nearly half of the funds that were only suppose to go to the wife and the good child. A properly drafted will would have prevented this outcome.

In example two the two kids who never came to visit or develop a relationship with the deceased spouse will get a great reward anyway because of intestate distribution. All the nice things this couple built and created were community property. The house, the cars and boats, the investments are things the couple built together and for each other. The distant and evil kids will get 1/2 of all the community property even though they hated the surviving spouse and never had anything to do with the spouse that died. The nice vacation home that was separate property of the deceased spouse will go as a 1/3 life estate to the surviving spouse to use as long as they live, but the 2/3 of the real ownership will go to the two kids. When the surviving spouse passes away, the kids get the 1/3 life estate back and then the own the entire vacation home to do with as they please. Here again a properly drafted will would have prevented this outcome.

What is the point of all this? If you have a will you can control where your property goes and how it is distributed. If you die without a will the State of Texas will mandate in the fairest way possible your property distribution by way of intestate distribution. The problem is you may not like how this division will be handled. There are of course cost considerations but I will not discuss them now.

What is the Good News? Texas probate laws are pretty straight forward and simple if you have a properly drafted will. Getting a will drafted is usually not a great expense. If you find you cannot afford an attorney you can write your own Holographic will. A Holographic will is one you write in your own hand writing and sign. It does not need a witness. This is better than not having a will at all if you do not want your property going to your heirs. If you are of sound mind, 18 years or older or married or in the armed forces, you meet the basic requirements. The requirements can be found in the Texas Estates Code Sections 251.001 through 251.052.

Nothing written above is meant to be legal advice or substitute for the importance of obtaining an attorney to discuss and develop you estate planning needs. This article was written to engage your thoughts in the importance of doing what 50% of Americans have not done, creating a valid Last Will and Testament.

About the author:

Timothy M. Clark is a licensed Texas attorney who moved to Santa Fe, Texas in 1989 with his wife and three children. He has worked in industrial construction as a pipe welder (Rig welder), fabricator, inspector and supervisor/manager for 38 years. He began his post education in 2002 where he received an Associate of Applied Science Degree in Non Destructive Technologies in 2005. He entered the University of Houston in 2008 where he received his Bachelors of Science Degree in Organizational Leadership and Supervision in May of 2010. He applied for admission and was accepted at South Texas College of Law and began his legal studies in August of 2010 graduating in the upper 30th percentile in December of 2013 with a Juris Doctorate Degree. Timothy took the Texas Bar exam in February of 2014 and received his law license in May of 2014.



NOTE: NOTHING IN THIS STORY SHOULD BE CONSIDERED LEGAL ADVICE. IF YOU HAVE LEGAL ISSUES YOU NEED TO TALK TO A LICENSED TEXAS ATTORNEY.