

# FACT SHEET

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Tom Prater

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## Better Estate Planning

### THE IMPORTANCE OF A WILL IN A TEXAS ESTATE

Eugene M. McElyea, L.L.B.\*

*Estate Planning attempts to create an equitable compromise between minimizing the amount of taxes due, distributing the property as desired to the designated heirs and assuring a financial source of security.*

*This fact sheet on The Importance of a Will in a Texas Estate was prepared by Eugene M. McElyea, L.L.B., College of Business, Texas A&M University and consultant to the Texas Agricultural Extension Service program for this series of fact sheets on Estate Planning.*

*Tom E. Prater  
Extension farm management specialist*

Having a properly drawn will is of immense importance. A will enables an individual to designate the manner of distributing his property after death. Without a will one's property will be distributed, but only according to the laws of descent and distribution. Since it is not possible for the state to write a separate law for each individual, one law applies for everyone. The distribution plan which this law provides is often not what one might personally prefer, therefore the law allows an individual the right to change the distribution plan by making a will. With a properly drawn will one's preference can be expressed and carried out after death.

Dying without a will creates several problems for survivors. It generally costs more money to

\*College of Business faculty, Extension consultant, Texas A&M University. Licensed attorney—member of State Bar of Texas.

die without a will than it does if there is one. These extra costs arise in various ways and are easily understood. Delays in estate administration resulting from no will require extra attorney services to handle estate affairs. He in turn requires an increased fee in such circumstances. Court costs and other administration fees often constitute substantial expense items for the estate. Charges for the premium on the administrator's bond are borne by the estate. While these extra costs mount up, the law requires these expenditures as safeguards to assure an orderly and faithful performance by those appointed to handle the estate affairs. With a will it is possible to eliminate many of the legal steps that would otherwise be required. The necessity for an administrator's bond can be eliminated by an appropriate provision in the will. The estate of a deceased person who has made a will can be handled with substantial savings in both time and money.

Without a will it is impossible to take steps to minimize the impact of estate and inheritance taxation. Generally if one relies on the state's "will" and does not make a will for himself, he may not achieve the savings in death taxation to which his estate might be otherwise entitled. This extra cost factor is one which a prudent person dare not overlook. The exact amount of death tax levied upon a particular estate is dependent upon the amount of money involved and the manner in which the estate is distributed. When one realizes that the heavy impact of such taxation can perhaps be lessened, it is essential that prompt action be taken to avert an unnecessary loss.

Notwithstanding the burdens of extra costs and possible higher taxation, another unpleasant aspect about dying without a will is often the fact that

one's estate may be distributed in a wholly unsatisfactory manner and contrary to the best interests of persons near him for whom he is building his estate. Only with a will is it possible to make those estate distributions after death in the manner that is consistent with one's desires and in a way which assures the well-being of survivors.

Everyone in Texas eighteen (18) years of age or older is eligible to make a will. Since a will is a document by which property disposition is made, does a person with "limited" property really need a will? Everyone who owns property interests or who has even a remote possibility of acquiring property needs a will. Persons possessing only "limited" means may not realize that the basic initial administration costs (excluding taxes) in an estate of any size are still high. It is in the smaller estate that some of the largest savings in initial costs can be made with a will.

While some people measure their wealth by material possessions, it can be said that our children comprise our most valuable assets. Their care, custody and financial security make it imperative that parents of minor children protect their offspring with an up-to-date will. Others who also need a will are married couples with no children. When they neglect to dispose of their estate, friction and hard feelings sometime arise among relatives. The same holds true for persons who have never married and others without children.

Having explained some of the perils of dying without a will, it is important to discuss several advantages for having a will.

**INITIALLY** the maker, rather than the court, makes the decision as to who will handle his affairs after death. The person named in a will to act as personal representative is called an executor. In Texas the executor can be, if designated, an "independent executor." That means the executor can, without court intervention, act with respect to estate property just as if it were his own. This is one of the more enlightened aspects of Texas probate law and has proven to be a highly satisfactory method of handling deceased persons' estates.

When no executor is designated in the will, the court appoints an administrator. The administrator does not have the same freedom in acting with respect to estate property as does the executor. The administrator could, in some instances, be one of the estate's creditors. While a creditor-administrator would be bonded to assure his proper administration, his interest is to see that creditors are paid. Questions of cost to the ultimate property recipients would not be items of ultimate concern to him.

**SECOND**, it is possible in a will to give suggestion to the court as to who is desired to act as guardian of one's minor children. In Texas a child over fourteen (14) can suggest his own guardian. Even with the best intentions, the court may not select the person most qualified to rear the children in the manner a parent might deem acceptable. This guidance and instruction is an important opportunity for both parents and children.

**THIRD**, guardianship is a costly and time consuming procedure to avoid if possible. It is the law's inflexible way of handling a minor's affairs until he attains lawful age. By creating a trust in a separate trust instrument or by appropriate provisions in the will this can be avoided. The trust is an exceedingly flexible and workable arrangement in contrast to the rigidity of guardianship. Avoidance of a guardianship during the period of a child's minority represents a substantial savings. If a guardianship with its built-in delays cannot be avoided, suggesting a name in a will of an appropriate person to act as guardian is certainly helpful to the court and beneficial to the surviving minor children.

**FOURTH**, savings in costs and taxes are primary advantages to having a will. A will offers the opportunity to establish an orderly method of debt and tax payment. The order of payment of debts and taxes can be made in a will assuring that those who benefit from the estate will receive their bequest free and clear of creditor or tax claims.

**FIFTH**, a will can provide various cost saving methods. It is wise to carefully consider whether or not the executor needs to be bonded. The necessity for such a bond can be eliminated by the will. Consider the compensation, if any, to be paid the executor.

**SIXTH**, by means of a trust one can afford a measure of protection for those who will benefit from his estate. They can be protected by deferring their bequest rather than permitting it to fall in one lump sum at or near the time of death. In this manner you can perhaps assure a regular income for a surviving spouse or child, and eliminate a temptation to squander the larger amount. In reality a method must be found to protect the beneficiary against his inexperience in handling property. Young people are not all alike and not all of them act as their parents might prefer. The establishment of a trust giving the trust principal outright to a child when attaining a given age somewhat beyond 21, has become a rather common

provision in will trusts. Trusts serve many purposes and a lawyer can prepare the trust that meets one's particular need.

**SEVENTH**, without a will one will be unable to make a gift of a portion of his estate to charity. The federal government encourages gifts to private charity by permitting a tax deduction for the full amount of such gifts on the estate tax return. Since death taxes are assessed on a graduated scale, giving to charity can have a profound effect in lessening the taxes paid in a particular situation.

**EIGHTH**, with a properly drawn will, one has the assurance that he has done all that is reasonably possible to direct the distribution of his property after death. It is still possible for a will to become out-of-date. While a recently executed will may be adequate for present circumstances, life has a way of changing things. It is essential that a will be kept up-to-date and made to fit changing conditions. Children grow up, tax laws change, beneficiaries die, etc. It pays to review the will periodically.

**FINALLY**, while it is not possible to predict how one shall die, it is in cases of a disaster or common accident where both parents of minor children are taken together that the problems of guardianship often arise. Costs involved only compound the misfortune of the remaining minors. While this is a rare happening, such incidents do occur. Wouldn't a will be preferable to this?

The attorney is the architect of the estate plan. He has the training and experience necessary to cope with the specific problems likely encountered. In order to help the attorney properly carry out his duty, it is essential that he be knowledgeable in several matters. First he must have some acquaintance with the value, location and extent of property. He will also need to know personal information about the family and the maker's intentions.

It is not unusual for an attorney to prepare a will and need to rewrite it even before the maker has signed it the first time. Providing full information initially might avoid this. The attorney will prepare the will as often as necessary in order to be absolutely sure it is exactly what the client wants. After all it is the client's last will and testament and not the attorney's.

After a lawyer has prepared the will, one can be reasonably sure that it is in a form acceptable

in law and that one's intentions have been accurately and correctly expressed.

Things regrettably are never so certain when an individual undertakes to write his own will in his own hand or attempts to use a "fill-in-the-blank" form. No one would think of performing surgery upon himself to remove his own appendix, but many people embark upon the dangerous activity of writing their own will. One might expect an attorney to frown upon this practice because it deprives him of a fee for preparing a will. In fact, however, the attorney's fee is greater generally in cases where there is no will or in those instances where the self-made will is incomplete or inadequate.

"Do-it-yourself" wills create many problems. They often lack clarity in draftsmanship or omit essential provisions. The will's validity is often subject to question and the maker's intent can be more easily frustrated. A good will is good insurance. A poorly drawn will is more costly in the long run.

There is no satisfactory substitute for a will. Some individuals assume that life insurance constitutes an effective replacement, but life insurance. A poorly drawn will is more costly in the long run.

Some individuals attempt to avoid "probate" by entering into joint property-owning arrangements generally with their spouse. In Texas, joint-owning with survivorship rights exists only in very limited situations. Even in states where joint-tenancy is widely used, it can lead unsuspecting individuals into extremely painful circumstances. Joint access to safety deposit boxes, joint bank or saving accounts and other joint arrangements do not eliminate a will's necessity.

While the will may not be the complete solution to the problems faced by survivors, it is a giant step in the right direction. In making any personal and financial plans, it is important that one have a properly drawn will.

*This publication is designed to provide accurate and authoritative educational information in regard to the subject matter covered.*

*It is distributed with the understanding that the publisher is not engaged in rendering legal services. Attorneys should be contacted for legal advice.*

## SUGGESTED READING

Listed below are additional Extension fact sheets on Estate Planning.

- L-951 Texas Laws on Descent and Distribution
- L-952 Community and Separate Property in Texas
- L-953 Costs of an Estate in Probate
- L-954 Charitable Gifts
- L-955 Federal Estate and State Inheritance Taxes
- L-956 Gifts and Trusts: Effective Estate Planning Tools