THE STATE BAR OF CALIFORNIA

Do I Need a Will?

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1. What is a will?

Your will is a legal document in which you give certain instructions to be carried out after your death. For example, you may direct the distribution of your assets (your money and property), and give your choice of guardians for your children. It becomes irrevocable when you die. In your will, you can name:

Your beneficiaries. You may name beneficiaries (family members, friends, spouse, domestic partner or charitable organizations, for example) to receive your assets according to the instructions in your will. You may list specific gifts, such as jewelry or a certain sum of money, to certain beneficiaries, and you should direct what should be done with all remaining assets (any assets that your will does not dispose of by specific gift).

A guardian for your minor children. You may nominate a person to be responsible for your child's personal care if you and your child's other parent die before the child turns 18. You may also name a guardian — who may or may not be the same person — to be responsible for managing any assets given to the child, until he or she is 18 years old. You can also nominate a guardian in a separate writing other than a will. Such a writing should be signed by all of the child's parents.

An executor. You may nominate a person or institution to collect and manage your assets, pay any debts, expenses and taxes that might be due, and then, with the court's approval, distribute your assets to your beneficiaries according to the instructions in your will. Your executor serves a very important role and has significant responsibilities. It can be a time-consuming job. You should choose your executor carefully.

An executor is entitled to compensation for the services provided.

Keep in mind that a will is just part of the estate planning process. Whether your estate is large or small, you probably need an estate plan. For more information on estate planning, see the State Bar's pamphlet **Do I Need Estate Planning?** To order a free copy of this pamphlet, send an email to pamphlets@calbar.ca.gov, or visit the bar's website at https://www.litorders.com/go/calbarca/custom/calbar/OrderForm.aspx, where you'll find the State Bar's consumer education pamphlets, as well as information on ordering them. If you do not have access to the Internet, call 888-875-LAWS (5297) for more information on ordering these publications.

2. Does a will cover everything I own?

No. Generally speaking, your will affects only those assets that are titled in your name at your death and for which there is no designated beneficiary. Those assets that are not affected by your will include:

Life insurance. The cash proceeds from a life insurance policy are paid to whomever you have designated as beneficiary of the policy in a form filed with the insurance company — no matter who the beneficiaries under your will may be.

Retirement plans. Assets held in retirement plans, such as a 401(k) or an IRA, are transferred to whomever you have named as beneficiary in the plan documents — no matter who the beneficiaries under your will may be.

Assets owned as a joint tenant with right of survivorship. Assets such as real estate, automobiles, bank accounts and stock accounts that are held in joint tenancy with right of survivorship will pass to the surviving joint tenant upon your death, and not in accordance with any directions in your will.

"Transfer on death" or "pay on death." Certain securities and brokerage accounts include a designation of one or more beneficiaries to receive the assets in that account when the account owner dies. The names of the beneficiaries are preceded by the words "transfer on death" or "TOD." Other assets, such as bank accounts and U.S. savings bonds, may be held in a similar form using the owner's name and the beneficiaries' names preceded by the words "paid on death" or "POD."

"Community property with right of survivorship." Married couples or registered domestic partners may hold title to their community property assets in their names as "community property with right of survivorship." Then, when the first spouse or domestic partner dies, the assets pass directly to the surviving spouse or partner without being affected by the will.

Living trusts. Generally, assets held in a revocable living trust are distributed according to the instructions in the trust regardless of the instructions in your will — with no need for court supervision. You can name yourself as the initial trustee of your living trust (most people do), and then name a successor trustee to manage the trust if you become unable to do so. With a living trust, your assets are managed for your benefit during your lifetime and then transferred to your beneficiaries without court supervision when you

die. For more detailed information, see the State Bar pamphlet **Do I Need a Living Trust?** (See #1 for information on ordering pamphlets.)

Your spouse's or domestic partner's half of community property. In California, any assets acquired by you and your spouse or registered domestic partner from earnings during your marriage or registered domestic partnership are community property. You and your spouse or registered domestic partner own equal shares of those assets. Your will, therefore, affects only your half of the community property. Assets that either of you owned before your marriage or registered domestic partnership, and gifts or inheritances acquired later, together with the earnings from such interests, are usually separate property. Your will affects all of your separate property assets.

Even if your entire estate consists of assets held in joint tenancy, a life insurance policy and a retirement plan, there are still good reasons for making a will. For example, if the other joint tenant dies before you do, then the property held in joint tenancy will be in your name alone and subject to your will. If named beneficiaries die before you do, the assets subject to a beneficiary designation may be payable to your estate. If you receive an unexpected bonus, prize, refund or inheritance, it would be subject to your will. If you have minor children, providing for someone to manage assets on their behalf if both parents die is very important.

3. What happens if I don't have a will?

If you die without a will (referred to as intestate), California law will determine the beneficiaries of your estate. Contrary to popular myth, if you die without a will, everything does not automatically go to the state. If you are married or have established a registered domestic partnership, your spouse or domestic partner will receive all of your community property assets. Your spouse or domestic partner also will receive part of your separate property assets, and the rest of your separate property assets will be distributed to your children or grandchildren, parents, sisters, brothers, nieces, nephews or other close relatives.

If you are not married or in a registered domestic partnership, your assets will be distributed to your children or grandchildren, if you have any — or to your parents, sisters, brothers, nieces, nephews or other relatives. If your spouse or domestic partner dies before you, his or her relatives may also be entitled to some or all of your estate. Friends, a non-registered domestic partner or your favorite charities will receive nothing if you die without a will. The State of California is the beneficiary of your estate if you die intestate and you (and your deceased spouse or domestic partner) have no living relatives.

4. Are there various kinds of wills?

Yes. In California, you can make a will in at least one of three ways:

A handwritten or holographic will. This will must be completely in your own handwriting. You must date and sign the will. Your handwriting has to be legible, and the will must clearly state what you are leaving and to whom. A handwritten will does not have to be notarized or witnessed. However, any significant typed material in a handwritten will may invalidate the will. (A typed will must be signed by two witnesses who jointly witness the execution of the will or were both present when you acknowledged that you had signed the will.) It is a good idea to consult with a qualified lawyer to make sure your will conforms with California law and does not have any unintended consequences.

A statutory will. California law provides for a "fill-in-the-blanks" will form. (This form can be printed out from the State Bar website. Go to www.calbar.ca.gov and click on Will Form under Quicklinks.) This will form is designed for people with relatively small estates. If there is anything you do not understand or if you are making any provisions that are complicated or unusual, you should ask a qualified lawyer to advise you.

A will prepared by a lawyer. A qualified estate planning lawyer can make sure that your will conforms with California law. The lawyer can make suggestions and help you understand the many ways that assets can be transferred to or for the benefit of your beneficiaries. A lawyer can also help you develop a complete estate plan and offer alternative plans that may save taxes. This kind of planning can be extremely helpful and economical in the long run. Your lawyer will either personally supervise the signing of your will or will give you detailed instructions on the rules for its execution by you and two witnesses (who are not beneficiaries of your estate).

Like most states, California has unique laws about what constitutes a valid will and how one should be executed. Use caution if you try to draft a will using a will-drafting kit or software.

No matter what kind of will you use, the will should be solely yours and not a joint will with your spouse, registered domestic partner or anyone else.

Also, keep in mind that your will is not a living will. The term "living will" is used in many states to describe a legal document that states you do not want life-sustaining treatment if you become terminally ill or permanently unconscious. In California, advance health care directives and durable powers of attorney for health care decisions are used for that same purpose (see #10).

5. What if my assets pass to a trust after my death?

You may make a provision in your will for your assets to be distributed to a trust upon your death. When trusts are created under a will, they are known as testamentary trusts. With an appropriate beneficiary designation, testamentary trusts can even be beneficiaries of life insurance policies and retirement plans.

If you have a living trust (a trust established during your lifetime), then your will is often referred to as a pour over will. Such a will includes instructions to transfer all remaining assets (assets that were not transferred to your living trust during your lifetime) to the living trust at the time of

your death. They are also referred to as an inter vivos, grantor or revocable trusts.

For relatively small gifts to beneficiaries who are minors, you may also consider providing for transfers from your estate to a custodian under the California Uniform Transfers to Minors Act.

6. Can I change or revoke my will?

Yes. You should review your will periodically. If it is not up to date when you die, your estate may not be distributed as you wish.

Your will can be changed through a codicil, a legal document that must be drafted and executed with the same procedure that applies to wills. A codicil is an amendment to your will. You should not change your will by simply crossing out words or sentences, or by making any notes or written corrections on it.

You may also establish a new will and, in doing so, revoke your old will. If you get married or divorced, or establish a registered domestic partnership or terminate one, you should seek the advice of a lawyer and make a new will, as such a change in status results in automatic changes to your will. You should also review your will when there are any other major changes in your family (such as births and deaths), when the value of your assets significantly increases or decreases, and when it is no longer appropriate for your proposed guardian or executor or testamentary trustee to act in that capacity.

If you have moved to California from another state and have a will that is valid under the laws of that state, California will honor its validity. It is important for you to review your will with a qualified California lawyer, however, since California law will govern the probate of your will if you live here at your death. If you move out of state, your California will should be reviewed by a lawyer there.

7. How are the provisions of a will carried out?

They are usually carried out through a court-supervised process called probate. Typically, the executor named in your will starts the probate process after your death by filing a petition in court and seeking official appointment as executor. The executor then takes charge of your assets, pays your debts and, after receiving court approval, distributes the rest of your estate to your beneficiaries.

Simpler procedures are available for transferring assets to a spouse or registered domestic partner, or for handling estates with assets under $150,000.

The probate process has advantages and disadvantages. The probate court is accustomed to resolving disputes about the distribution of assets fairly quickly through a process with defined rules. In addition, the probate court reviews the executor's handling of each estate, which can help protect the beneficiaries' interests.

One disadvantage, however, is that probates are public. Your estate plan and the value of your assets will become a public record. Also, because lawyer's fees and executor's commissions are based on a statutory fee schedule, a probate may cost more than the management and distribution

of a comparable estate under a living trust. Time can be a factor as well. A probate proceeding generally takes longer than the administration of a living trust. Discuss such advantages and disadvantages with an estate planning lawyer before making any decisions.

8. Who should know about my will?

No one — other than you and the lawyer who wrote the will — needs to know the contents of your will. But your executor and other close friends or relatives should know where to find it. Your original will should be kept in a safe place such as your safe deposit box or a locked, fireproof box at your residence or office.

9. Will my beneficiaries have to pay estate taxes?

It depends on the circumstances. Assets left to your spouse (if he or she is a U.S. citizen) or any charitable organization will not be subject to estate tax. Assets left to anyone else — even your children — will be taxed if that portion of the estate (including gifts made during lifetime) totals more than the lifetime gift and estate tax exemption (which was $5.34 million in 2014. Under current law, the exemption is scheduled to rise to account for inflation.). For estates that approach or exceed this amount, significant estate taxes can be saved by proper estate planning before your death or, for couples, before one of you dies.

Keep in mind tax laws often change. Estate planning for tax purposes must take into account not only estate and gift taxes, but also income, capital gains, property and generation-skipping taxes as well. You should obtain qualified legal advice about taxes and current tax law from a competent lawyer during the estate planning process.

10. What other planning should I do?

Make a list of your assets and debts. This can be extremely helpful when you are no longer around to provide such information. Make sure that your executor or other family members know where to find the list. Include your bank accounts, safe deposit boxes, stocks and bonds, real estate, and other assets on the list, including online accounts. Also, list the names and addresses of anyone to whom you owe money.

Make and circulate a list of your professional advisors. Letting your family members and professional advisors know the other professionals who you work with can improve communications and encourage teamwork among your advisors, streamline tasks being done for you, and ensure that the proper people are contacted in the event of your death, sickness or incompetence.

Set up a durable power of attorney for asset management. In this document, you would appoint another individual (the attorney-in-fact) to make property management decisions on your behalf if you ever become unable to do so. During your lifetime, the attorney-in-fact would manage your assets and be required to act solely in your best interests.

Consider preparing an advance health care directive / durable power of attorney for health

care. This document allows the person named as attorney-in-fact to make health care decisions for you when you can no longer make them for yourself. It may also contain your wishes concerning life-sustaining treatment, other health care issues, organ donation, burial instructions and your funeral.

11. How can I find a lawyer to write a will for me?

If you do not know a lawyer who is qualified to discuss your assets and your estate plan with you and to write a will for you, obtain referrals from someone whose judgment you can trust — a friend or employer, for example.

You can also call a State Bar-certified lawyer referral service in your area. For an online list of such services, visit the bar's website at calbar.ca.gov/lrs. For a recorded message with the phone numbers of local certified lawyer referral services, call 866-44-CA-LAW (442-2529).

If you are out of state, call 415-538-2250 to hear the same message or check the Yellow Pages of your telephone directory or contact your local bar association.

Some lawyers who work in the estate planning area are "certified specialists in estate planning, trust and probate law." This means that they have met standards for certification set by the State Bar. (Not all lawyers who have experience in estate planning, however, seek such certification.)

For an online list of State Bar-certified specialists, visit californiaspecialist.org and click on Specialist Search. Or contact the State Bar at 415-538-2120.

For more information on finding an attorney, see the State Bar pamphlet **Finding the Right Lawyer.** To order this pamphlet, see #1 above.

The purpose of this pamphlet is to provide general information on the law, which is subject to change. It is not legal advice. If you have a specific legal problem, you may want to consult a lawyer.

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