

Law Office of Nicole A. Davidson

P.O. Box 125
Alamo, CA 94507

Cell: 510-919-8389
Tel/Fax: 925-932-5555

nicoledavidsonlaw@gmail.com
www.nicoledavidsonlaw.com

DO I NEED A WILL?

1. What Does a Will Do?

A *will* is a legal document, drafted and executed in accordance with state law, which becomes irrevocable at your death. In your will, you can name:

- **Your beneficiaries.** These are family members, friends, or charitable organizations who will receive your assets as you direct. You may provide for specific gifts of such items as jewelry or a specific sum of money to named beneficiaries. You should also provide for the distribution of the *residue* of your estate -- that is, your remaining assets (they do not need to be specified) which are not specifically given to individuals or organizations in your will.
- **A guardian for your minor children.** You may nominate a person who will have the responsibility to care for your child if you and your spouse die before the child attains 18 years of age. You may also name a guardian -- who may or may not be the same person -- to be responsible for management of assets given to a minor child, until the child attains 18 years of age.
- **An executor.** This person or institution of your choice, named in your will and appointed by the probate court, collects and manages your assets, pays your debts and expenses and any taxes that might be due, and then, in a manner approved by the court, distributes your assets to your beneficiaries in accordance with the provisions of your will. Your executor plays a very important role with significant responsibilities. It can be a time-consuming job. You should choose your executor carefully. A will is a part of your "estate plan."

To provide you with more information, the State Bar of California has published a pamphlet entitled "Do I Need Estate Planning?" To order a complimentary copy of this pamphlet, send an e-mail to pamphlets@calbar.ca.gov, or visit the bar's Web site -- www.calbar.ca.gov -- where you'll find the State Bar's consumer education pamphlets, as well as information on ordering them.

Or, if you do not have access to the Internet, call 1-888-875-LAWS (5297) for more information on ordering these publications. The pamphlets can be ordered in bulk as well.

2. Does a Will Cover Everything I Own?

No. Generally speaking, your will affects only those assets which are in your name alone at your death. Some assets which are not affected by your will include:

- **Life insurance.** The cash proceeds from an insurance policy on your life 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.
- **Assets owned as a joint tenant.** Assets such as real estate, automobiles, bank accounts and other property held in joint tenancy will pass to the surviving joint tenant upon your death, not in accordance with any directions in your will.
- **"Transfer on death" or "pay on death."** Securities and brokerage accounts may be registered or held with beneficiaries named on the security or account. Title is held in the name of the owner and 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 in their names as "community property with right of survivorship." Property held in that manner at the death of the first spouse or domestic partner is not affected by that spouse's will, but passes instead to the surviving spouse or domestic partner.

- **Living trusts.** Assets held in a *revocable living trust* at your death are distributed pursuant to the provisions of that trust document. A living trust allows for the management of your assets during your lifetime and the transfer of those assets pursuant to the terms of the trust without a court-supervised probate proceeding. The State Bar has published a pamphlet entitled “Do I Need a Living Trust?” which provides more detailed information about living trusts. (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 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, not your spouse’s or domestic partner’s. Assets that either of you owned at the date of the marriage or registered domestic partnership, together with gifts and inheritances given to just one of you during the marriage or domestic partnership, are that individual’s separate property. Your will affects all of your separate property held in your name alone.

Even if your entire estate consists of property held in joint tenancy, a life insurance policy and a retirement plan, you should still consider making a will. 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. You may unexpectedly be entitled to a bonus, a prize, a refund, or may receive an unexpected inheritance which would then be subject to your will as well. If you have minor children, the nomination of a guardian of their person and estate is a very important reason for making a will.

3. What Happens If I Don’t Have a Will?

If you die without a will (also 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 receives all of your community property. Your spouse or partner will also receive part of your separate property, and the rest of your separate property 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 close relatives.

If your spouse or domestic partner died 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 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 typed material in a handwritten will may invalidate the will. A typed will must be signed by two witnesses. 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 Web site. Simply go to www.calbar.ca.gov and click on *Public Services* and *Making a Simple Will*.) The 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 which 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 also offer suggestions and help you understand the many ways that property 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 which may save taxes. This kind of planning can be

extremely helpful and economical in the long run for you and your beneficiaries. Your lawyer will either personally supervise the signing of your will or will provide you with detailed instructions concerning the rules for its execution by you and two witnesses who are not beneficiaries of your estate.

No matter what kind of will you use, the will should be solely your will and not a joint will with your spouse or any other person.

Also, keep in mind that your will is not a *living will*. The term *living will* is used in many state to describe a legal document stating that 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 the same purpose (see #10).

5. **What If My Assets Pass to a Trust After My Death?**

You may make provision in your will for a trust to be created after your death and funded with assets held in your estate. 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.

If you have a living trust, then your will is often referred to as a *pour over* will. That will provides that any assets held in your name at your death and not in your living trust will be added to the trust, to be held, administered and distributed in accordance with its terms.

For 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 My Will?**

Yes. You should review your will periodically because, 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 which must be drafted and executed in accordance with the same state laws which apply to wills.

A *codicil* is simply an amendment to your will. Your will must not be changed by crossing out words or sentences or making any notes or written corrections on it.

You should seek the advice of a lawyer and make a new will when you marry or divorce, or if you establish a registered domestic partnership or terminate one.

You should also review your will when there are any 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 the persons named as guardian or executor or testamentary trustee to act in that capacity.

If you have moved to California from another state and have a will which 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 to another state, your California will should be reviewed by a lawyer there.

7. **How Are the Provisions of My Will Carried Out?**

The process by which the provisions in your will are carried out following your death is known as *probate*. Probate is the court-supervised process developed under California law which has as its goal the transfer of your assets at your death to the beneficiaries set forth in your will, and in the manner prescribed by your will. It also provides for the relatively quick determination of the validity of any claims by creditors against your assets at your death.

At the beginning of a probate administration, a petition is filed with the court, usually by the person or institution named in your will as executor. After notice is given and a hearing is held, your will is admitted to probate and an executor is appointed.

If your will provides that assets shall pass to your surviving spouse or registered domestic partner at your death, then those assets can be transferred to him or her through the filing in the probate court of a *spousal and domestic partner property petition*, which is a simpler and less expensive procedure than a formal probate administration.

If the assets in your name alone at your death have a total value of less than \$100,000, then generally the beneficiaries under your will may follow a statutory procedure to effect the transfer of those assets pursuant to your will, subject to your debts and expenses, without involving the probate court, except as to real estate interests, which require a simplified court proceeding.

A probate has advantages and disadvantages. The probate court is accustomed to resolving disputes about the distribution of assets in a relatively expeditious fashion and in accordance with defined rules.

In addition, you are assured that the actions and accountings of your executor will be reviewed and approved by the probate court.

Disadvantages of a probate include its public nature; the provisions of your will and the value of your assets become a public record. Also, because lawyer's fees and executor's commissions are based on a statutory fee schedule, the expenses may be greater than the cost of a comparable estate managed and distributed under a living trust.

Time can also be a factor; often distributions to beneficiaries can be made pursuant to a living trust more quickly than in a probate proceeding.

8. **Who Should Know About My Will?**

Other than the lawyer who writes a will for you, no one needs to know what your will says. But the location of your original will should be known by your executor and other close friends or relatives.

Your will should be kept in a safe place such as your safe deposit box, your lawyer's safe, or a locked, fireproof box at your residence.

9. **Will My Beneficiaries Have to Pay Estate Taxes?**

Assets transferred to either your spouse (if he or she is a U.S. citizen) or to charitable organizations are not subject to estate taxes. From 2006 through 2008, assets passing to other individuals will be taxed if the net value of those assets is \$2 million or more.

That amount will increase to \$3.5 million in 2009. Then, the estate tax will disappear completely in 2010. In 2011, however, unless Congress passes an extension, the exemption will revert back to \$1 million. For estate which approach or exceed this value, significant estate taxes can be saved by proper estate planning.

That planning must usually be accomplished before death and, in the case of married couples or registered domestic partners, before the death of the first spouse or domestic partner.

While estate planning generally focuses upon estate taxes, planning must take into consideration income, gift, property and generation-skipping taxes as well. Qualified advice about taxes should be obtained during the estate planning process.

10. **What Other Planning Should I Do?**

- **List of assets and debts.** Making a list of your assets and keeping it in a place known to your executor or other family members is of great help to them when you are not able to share that information with them. List your bank accounts, safe deposit boxes, stocks and bonds, real estate, and other assets. Also list the names and addresses of anyone to whom you owe money.
- **Durable power of attorney for property management.** In this document, you appoint another individual (the *attorney-in-fact*) to make property management decisions on your behalf if you are incapacitated. The attorney-in-fact manages your assets and must do so in a prudent manner accountable to you and solely in your best interests.
- **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 statements of wishes concerning such matters as life sustaining treatment and other health issues, and instructions concerning organ donation, disposition of remains 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 -- friends, associates or your employer.

Or call a State Bar-certified lawyer referral service in your area. For an online list of certified lawyer referral services, visit the bar's Web site at www.calbar.ca.gov/lrs. For a recorded message with the phone numbers of certified lawyer referral services in your area, call 1-866-44-ca-law (1-866-442-2529). If you're out of state, you can call 415-538-2250 to hear the same message. Or check the Yellow Pages of your telephone directory for a listing under "Attorney Referral Service."

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

For an online list of State Bar-certified specialists, visit www.californiaspecialist.org and click on *Specialist Search*. Or contact the bar's Office of Certification at 415-538-2120.

The cost of preparing a will will depend on the complexity of the documentation and planning required. Costs may vary from lawyer to lawyer. You may belong to a "legal insurance plan" or, if you have very little income, you may qualify for free or low-cost legal help. Check your telephone directory for a legal aid society in your county. Or contact your county bar association for guidance.

You should be wary of organizations or offices which are staffed by non-lawyer personnel. Also, ask yourself whether the estate planning advisor could have an underlying financial incentive to sell you a particular investment, such as an annuity or life insurance policy.

For more information on finding an attorney, see the State Bar pamphlet *How Can I Find and Hire the Right Lawyer?* To find out how to order this pamphlet and other State Bar consumer education pamphlets, see #1.

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

The State Bar of California
Office of Media and Information Services
180 Howard Street
San Francisco, CA 94105-1639
415-538-2000
Publications: 1-888-875-LAWS (5297)
pamphlets@calbar.ca.gov
www.calbar.ca.gov