

# Elder Law Today

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MEMBER



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## *Estate Planning Basics 101 - Last Will & Testament*

I am always amazed when people tell me that the reason they don't do their estate planning is that they don't know what to do –so they do nothing! A person can hear so many conflicting bits of information that they naturally balk at the idea of doing their own planning. The purpose of this article is to cut through the clutter so that you will be armed with the necessary information to begin your estate plan while you are still able to do so.

At the basic level most people think about a *will*. A will is an estate planning document that allows you to (1) specify a successor *executor* (person who administers your estate at your death); and (2) designate *beneficiaries* (the person(s) who are to receive your assets at your death). Wills can also incorporate advanced features such as *testamentary trusts*, which may be designed to hold and administer assets for the benefit of a person, usually a minor, at the death of the *settlor* (person executing the trust).

Now, lets look at the Pros and Cons of a Will:

1. Pro - A major advantage of a will is that it allows you to designate the person(s) who are to receive your estate at your death. I am always amazed at the number of people who just assume that things will magically be distributed the way that they want with no advance planning at all. I hear comments like, "Well, everyone know what I want". (Guess what that's worth?!) Another good one is "Let them fight it out!" (Sometimes they do!).

You may have hear the old saying, "If you don't have a will, the state has one for you". The state does have a descent and distribution statute that provides for the distribution of assets for those people who die *intestate* (without a will). The problem is that the state's plan may be good for some and disastrous for others. One size doesn't fit all. However, if you don't have an estate plan in place prior to your death, you forfeit your right to choose.

2. Pro - Another good feature of a will is that it allows you to specify the person who will administer your estate at your death. Once again, if you don't make the decision, you forfeit your right to choose. Chances are the Judge will approve whoever asks the Court for the job - and it may not be the person that you want!
3. Pro and Con - A will is relative inexpensive on the front end, but fairly expensive on the back-end when probate costs are added.
4. Con - The major disadvantage of a will is the Court process, which happens after your death called *Probate*. Probate is the process of proving the will and is usually the only legal way to change title of assets from one generation to another.

Probate\* usually takes from 9 - 24 months and costs an average of approximately 3% of your estate to complete. Obviously the time and cost to complete the process could be more

or less depending on the complexity of the matter, but these are good averages. The process takes this amount of time since the executor must get the court's approval in advance prior to taking any action to settle the estate. The probate (lawyer's) fees are set by state statute.

One common misunderstanding about probate is expressed in the often-repeated question that I hear at almost every seminar, "I don't have to go through probate, do I?" When the first spouse dies a probate is usually not required since spouses usually hold assets jointly - one spouse dies and all assets are distributed to the surviving spouse by operation of law. However, when the surviving spouse dies a probate is usually required to distribute assets to the next generation. This is true even if (1) you have a will; (2) everything is paid for; and (3) "the children won't fight".

5. Con - Another disadvantage of a will is that it provides for the distribution of assets at death, but does nothing to assist you if you become incapacitated prior to your death. I heard a preacher a few weeks ago say that the odds of dying is 1 out of 1 or 100%. We laughed because we all realized, but don't want to think about this. However, I heard another presenter say that the odds of becoming incapacitated (stroke, Alzheimer's, etc.) prior to death, and losing a large chunk of our estate to long-term care expenses or nursing homes is about 1 out of 5 or 20%. I will discuss strategies to protect your estate "from the Nursing Home", along with other elder law and incapacity issues in a future newsletter.

Estate planning attorneys have several estate planning tools in their arsenal. Sometimes a will is the best estate-planning tool to use. For example in certain special needs situations, such as families with disabled adult children, a

will with a specially worded testamentary trust for special needs purposes much be utilized to protect assets for the benefit of the disabled child and their family. This strategy, along with other special needs issues will be discussed in a future newsletter. Additionally, if the estate is very complicated, the extra cost required for court intervention via probate can be justified.

However, in many cases, probate court involvement is not cost efficient, but may be required. If a will was the estate-planning tool of choice, probate will most likely be required, even if it is not the most efficient way to settle the estate.

Probate is a detailed and somewhat involved court proceeding to change title to assets from one generation to another. We will take a close look at Probate in our next newsletter, entitled "Estate Planning Basics 102 - Probate"

#### ***In-Service Training Available***

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