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Estate Planning in North Dakota: THE BASICS

Wills and Probate

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Although most North Dakotans are quite conscientious about their property while living, some of these same thoughtful people make no provisions for its management and disposition after their deaths. Despite concern for families, friends and property during their lifetime, they fail to provide guidance when it is most needed — when they are no longer present to make the decisions.

The probate process

"Probate" is the legal procedure for settling an estate when someone dies owning property in North Dakota. The property could include real property (such as land) as well as tangible and intangible personal property (such as a car or a bank account, respectively). When a person dies, in legal terms, he or she becomes known as the "decedent." Probate requires a determination of what property the decedent owned and its value; what debts the decedent owed; and the distribution, or assigning the ownership, of the decedent's property to its new rightful owners. Federal and state estate taxes also must be determined, and these must be paid even if no probate procedure is required. The U.S. does not have a federal estate tax (more on that in another section).

Property is subject to probate only if the new owner is not recognized by the law upon proof of the death of the prior owner or co-tenant. For example, life insurance proceeds, Individual Retirement Accounts (IRAs), U.S. savings bonds and similar property bypass probate because a beneficiary usually is named. Property held in living trusts does not go through probate, but the trustee follows a similar process without court supervision to distribute the property to the new owner. Joint tenancies with right of survivorship usually avoid probate as well. Other property that does not have a legally recognized successor is subject to the probate process.

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Notice of death must be given to creditors to allow them to make claims against the estate for debts the decedent owed them. Additionally, the court may approve an estate being administered as a "simplified estate;" this avoids direct court supervision of the personal representative. In a simplified estate, the court's role primarily is to open and close the probate process.

If a decedent had no outstanding debts, or any debts are assumed and paid by other people, and the decedent had no interest in property subject to the probate process, no probate proceeding is required.

The probate process includes the following steps:

1. Petition for probate of the will or for administration of the estate
2. Appointment of a personal representative
3. Notice to creditors
4. Assembly, inventory and appraisal of property
5. Classification and payment of demands against the estate (such as debts of the decedent and liens against his or her property)
6. Determination of homestead rights and family allowances
7. Management (and sale, if necessary) of property
8. Payment of state and federal taxes
9. Accounting to the court and distribution of property

Probate costs and fees

A number of costs are involved in estate settlement, including any taxes that may become payable. The court is authorized to allow these costs as claims against the estate; that is, to use property from the estate to pay these taxes. Fees paid to the personal representative and attorney are major costs associated with probate. North Dakota law allows for "reasonable" compensation to the personal representative and the attorney for services provided. The issue of cost should be discussed by the personal representative and attorney at the beginning of estate administration and a reasonable fee agreed upon. Often, fees are based on an hourly rate, but sometimes a flat rate can be charged. The court makes the final determination of what are "reasonable" fees. Some other fees to be paid include accounting and appraisal fees and various court costs, such as filling fees and publication costs.

What is a will?

A will is a written document that describes how property is to be distributed after the death of the owner. The person who makes a will is called a **testator** (**testatrix** if female). A person who dies leaving a will dies **testate**, and a person who dies without leaving a will dies **intestate**. Fulfilling all the formalities involved in writing a valid will is called **executing a will**. A will can be either complex or simple, and can designate who receives property, how much each beneficiary receives, when it is distributed and, to some extent, what can be done with the property after distribution. A will only becomes effective upon death; it has no effect during the lifetime of the testator.

What is required to make a valid will?

To dispose of property via a will, a person must be of sound mind and possess the rights of majority. The sound mind requirement generally is met if the testator has the capacity to know the general nature and extent of the property he or she owns and those who ordinarily would be expected to inherit property because of relationship, obligations or other reasons. In North Dakota, unless a specific situation requires otherwise, a person attains the rights of majority at age 18.

To be considered a valid will, it must be executed following certain requirements. The will must be in writing, signed by the testator or someone in the presence of the testator, and it must be signed by two disinterested witnesses who saw the testator sign the will or heard the testator acknowledge that the will is his or hers. A will is considered invalid if the testator was under "undue influence" from another person when the will was executed. If somebody exercised coercive influence over the testator and the testator was unable to exercise his or her independent personal judgment, the testator would be considered under undue influence and the will is not considered valid.

Testimony from the witnesses generally is required to prove the validity of the will in court, but the testimony can be avoided by attaching a self-proving affidavit to the will and executing the will. This usually is done at the time the will is executed, but it can be done at a later date. The affidavit includes a statement stating that the testator and witnesses signed and acknowledged the making of the will and that the will is signed by the testator and witnesses. The acknowledgement must be made before a notary public. This certifies the authenticity of the will. Once the testator dies and the will becomes effective, the will can be admitted to probate. Further testimony from the witnesses is required only if the will is contested. If the will is contested, it will be treated as if it was not self-proved and witnesses must testify as to the execution of the will.

The personal representative

An estate must have a "personal representative," who is a person who carries out the plan for the settlement of the estate. An individual, a bank with trust authority or a trust company can serve as personal representatives. The court determines whether a proposed personal representative is legally competent to serve in the position. A personal representative can be named in the decedent's will or trust, and after a determination of legal competency, the court will appoint that person as the personal representative. If no one is named as a personal representative in the will, the court will name one. Because the settlement of a decedent's estate involves continual contact with the court and various legal rights and responsibilities must be determined, personal representative should hire an attorney for assistance. The personal representative generally chooses the attorney, although a person can state a preference for a particular attorney to help in administration of the estate in his or her will or trust

Restrictions on disposing of property by will

The passing of property to someone after death is a privilege granted by law, and wills must be made within the limitations North Dakota law sets. In North Dakota, very little restriction is placed on disposal of property through a will. The elective share of the surviving spouse is probably the most important restriction. In North Dakota, a surviving spouse is entitled to assets equaling not less than 50 percent of the estate, subject to certain allowances and deductions. The purpose of this restriction is to protect the financial interest of a surviving spouse

A surviving spouse may consent to receive less than his or her elective share, but that consent must be in a signed writing. In some situations, a waiver of elective spousal share can be contested and may be overturned; for example, if the waiver was unconscionable at the time of execution. Unconscionability has been defined as an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party. A contract is unconscionable when it is totally one-sided or oppressive. If no waiver exists, and the testator leaves the surviving spouse less than statutory regulations would provide, the surviving spouse may be able to contest the will as invalid and have the estate distributed subject to the state statutes.

This financial protection does not extend to children, who may be disinherited. However, if a child is omitted unintentionally, the estate will be redistributed according to statutes to include that child's share. Generally, attorneys will name all children in the will to show that none has been forgotten, even if any are disinherited intentionally. If attorneys did not follow this practice, a disinherited child may contest a will claiming to have been omitted unintentionally.

May personal possessions be included in a will?

In North Dakota, probate law allows a person to refer in a will to a separate list disposing of tangible personal property not otherwise disposed of in the will, except money. The separate list must be signed by the testator and identify the items and who is to receive them with reasonable certainty.

Those who have completed a household inventory of personal property are steps ahead. NDSU Extension Service publication HE223, "Household Inventory Sheet," may help you complete a household inventory and determine gifts of personal property.

Can a will be changed?

A will can be changed or revoked during the testator's lifetime as long as he or she remains competent. This allows the testator the opportunity to change a will to keep it in line with changes in circumstances, tax laws or family situation. A "codicil" - a supplement or amendment - can be used to change or amend a will. A codicil must be executed in the same manner as a will and also may be "self-proved." If major changes are desired in a will, revoking it and making a new one is a better option. A will should be reviewed periodically, especially when changes in family or financial situations occur. Such circumstances might include:

- birth of a child
- marriage or divorce
- death of a beneficiary
- substantial changes in the value of any property
- a move to another state
- the executor/personal representative no longer is able to serve
- the guardian no longer is able to serve or no longer is needed
- changes in the tax laws
- acquiring additional property
- a desire to change the status of beneficiaries

Certain conditions automatically revoke a will or parts of it. A will is revoked by a later will or by destruction of the will with the intent to revoke it. Divorce and annulment of a testator's marriage revoke a portion of the will but not necessarily the entire will. Divorce revokes the provisions made in favor of the ex-spouse. A will is not revoked merely by a subsequent marriage, however, because of the spouse's choice of alternative rights (to take property under the will or under intestate law).

Where should a will be kept?

An original will should not be kept in your home, although keeping a copy on file at home is smart. If an original will is stored at home, it may be lost or somebody with badintentions may find and destroy the will. The best option is to find a safe place where the necessary parties can locate it easily after death. A safe deposit box is a good idea; sometimes the attorney who prepared the will can store it in an office safe. Also, if a bank or trust company is named as a personal representative, depositing the will there may be possible.

Why do I need a will?

Dying without a will – intestate succession in North Dakota

Do you know how and to whom property you own will be distributed if you die?

Since something must be done with property after a death, North Dakota has provided a method for dividing it among heirs. If other arrangements have not been made through a will or living trust, for example, the decedent's property will be distributed according to the North Dakota intestate succession law. This would include all solely owned property, as well as the decedent's share of tenancy-in-common property.

The property of a North Dakota resident who dies intestate (without a valid will) generally is distributed in the following manner:

- Real estate is distributed according to the laws of descent and distribution of the state in which the property is located. For example, if you live in North Dakota and own real property in Minnesota and Montana, that property will be distributed according to laws of those states if you die without a will. Other states' laws relating to the distribution of property vary and may be quite different from North Dakota law.
- Personal property (no matter where it is) will be distributed according to the laws of the state in which the decedent lived at the time of death. For example, if a North Dakota resident dies intestate, a house owned in another state will be distributed to heirs according to the laws of the state where it is located, while the furnishings and other personal property (no matter where located) will be distributed according to North Dakota law.

Dying without a will is called dying intestate. North Dakota law lays out the procedure for the division of the estate. The first person to inherit is the

surviving spouse of the decedent. If no child or parent of the decedent survives the decedent or if all of the decedent's surviving children are also children of the surviving spouse, the surviving spouse receives the entire intestate estate (the entire portion of the estate that is not addressed by a will).

If the decedent has a surviving spouse as well as surviving parents and/or children, the rules get a little more complicated. The different division formulas are listed below:.

- If the decedent has a surviving spouse and a surviving parent, but no surviving children, the surviving spouse inherits the first $300,000 of the estate and three-fourths of any leftover balance of the intestate estate, and the rest is divided among the surviving parents by representation. If all of the decedent's children are also children of the surviving spouse, and the surviving spouse has any surviving children who are not children of the decedent, the surviving spouse inherits the first $225,000 and one-half of any balance of the intestate estate, and the rest is divided among the decedent's children by representation.
- If any of the decedent's surviving children are not children of the surviving spouse, the surviving spouse inherits the first $150,000 and one-half of any balance of the intestate estate, and the rest is divided among the decedent's surviving children by representation.

The balance of the intestate estate after the surviving spouse receives his or her share is divided as follows:

- The balance goes entirely to the decedent's children by representation.
- If the decedent has no surviving children, the decedent's parents inherit the balance equally if they are both alive, or the balance goes entirely to the surviving parent.
- If the decedent has no surviving children or parents, the balance is inherited by the decedent's brothers or sisters by representation.
- If the decedent has no surviving children, parents or siblings but has surviving grandparents on the paternal or maternal sides, the balance is divided with half going to the surviving maternal grandparents and half to the surviving paternal grandparents, singly or equally, depending on if both or one is surviving.
  - If either maternal or paternal grandparents both are deceased, then their respective shares pass equally to any of their surviving children by representation.
  - If both paternal or both maternal grandparents are deceased with no living descendants, the entire balance will be distributed to the surviving grandparents or any of their living children.
- If the decedent has no surviving spouse, children, parents, siblings, grandparents, aunts or uncles but has a deceased spouse with surviving children who are not children of the decedent, the balance is divided among as many deceased spouses the decedent may have had, and each share is passed to those surviving children by representation.

If the decedent has no person who can inherit under this description, the entire intestate estate passes to the state to be used to support common schools.

According to North Dakota law, the term "by representation" is a way to divide assets in the following way:

- The portion of the estate that is being distributed "by representation" is divided equally among the generation with at least one surviving member who is closest to the decedent and then divided equally among surviving children of deceased members of that generation.

For example: Adam dies with two surviving daughters, Beth and Cate, and one deceased son, David, who is survived by his two sons, Erick and Frank.

- In the class of Adam's children, two out of three are alive, which means the balance of Adam's intestate estate will divided equally in three shares. Beth and Cate each will receive one-third of the balance. Because David is deceased, his one-third will be divided equally between his surviving sons.

- This process begins at the generation closest to the decedent with at least one living member at the time of decedent's death.

Consider these examples of situations in which intestate succession would be unfortunate and insufficient:

1. When a young man got married, his parents gave him a farm as a gift. Before any children were born, he and his wife were in an automobile accident. The young man was killed instantly and his widow died of injuries a few days later. Neither had wills. They were young and without children. They thought they did not need wills. The young man's property would pass to his parents if his wife did not live for at least five days after his death. If she lived for more than 120 hours after he died, she would receive the first $300,000 of his estate, plus three-fourths of the balance. His parents would receive only the remaining one-fourth. What his wife inherited from him would be inherited by her parents at her death. In this situation, the farm that had been gifted to the son and his wife by his parents may end up property of their sons in-law instead of reverting back to his parents' ownership.

2. A widower, age 50, had an estate valued at $250,000. He has three adult children, one of whom is mentally and physically disabled. The other two children have had substantial assistance from their parents for advanced education and help in establishing their careers. Under North Dakota law, if the widower dies without making a will, the children will share the estate equally. The child who is incapacitated — and who might need additional resources and care — gets equal (but not necessarily appropriate or equitable) treatment. Through a will or other arrangement (such as a trust), the widower could provide for the welfare and needs of that child. Without such a plan, various legal arrangements will need to be made for the incapacitated child. For example, the court will need to appoint a guardian and a conservator to look after the child's care and inheritance, both of which take time and money.

3. The statutory plan often adds expenses as well as inconveniences. For example, a young man, age 25, died suddenly, leaving a wife and three small children. His wife will receive his entire estate if all three children are his and his wife's children. If any of the children are from the wife's former relationship and thus are not the husband's blood relative, the widow would receive the first $150,000 of his estate, plus one-half of the balance. His child(ren) would receive the other one-half. Since the children are not old enough to manage their own money, a guardian and conservator may have to be appointed, which is a costly and time-consuming court procedure.

4. A couple had one son when the wife died. The husband would receive all of the wife's property, provided that the child is the son of the husband and the wife. If the child was not the husband's child, the husband would receive the first $150,000 of her estate, plus one-half of the balance. The son would receive the rest. If her

estate is under $150,000, her son would receive nothing.

5. You want a favorite charity or a close personal friend to inherit a share of your estate. Because North Dakota intestate succession laws provide for the distribution of your estate only to relatives, you must make a will or use other estate planning tools to achieve that objective.

What can a will do?

A person might want to provide for a property distribution that differs from the laws of intestate succession. Examples might include:

- All property to the surviving spouse and nothing to the children
- More to one child than to another
- Inclusion of stepchildren or foster children who have not been adopted legally
- Inclusion of relatives of a deceased spouse
- Gifts to nonrelatives, such as friends or charities
- Property to children (as remaindermen) via a trust, with the surviving spouse receiving income from the trust until his or her death
- Specific items of personal property or real property to certain people or organizations

A properly prepared will can accomplish these objectives.

A will can do other things, also. If a person with minor children dies without a will, the court must appoint a guardian (usually the surviving parent) to take care of the minor children. A conservator also may be required, depending on the size of the minor's inheritance. Wills allow parents to name the person they would like to raise their children. In some cases, having the personal representative continue the operation of a business, particularly a farming business, may be advisable. A person can make plans for such continuation in a will.

Note that a will cannot do some things. As mentioned previously, a will cannot distribute property owned in joint tenancy with right of survivorship (since that property passes automatically to the surviving co-owners, bypassing the will). Nor can a will change the beneficiary of a life insurance policy or dispose of the proceeds of a life insurance policy, pension funds, U.S. savings bonds or other property where a beneficiary is named unless the estate is named as beneficiary.

How is a will made?

An estate planning attorney

The best option to plan the distribution of your estate is to consult an estate planning attorney. The laws affecting taxation and estate planning have grown increasingly complex, and the services of an attorney with expertise and experience in these fields are important. An attorney will be able to translate your wishes to a well-drafted document that follows your state rules and will be more difficult to contest that a holographic will, or a will written through a form found online. An attorney will be able to understand you and the particularities of your situation, as well as be able to tailor your will to North Dakota laws, which also will help deter contestation.

The cost of legal assistance varies according to the size of the estate, the complexity of the will and the attorney providing the services. Attorneys base their fee on the time drafting the will takes; this could be an hourly rate or a flat fee. You need to ask for an estimate of the fee at the beginning of your relationship with the attorney so you can prepare adequately. If you prepare and keep complete and organized records, drafting your will likely will take less time and therefore cost less.

Online forms and templates

Although seeing an attorney to have a will drafted is best, you have other options. Many websites offer will forms or templates. Some are available for free; others have an associated cost. These are found for a range of prices, often between $20 and $60. Generally, these consist of a simple, pre-written will on which you fill in your personal information. While this could be better than leaving your estate to pass through intestacy, this is not a great option for estate planning because conforming a Web document to your situation will be difficult. Also, states have varying rules that a general template may not take into consideration.

Holographic wills

If you are unable to retain an attorney or want to make small changes or quickly make changes, writing a will yourself is possible. If “material portions” of a will are written in the testator’s handwriting and it is signed, that will is considered valid. However, this is not the best option to pursue because it leaves much room for error and those not benefitting as much as they would under intestacy laws to contest it.

A holographic will, whether or not it is witnessed, is valid if the signature and the material portions of the will are in the handwriting of the testator, even if the document does not comply with the general requirements for a valid will.

Other/Additional

Letter of last instructions

Another valuable document to consider writing is a letter of last instructions, which is separate from the will, to your lawyer, personal representative or family. This letter, to be opened upon your death, can provide additional information, such as where important papers are located; funeral and burial instructions; an inventory of your savings and investments; instructions and directions concerning your business; and a listing of various advisers, their addresses and phone numbers. A letter of last instructions is not a substitute for a will, but it does eliminate uncertainty and confusion when death occurs. It enables the survivors to handle financial affairs in an orderly manner. It also can help individuals gain a clearer understanding of their own affairs, as well as remind them where important papers are located.

Advance directives

A **durable power of attorney for health care** and a **living wil**l are two forms of advance directives, or legal tools that individuals can use to declare their wishes regarding health-care decisions. Unlike a will, these documents are effective *during* an individual's lifetime.

A **living will** is a legal document in which competent people can state instructions about the kind of medical treatment they would want if they were terminally ill and not able to speak for themselves. A living will gives individuals an opportunity to provide clear and convincing evidence about their wishes regarding the use of medical technology on their behalf when they have a terminal condition.

A **durable power of attorney for health care** is a way to give someone you trust, and who shares your beliefs, the power to make medical decisions for you when you cannot.

One common question is: "Which is most valuable, a living will or a durable power of attorney for health care?" When attorneys respond to this question, they invariably will choose the durable power of attorney for health care. This document, more recently developed and less well-known, gives an individual (the principal) a way to name another person (the agent) to act in his or her behalf if it becomes necessary. While the living will is limited because it only applies to cases of terminal illness, the durable power of attorney for health care provides a way for another person to legally make decisions regarding medical care and treatment that individuals normally would make for themselves. Because this is a powerful legal tool, choosing an agent carefully and consulting an attorney before making any changes in the statutory form is important. The form is available at www.nd.gov/dhs/info/pubs/docs/aging/aging-healthcare-directives-guide.pdf.

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This publication is based on material developed by Joyce E. Jones, Extension specialist, Adult Development and Aging; and Douglas F. Beech, Extension specialist, Kansas State University Cooperative Extension Service, Manhattan, Kan., 1992.

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North Dakota Century Code, Chapter 30.1-12.

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This publication is not intended to provide a substitute for legal advice. Nor is it intended to serve as a complete and exhaustive text on estate planning. Rather, it is designed to provide basic, general information about the fundamentals of estate planning so you will be better prepared to work with professional advisers to design and implement an effective estate plan.

Information in this publication is based on the laws in force on the date of publication.

For more information on this and other topics, see: www.ag.ndsu.edu

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