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ESTATE PLANNING IN NORTH DAKOTA: THE BASICS

Part 3: 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

When someone dies owning property (real property, as well as tangible and intangible personal property) in North Dakota, the law provides a legal procedure for settlement of the estate. This procedure, commonly called "probate," involves determining what property the person owned and its value; what debts the person owed; and distributing or assigning title of the decedent's (the person who dies) property to its new rightful owners. Federal and state estate taxes also will be determined, although these must be paid even if no probate procedure is required.

Not all property is subject to the probate process. For example, property held in a living trust does not go through probate although similar steps are generally followed by the trustee — but without court supervision. Property held in joint tenancy with right of survivorship is not generally subject to probate, either. Life insurance proceeds, Individual Retirement Accounts, U.S. savings bonds and similar property where there is a named beneficiary (unless the estate is the beneficiary) also bypass probate.

A period of three months is required after notice is given to creditors to allow them to make claims against the estate for debts owed to them by the decedent. In certain circumstances, with court approval, an estate may be administered as a "simplified estate," where direct court supervision of the activities of the personal representative is not generally required, except to open and to close the estate.

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No probate proceeding is required in a few cases. An example would be if the decedent had no outstanding debts (or if any debts are assumed and paid by other people) and no interest in property subject to the probate process. 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.

The Personal Representative

The person who carries out the plan for the settlement of an estate is called a "personal representative." This can be an individual, a bank with trust authority or a trust company.

The court determines whether the proposed personal representative is legally competent to serve. If named in the decedent's will or trust, the person is referred to as a personal representative. If legally competent, the court will appoint that person. If there is no will naming a personal representative, the personal representative is named by the court.

Settlement of a decedent's estate involves continual contact with the court. Various legal rights and responsibilities must be determined. For that reason, it is advisable for the personal representative to hire an attorney for assistance. The choice of an attorney is made by the personal representative, although a person can state in his or her will or trust a preference for a particular attorney to help in administration of the estate.

Probate costs and fees

A number of costs, in addition to any taxes that might be payable, are involved in estate settlement. The court is authorized to allow these costs as claims against the estate.

The major costs associated with probate are those paid to the personal representative and to the attorney. North Dakota law provides that the personal representative and an attorney are entitled to "reasonable" compensation for their services. This issue should be discussed at the outset of administration of the estate and a reasonable fee basis agreed upon. Fees customarily have been determined as an hourly rate of compensation for the time expended. The final responsibility for determining what "reasonable" means rests with the court.

Other costs include accountants' fees, appraisers' fees and various court costs (such as filing fees and publication costs).

Dying without a will*

Since something must be done with property after a death, the state of North Dakota has provided a method for dividing it among heirs. If other arrangements have not been made (such as through a will or living trust), do you know how and to whom property you own will be distributed if you die?

The decedent's solely owned property, as well as the decedent's share of tenancy-in-common property, of a North Dakota resident who dies intestate (without a valid will) is generally distributed in the following manner:

Survivors	Division of Property
Spouse only no children decedent left no parents	All to surviving spouse.
Spouse and all descendants are those of the decedent and surviving spouse	All to surviving spouse.
Spouse and no children but decedent leaves a parent	Surviving spouse gets first $200,000 plus 3/4 of balance of estate. Parent gets 1/4 of balance of estate.
Spouse and decedent and spouse have issue* but spouse also has issue that are not those of decedent	Surviving spouse gets first $150,000 plus 1/2 of balance of estate. Decedent's issue share remaining 1/2 equally.
Spouse and decedent left issue who are not issue of spouse	Surviving spouse gets first $100,000 plus 1/2 of balance of estate. Decedent's issue share remaining 1/2 equally.
No spouse. Children only.	Split whole estate equally.
No spouse. One or more child has predeceased leaving issue.	Decedent's descendants take by right of representative.
Parents only	To both equally, or to the surviving parent.
Siblings only	Shared equally.
Other relatives only	Half to maternal grandparents, half to paternal grandparents. If no grandparents, half to maternal aunts and uncles, equally, half to paternal aunts and uncles equally.
No relatives	All to State of North Dakota

*Issue is a legal term referring to lineal descendents and their direct descendents, such as children, grandchildren and great grandchildren. Legally adopted children are considered issue and inherit accordingly.

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 reside 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 state laws relating to the distribution of property vary and may be quite different from North Dakota law.

It should be noted that personal property (no matter where it is) will be distributed according to the laws of the state in which the decedent resided at the time of death. So, 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.

North Dakota laws of descent and distribution provide for the simple division and distribution of your property. They cannot, because of their universal applicability, allow for special situations. The North Dakota law is a fair law, but when applied to a specific family situation, unforeseen (and sometimes unfortunate) circumstances may result. Consider the following examples.

1. A young man at his marriage was given a farm as a gift by his parents. 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 $200,000 of his estate plus three-fourths of the balance. His parents would receive the remaining one-fourth.
2. A widower, age 50, had an estate valued at $250,000. He has three adult children, one of whom is mentally retarded and physically handicapped. 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, a guardian and a conservator will need to be appointed by the court to look after the child's care and inheritance — both of which take time and money.

3. The statutory plan often adds additional 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 the issue of him and his wife. If any of the children are from the wife's former relationship and are thus 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, he would receive the first $100,000 of her estate plus one-half of the balance. The son would receive the rest. If her estate is under $100,000, 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, so you must make a will or use other estate planning tools to achieve that objective.

You have a choice

The way North Dakota law provides for distribution of property in the absence of a will may be satisfactory, in some instances. However, it does not take into account individual needs, abilities or requirements of various family members. Furthermore, even though the state laws of descent and distribution may seem to provide exactly the distributional plan desired, laws or circumstances can change.

Does the state plan for the distribution of your property, should you die without a will, meet your wishes? If it does not, then it is your responsibility to see that your wishes are followed. A will is one of several estate planning tools that provide you an opportunity to state what you want done with your property after your death.

What is a will?

A will is a written document that describes how property is to be distributed after death. It can be simple or complex. A will can designate who receives property, how much each beneficiary receives, when it is received, and, to some degree, what can be done with it. A will has no effect during the lifetime of the person making it. Only upon death does a will become effective.

First, a few more definitions—

— A person who makes a will is called a *testator (Testatrix if a female)*.
— When a person dies leaving a will, he is said to have died *testate*. A person who dies without leaving a will dies *intestate*.
— To *execute a will* means to fulfill all the formalities involved in writing a valid will.

What is needed to make a valid will?

Anyone of sound mind, and possessing the rights of majority, may dispose of any or all of his or her property by will. A testator is judged to be of sound mind if he or she has the capacity to know the general nature and extent of property owned, and the natural objects of his or her bounty — those who would ordinarily be expected to inherit property because of ties of relationship, obligations or other reasons. In North Dakota, a person generally attains rights of majority at age 18.

In order to be admitted to probate, a will must be executed with certain formalities. It must be in writing, be signed by the testator (or someone else in the presence of the testator), and be signed — in the presence of the testator — by two disinterested witnesses who either saw the testator sign the will or heard the testator actually acknowledge that the will is his or hers.

Further, a will is not entitled to be admitted to probate if it was executed when the testator was under "undue influence" from another person. That is, someone exercised such coercive influence over the testator that he or she was incapable of exercising independent personal judgment.

On a related issue, testimony of the witnesses is generally required to prove the validity of the will in court. The testimony can be eliminated by attaching a self-proving affidavit to the will and executing it. Generally, this is done at the same time the will is executed. However, a will can be self-proved at a later date. The affidavit includes an additional statement which states, in effect, that the testator and witnesses signed and acknowledged the making of the will. An affidavit signed by the testator and witnesses (and acknowledged before a notary public) certifies the authenticity of the will. Upon the death of the testator, the will can be admitted for probate without further testimony from the witnesses, unless the will is contested. In that case it will be treated like a will that is not self-proved (and witnesses must testify as to the execution of the will).

What can a will do?

A person might want to provide for property distribution that differs from the laws of descent and distribution. 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 legally adopted

— Inclusion of relatives of a deceased spouse

— Gifts to non-relatives, 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 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 may also 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. North Dakota law does not require the court to choose the guardian and conservator named in the will of a parent of a minor child.

In some cases, it may be advisable to have the personal representative continue the operation of a business, particularly a farming business. A person can make plans for such continuation in a will.

As mentioned earlier, a bond is required to protect the estate from certain actions of a personal representative. This bond can be waived in a will or by the court under certain circumstances. Because these bonds are fairly expensive and payable from the estate, the testator may choose to waive it. This points to the need for careful selection of an executor.

If a North Dakota resident dies intestate, the part of the estate remaining after the payment of debts, claims, administration expenses and specific gifts — the "residual" of the estate — is divided among those eligible to receive the property. For example, if the decedent owned a farm, as well as an interest in non-farm property, all of the children (if there is no surviving spouse or parent) would share equally both properties. The laws of descent and distribution do not take into consideration any special circumstances, such as one child preferring to remain on the farm and the others preferring to live and work elsewhere. A will is one of several estate planning tools that can allow for this kind of distribution.

A will may allow the executor some flexibility in managing estate property without direct supervision of the court. Further, the possibility of simultaneous deaths of family members — or deaths of family members within a short period of time — can also be provided for when making provisions for property division in a will.

It is important to note that there are some things a will cannot do. As mentioned previously, a will cannot distribute property owned in joint tenancy with right of survivorship (since they pass 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 there is a named beneficiary — unless the estate is named as beneficiary.

Are there 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 set by North Dakota law. In reality, the law is remarkably free of restrictions. The most important restriction protects the surviving spouse.

Generally, in North Dakota neither spouse may will away from the other more than approximately half of his or her property (subject to certain rights of homestead and allowances), unless the other spouse consents. If a will gives the spouse less than the statutory share he or she would inherit if there was no will, and the spouse has not consented in writing, the spouse may be able to reject the will and take the share that would be due under the laws of descent and distribution.

This limitation applies only to a surviving spouse. Children have no vested interest in their parents' property and may be disinherited. It is not necessary to leave a small sum, such as a dollar, to a child to show that he or she was not forgotten. Attorneys generally follow the practice of naming the children to show that the testator has not forgotten any of them. Otherwise, a child might contest a will claiming the parents unintentionally omitted him or her, or were of unsound mind.

May personal possessions be included in a will?

People often have personal possessions or heirlooms which they want to hand down to certain family members or others. The North Dakota probate code provides that a person may refer in a will to a separate list disposing of tangible personal property (not otherwise disposed of in the will). However, this list cannot include money, evidences of debt, title documents, securities or property used in a trade or business.

The list — separate from the will — must identify the items with reasonable certainty, state who is to receive them and be dated. It must be either in the handwriting of the testator or signed by the testator. The list can be changed simply by making a new list, dating and signing it.

Those who have completed a household inventory of personal property are steps ahead. The NDSU Extension Service publication HE223, "Household Inventory Sheet," may be of help in completing a household inventory and determining 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 of changing 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 the same as a will and may also be "self-proved." A will should not have words or statements marked out or added. They are ineffectual and may destroy the entire will. If major changes are desired in a will, it is better to revoke it and make a new one.

A will should be reviewed periodically, especially when there are changes in family or financial situations. Such circumstances might include:

— birth of a child

— marriage or divorce

— death of a beneficiary

— substantial changes in the value of any property

— moving to another state

— the executor no longer able to serve

— the guardian no longer able to serve, or is no longer 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. Divorce and annulment of a testator's marriage revoke a 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?

After a will is executed, it should be stored in a safe place where it can be found. If a bank or trust company is named as executor, it may be possible to deposit the will there for safekeeping. A safe deposit box is another good place to store a will, with a copy located in a home file. Sometimes the attorney who drew the will can store it in an office safe.

It is not a good idea to leave the original will in a desk drawer or other storage place around the home. After a death, it may be found and destroyed by someone who would receive more under the laws of intestacy than under the will.

What is the cost of having a will prepared?

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.

Fees for legal assistance in making a will vary, depending on the size of the estate and the complexity of the will. Attorneys usually base their fee on the length of time it takes to draft the will. Do not hesitate to ask for an estimate of the fee for preparing a will, preferably at the first meeting. The more prepared you are and the better your records, the less it will likely cost you.

Letter of last instructions

Another valuable document to consider writing is a letter of last instructions — separate from the will — to your lawyer, your executor or your 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 can also help individuals get a clearer picture 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 will* are two forms of advance directives, or legal tools that individuals can use to declare their wishes regarding health care decisions.

A *living will* is a legal document where competent persons 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 will invariable 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 would normally make for themselves. Because this is a powerful legal tool, it is very important to choose an agent carefully and to consult an attorney before making any changes in the statutory form.

The NDSU Extension Publication, HE 494, "Advance Directives in North Dakota," gives more detailed information and includes the statutory forms needed.

References

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, Manhatten Kansas, 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.nodak.edu

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