

## **WHAT IS A WILL, AND WHY IS IT IMPORTANT?**

Every person owns some type of property – whether real or personal – and therefore every person has an estate. Real property is made up of land and anything growing on, attached to, or erected on it. Personal property is any movable or intangible thing that is subject to ownership and not classified as real property. Examples of personal property include stocks, bonds, cars, trucks, jewelry, and other personal effects.

The owner of property has the freedom to decide how he or she wants her property distributed upon death. One way to distribute the property upon the death of the owner is through the use of a will - a written document by which a person directs his or her estate to be distributed upon death.

### **Why is a will important?**

An estimated 70% of people in the United States die “intestate,” which means that they die without having executed a written will. When a person dies intestate, their estate is distributed according to the statutes of the state the decedent was living in when he or she passed away. Understandably, few people desire to have the government determine how their property will be distributed upon their death. The best way to avoid such a scenario is to execute a written will before your death.

### **Important things to know about wills**

- Wills are revocable, which means that you can alter, modify, change, or withdraw your will at any time, and from time to time before your death.
- Wills only become effective upon your death.
- The overall goal of the will is to afford you the opportunity to fulfill your right in distributing your property to whom you wish.
- Generally speaking, you must be of sound mind and of majority age in your state where you live to execute a will.
- The will must be in writing, signed by you, and it must be witnessed by the appropriate number of witnesses.
- The will should be revised from time to time in order to reflect any changes in the family, the estate, or in various tax laws.
- Taxes greatly effect the disposition of your property. The federal government has the right to collect inheritance taxes on the value of your estate, which is made up of real and personal property. Not all estates are “taxable” estates.

### **Testamentary Capacity**

Testator (man who leaves a will) executed his will 12 hours before his death. The will devised property to different individuals including his children, but his wife from whom he had been separated from for over 10 years and step-son were not named as

beneficiaries. At trial, the wife convinced the jury that the Testator lacked testamentary capacity and was subject to undue influence when he executed his will.

The Court of Appeals affirmed the lower court ruling and held that there was sufficient evidence to support the jury's finding that the Testator lacked testamentary capacity. The Testator was suffering from the end stages of cancer and had executed the will while in his hospital bed. Testimony during the trial confirmed that the Testator often displayed signs of confusion after he was admitted into the hospital several days before executing his will.

Moreover, the attorney who drafted the will never spoke with the Testator and was not present during the will execution ceremony. Rather, the attorney drafted the will based upon instructions from a friend. Although the Court of Appeals acknowledged that there was some evidence that the Testator had testamentary capacity, the Court concluded that the evidence of the Testator's lack of capacity was not so weak as to make the jury's finding unjust.

*In re Estate of Blakes*, 104 S.W.3d 333 (Tex. App-Dallas 2003, no pet. h.).

### **Testamentary Intent**

Testatrix's (woman who leaves a will) 1992 will was admitted to probate. Afterwards, the beneficiary filed an application to probate four alleged codicils (supplements or additions to a will) to the 1992 will. The codicils consisted of letters and memoranda to the Testatrix's attorney in which the Testatrix set forth changes that she wanted her attorney to make to the 1992 will.

The trial court granted a summary judgment that these documents lacked testamentary intent and thus were not codicils to the Textatrix's will.

The appellate court affirmed and held that the documents clearly and unambiguously lacked testamentary intent. Rather, the documents were simply instructions or directions to the attorney to prepare new wills or codicils that carried out the requested changes. The Testatrix did not intend for the documents to be wills or codicils.

Letters from clients, memoranda, and other written documents indicating provisions which the attorney should include in the will are not themselves wills.

*In re Estate of Schiwetz*, 102 S.W.3d 355 (Tex.App.-Corpus Christi 2003, pet. denied).

### **Disclaimer**

**This publication and the information included in it are not intended to serve as a substitute for consultation with an attorney. Specific legal issues, concerns, and conditions always require the advice of appropriate legal professionals.**