

Common Questions Regarding Minnesota Wills

What is the Purpose of a Will?

A Will allows a person to declare how his or her “*probate property*” is to be distributed at the Will maker’s death.

In the absence of a Will, *probate property* is distributed in accordance with state law. Sometimes state law distributes probate property in the manner that the decedent would have wanted anyway, but sometimes it does not.

For example, in the absence of a Will, if there is a surviving spouse but no children, the surviving spouse will receive all of the decedent’s *probate property*, which is generally the way most married couples would want their property to be distributed anyway.

However, if there are children of the decedent, the share of the surviving spouse would depend on:

- ◆ the size of the estate,
- ◆ the date of the decedent’s death,
- and
- ◆ whether or not the decedent’s children were also the children of the surviving spouse.

Is Non-probate Property Governed by a Will?

Non-probate property, such as joint accounts, life insurance, annuities, and retirement plans, is not distributed pursuant to the decedent’s Will unless it is expressly payable to the Will maker’s estate:

- ◆ Joint accounts are owned by the surviving joint tenant(s),
- and
- ◆ assets which have beneficiary designations are distributed to the beneficiary or beneficiaries designated in the contract.

What is “Probate”?

When there is a Will, “*probate*” is the judicial or administrative process of establishing:

- ◆ the validity of the Will,
- and
- ◆ the persons entitled to receive the decedent’s property pursuant to the Will.

Common Questions Regarding Minnesota Wills

In the absence of a Will, **probate** is the judicial or administrative process of obtaining legal determinations:

- ◆ that the decedent died without a Will,
and
- ◆ identifying the heirs who are entitled to receive the decedent's property pursuant to statutory provisions.

Can A Will Reduce Probate Costs?

A Will can facilitate probate of the decedent's estate at a reduced cost:

- ◆ by requesting that the probate proceed without court supervision,
and
- ◆ by waiving the fiduciary performance "bond" which may otherwise be required of the personal representative.

What is a "Bond"?

A bond is a form of insurance policy issued by a bonding company after payment of a premium to secure the proper administration of an estate.

However, since a personal representative usually must have a good credit rating in order to obtain a bond, a waiver of the bonding requirements may be necessary in order to allow some individuals to serve as the personal representative of an estate.

What is a "Personal Representative"?

A personal representative is the person or persons who are responsible for working with the lawyer who will actually "probate" the estate.

The personal representative or representatives can be nominated by the Will maker in the Will, and such nominations are usually respected by the probate court.

Can a Will Reduce Estate Taxes?

For estates which are sufficiently large, Will provisions can be used to reduce federal estate taxes, leaving more assets for the Will beneficiaries.

Can A Will Provide Trust Protection For Beneficiaries?

One useful Will drafting technique involves the creation of one or more trusts at the Will Maker's death. A trust is a legal arrangement in which property is owned by one person (a trustee) for the benefit of other persons (beneficiaries).

The beneficiaries typically receive a certain amount of the trust assets annually, and the remainder of the trust assets at some future date.

Protection From Creditors

Trusts can effectively protect the trust property from the beneficiaries' creditors since the property is owned by the trustee until it is distributed to the beneficiaries. Such protection may be a significant benefit to youthful beneficiaries, particularly given the level of gambling opportunities now available in Minnesota.

Control of Distributions

Trusts also provide the Will maker with considerable control regarding the manner of distribution of trust assets, which:

- ◆ can be held in trust until the beneficiaries reach a certain age,
and
- ◆ can be distributed for specified purposes, such as to pay for college or medical expenses.

A trust's distribution schedule can be tailored to satisfy the Will maker's individual preferences.

Who is Authorized to Make a Will?

Any person over the age of 18 with sufficient mental capacity may make a Will.

What Level of Mental Capacity is Required to Make a Will?

The maker of a Will must have sufficient "testamentary capacity" - the mental condition wherein a person:

- ◆ understands the nature and extent of his or her property,
and
- ◆ is able to:
 - ◆ identify those family members who could be expected to receive such property upon the person's death,

Common Questions Regarding Minnesota Wills

and

- ◆ make an informed decision regarding the recipients of his or her property.

What are the Procedural Requirements for Making a Will?

Under Minnesota law, a Will must be:

- (1) in writing;
- (2) either:
 - ◆ signed by the person making the Will,
 - or
 - ◆ signed in such person's name by another person in the presence of, and at the direction of, the Will maker,and
- (3) properly witnessed.

In certain circumstances, a Will may also be signed by a person's conservator pursuant to court supervision.

What are the Requirements for the Proper Witnessing of a Will?

In order to be valid, a Will must be signed by at least two witnesses, each of whom signed the Will within a reasonable time after witnessing either:

- ◆ the signing of the Will by its maker,
- or
- ◆ the Will maker's acknowledgment of:
 - ◆ his or her own signature on the Will,
 - or
 - ◆ the Will having been signed by someone else on the Will maker's behalf.

Who May Witness the Signing a Will?

Persons who are competent to testify as witnesses at trial may act as witnesses to the signing of a Will, i.e., adults of sound mental capacity.

Common Questions Regarding Minnesota Wills

While it is generally advisable to have Will witnesses who are not also Will beneficiaries, there is no statutory restriction against Will beneficiaries - even spouses - serving as witnesses to the signing of a Will.

Are the Witnesses to the Signing of a Will Required to Testify in Court?

Witnesses to the signing of a Will may be required to testify in court if they are alive, competent, and available at the time that the Will is submitted for probate. However, in most situations, they do not ever have to appear in court.

What is a “Self-proved Affidavit”?

A “Self-proved Affidavit” is a supplemental document signed in the presence of a notary public by the Will maker and the witnesses to the Will immediately after the Will itself has been signed, which contains substantially the following provisions:

I,, the testator, sign my name to this instrument this day of, and being first duly sworn, do hereby declare to the undersigned authority

- ♦ *that I sign and execute this instrument as my will and*
- ♦ *that I sign it willingly (or willingly direct another to sign for me),*
- ♦ *that I execute it as my free and voluntary act for the purposes therein expressed, and*
- ♦ *that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.*

We,,, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority

- ♦ *that the testator signs and executes this instrument as the testator's will and*
- ♦ *that the testator signs it willingly (or willingly directs another to sign for the testator), and*
- ♦ *that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and*
- ♦ *that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.*

Even though a Will can be valid without an accompanying “Self-proved Affidavit”, providing a “Self-proved Affidavit” to the probate court at the time that the Will is offered for probate may excuse the proponent of the Will from having to:

- ♦ locate one or more of the witnesses to the Will,

Common Questions Regarding Minnesota Wills

and

- ◆ have them sign an affidavit at that time which makes the same declarations as in a “Self-proved Affidavit”.

Do Items of Personal Property Have to be Listed in a Will?

A Will may incorporate by reference one or more supplemental written lists which serve to dispose of certain items of tangible personal property not specifically identified in the Will. However, any gifts of:

- ◆ money,
- ◆ coin collections,
- and
- ◆ property used in trade or business,

must be made in the body of the Will itself.

Such written lists must:

- ◆ be referred to in the Will,
- ◆ describe the property items and the recipients of such property with reasonable certainty,
- and
- ◆ either be:
 - in the handwriting of the Will maker,
 - or
 - signed by him or her.

Such written lists may be:

- ◆ prepared either before, or after, the Will is signed,
- ◆ altered by the person after its preparation,
- and
- ◆ comprised of multiple documents. However, if the same item of property is given to different persons pursuant to different documents, the most recent document will control the disposition of such property.

Are Wills Signed in Another State Valid in Minnesota?

Written Wills that are prepared and signed in another state are valid in Minnesota if they satisfy the Will execution and witnessing requirements of either:

- ◆ the State of Minnesota,
- ◆ the state where the Will was signed,
- or
- ◆ the state where the Will maker permanently resided at the time of his or her death.

Can a Will be “Changed”?

In general, any changes or alterations to a Will must be signed and witnessed in the same manner as the original Will. Therefore, it is not advisable to cross out an original name, term, or provision in a Will and replace it with a new name, term, or provision, since the signature and witnessing requirements of a Will can create doubt as to the effectiveness of such changes.

It is better to execute a new Will any time that changes are desired to be made to an existing Will.

How is a Will “Revoked”?

A Will can be revoked either by written words, or by physical actions.

If a person makes a new Will which *expressly revokes* an earlier Will, the earlier Will is thereafter null and void.

However, if a new Will does not expressly revoke an earlier Will, the signing of a new Will can still be effective to revoke an earlier Will if the Will maker intended the new Will to *replace*, rather than *supplement*, the earlier Will.

- ◆ A Will maker is presumed to have intended a new Will to *replace*, rather than *supplement*, an earlier Will if the new Will **completely disposes of** the Will maker’s estate.
- ◆ A Will maker is presumed to have intended a new Will to *supplement*, rather than *replace*, an earlier Will if the new Will **does not completely dispose of** the Will maker’s estate.

Such presumptions are rebuttable only by clear and convincing evidence to the contrary.

If a Will maker performs a physical action with the intent of revoking an earlier Will - such as burning, tearing, canceling, obliterating, or destroying all or part of an earlier Will - the earlier

Common Questions Regarding Minnesota Wills

Will is thereafter null and void, whether or not such physical actions visibly altered any of the words printed on the earlier Will.

Are Joint Wills Valid?

Generally, each spouse should have their own Will. However, sometimes two spouses will sign the same Will, intending that such a Will:

- ◆ cover all of their combined property,
and
- ◆ not be subject to revocation upon the death of the first spouse to die.

While such "Joint Wills" are not invalid per se, the adoption of a joint Will does not necessarily mean that it cannot be revoked by the surviving spouse.

Are Contracts Not to Revoke a Will Enforceable?

If both spouses want to have Wills which cannot be revoked by the surviving spouse, they may do so by entering into a mutual contractual obligation, providing that:

- (i) there is a separate writing signed by each of the spouses evidencing such a contract,
- (ii) there is an express reference in each of their Wills to such a contract, and extrinsic evidence proving the terms of such a contract,

or
- (iii) there are express provisions in the Will stating the material provisions of such a contract.

In addition, normal contractual requirements will apply to the creation of any such "***contract not to revoke a Will.***"

Is a "Penalty Clause" in a Will Enforceable?

A provision in a Will which attempts to penalize an interested person for contesting the legitimacy of either:

- ◆ an entire Will,

or
- ◆ some provision thereof relating to the estate,

is unenforceable if "***probable cause***" exists for commencing such a contest.

Common Questions Regarding Minnesota Wills

In other words, if there is a legitimate justification for alleging that a Will was signed:

- ◆ under duress or undue influence,
or
- ◆ by a person who did not have the testamentary capacity to do so,

such a penalty clause may be unenforceable.

Where Should I Keep My Original Will?

An original Will should be kept in a fireproof safe, either at home or at a financial institution.

Alternatively, an original Will may be deposited with the court for safekeeping. During the Will maker's lifetime, a deposited will may be released by the court only:

- ◆ to the Will maker,
or
- ◆ to someone authorized in a writing signed by the Will maker to receive the Will.

Upon receiving notice of the Will maker's death in another county, the court holding the Will may deliver it to the court in such other county.

In the past, the attorney drafting the Will often kept the original Will in a fireproof safe in the attorney's office. However, given the current nature of the legal profession, and the mortality of individual lawyers, such a practice is not recommended.

What Should I Do With a Will Upon the Death of a Person?

Upon the death of a Will maker and a request by a person having a post-death need for the Will to be filed with the probate court, anyone having possession of the Will must deliver it promptly to the appropriate court.

The intentional failure to deliver a Will to the appropriate court may subject the possessor of the Will:

- ◆ to liability to any person who sustains a loss as a result of such failure,
and
- ◆ to a contempt of court citation.

Is Any Part of a Will Revoked Automatically Merely by a Change in Circumstances?

There are generally only two circumstantial changes that will result in the automatic revocation of certain Will provisions:

1. The murder of the Will maker by one of its beneficiaries;

and
2. A divorce involving the Will maker.

Murder of a Will Maker

A Will beneficiary who intentionally murders the Will maker is not entitled to any benefits under the Will - or to any other statutory property benefits either. In such a situation, the estate of the Will maker passes as if the murderer had died before the Will maker.

Divorce Involving a Will Maker

With a few limited exceptions, the dissolution or annulment of a marriage revokes:

- (1) any gift of property made in a Will by a Will maker to the Will maker's former spouse;

and
- (2) any nomination in a Will of the Will maker's former spouse to serve in any fiduciary or representative capacity, such as a personal representative, executor, trustee, conservator, agent, or guardian.

What if a Will Beneficiary Dies Before the Maker of a Will?

If a Will beneficiary who is either:

- ◆ a grandparent,

or
- ◆ a lineal descendant of a grandparent,

of the Will maker fails to survive the Will maker, descendants of the deceased Will beneficiary who survive the Will maker by 120 hours will take in place of the deceased Will beneficiary, unless a Will provision contains survivorship language such as:

- ◆ *"if he or she survives me,"*

or,

- ◆ "to my surviving children."

What if a Will Does Not Properly Specify the Disposition of “Class Gifts”?

If a class gift in favor of "*descendants*," or "*issue*," does not specify the manner in which the property is to be distributed among such class members, the gift will be distributed among the class members who are living upon the death of a Will maker in such shares as they would receive under Minnesota's law of intestate succession - as if the designated ancestor had then died intestate owning the property to be transferred to the class.

What are “Laws of Intestate Succession”?

A person who dies without a Will dies "*intestate*".

A deceased person's intestate estate passes to the person's "heirs", who may include the person's surviving spouse, descendants, and other family members.

Intestate Share of the Surviving Spouse

The intestate share of a *deceased person's surviving spouse* is equal to:

- (1) the entire intestate estate if:
 - (i) no descendant of the deceased person survives;
 - or
 - (ii) all of the deceased person's surviving descendants are also descendants of the surviving spouse - and there is no other descendant of the surviving spouse who survives the deceased person;
 - or
- (2) the first \$150,000, plus one-half of any balance of the intestate estate,
 - ◆ if all of the deceased person's surviving descendants are also descendants of the surviving spouse, and the surviving spouse has one or more surviving descendants who are not descendants of the deceased person,
 - or
 - ◆ if one or more of the deceased person's surviving descendants are not descendants of the surviving spouse.

Intestate Share of Persons Other Than the Surviving Spouse

To the extent that any part of the intestate estate does not pass to the deceased person's surviving spouse, or if there is no surviving spouse, the entire intestate estate passes in the following order to the individuals designated below who survive the deceased person:

- (1) to the deceased person's descendants "*by representation*";
- (2) if there is no surviving descendant, to the deceased person's parents equally if both survive, or to the surviving parent if only one survives;

and
- (3) if there is no surviving descendant or parent, to the descendants of the deceased person's parents, or either of them, "*by representation*".

What is Meant by the Terms “by representation”, and “per stirpes”?

If a Will provision or statute calls for property to be distributed "*by representation*" or "*per stirpes*," the property is divided into as many equal shares as there are:

- (i) surviving children of the designated ancestor,

and
- (ii) deceased children who left surviving descendants.

Each surviving child, if any, is allocated one share.

The share of each deceased child with surviving descendants is divided in the same manner, with a subsequent division repeating at each succeeding generation until the property is fully allocated among surviving descendants.

What is Meant by the Term “per capita”?

If a Will provision or statute calls for property to be distributed "*per capita*" at each generation, the property is divided into as many equal shares as there are:

- (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants,

and
- (ii) deceased descendants in the same generation who left surviving descendants, if any.

Common Questions Regarding Minnesota Wills

Each surviving descendant in the nearest generation is allocated one share.

The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if:

- ◆ the surviving descendants who were allocated a share
and
- ◆ their surviving descendants had predeceased the distribution date.

What Happens When a Specific Gift Identified in a Will is no Longer Owned by the Will Maker at Death?

In general, a person entitled to receive a specific gift of property in a Will has a right to receive:

1. such specifically devised property upon the death of the Will maker,
and
2. any balance of the purchase price owing from a purchaser to the Will maker at death by reason of the sale of the property.

However, if specifically devised property is sold by a conservator or an agent acting within the authority of a durable power of attorney for an incapacitated person, the specific devisee has the right to a general monetary gift equal to the net sale price only if such incapacity existed for less than one year before death.

What is Attorney Gary Dahle's Experience in Drafting Minnesota Wills?

Attorney Gary Dahle has drafted Wills for residents of the following cities in Minnesota:

Aitkin, Andover, Anoka, Apple Valley, Arden Hills, Blaine, Brainerd, Brooklyn Center, Brooklyn Park, Columbia Heights, Cambridge, Cedar, Centerville, Coon Rapids, Crosslake, Crystal, Deerwood, Eagan, Edina, Elk River, Forest Lake, Fridley, Glenwood, Ham Lake, Hastings, Hugo, Inver Grove Heights, Isanti, Lakeville, Maplewood, Minneapolis, Mounds View, New Brighton, New Hope, North Branch, North Oaks, Oakdale, Pequot Lakes, Pine City, Plymouth, Remer, Robbinsdale, Rogers, Roseville, Sandstone, Savage, Shoreview, Spring Lake Park, St. Paul, St. Paul Park, Vadnais Heights, White Bear Lake, Woodbury, Wyoming, and Zumbro Falls,

located in the following Minnesota Counties:

Aitkin, Anoka, Chisago, Crow Wing, Dakota, Hennepin, Isanti, Pine, Ramsey, Scott, and Washington.

Common Questions Regarding Minnesota Wills

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