

“Let our advance worrying become advance thinking and planning” – Sir Winston Churchill

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ELDER LAW TODAY

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For this Elder Law Today, I want to remind you of the importance of having your estate plan in order. So here is what I want to focus on: intestate succession – what happens to your estate if you die without a properly drawn Will. Two examples, both based on true facts, which we have seen in our office recently show what can happen.

Jane Doe comes to our office and wants to discuss probating her mother’s Will. Her mother went “on-line” (or someone did on her behalf) to prepare the will. The Will was witnessed by two people and notarized. But the most important clause, called the “residuary clause”, was left blank!! Typically, a Will may have some specific bequests: “I give to my friend John my watch; to my friend Sarah, my Farmall tractor; and I give all of the **“residue of my estate”** to _____”. So, Jane’s Will left out who gets the bulk of her estate. Lawyers call this situation “partial intestacy” – meaning the bulk of her estate (THE RESIDUE) will pass to Jane’s “heirs at law.” The Court cannot fix this defect!! Rather, there will have to be a dependent administration taken out; a lawyer will have to be appointed to represent “unknown” heirs; and it will be necessary for a “determination of heirship” to be rendered by the Court. So, the moral to this story is that “doing it yourself” on “LegalZoom” or some other free web-based service may be cheaper in the short run – but certainly not in the long run!!!

Second situation. Sam Snoe comes into our office for some estate planning. He was recently retired. We discuss the assets. Home is worth \$200K (no mortgage). His 401K is \$400K. He casually mentions that his wife died a few months ago; that they had been married 30 years. I asked the status of her estate. He tells me he had not probated her Will – says she did not have a Will. I then asked did they have children. He replied, “she had a child by a prior relationship -- we had not been on good terms with her for several years – He said she was not responsible; a drug addict, etc. He said that she did not even come to her mother’s

funeral.” I then explained to him that his stepdaughter has

inherited one-half of all their community property – including half of the homestead (although he has the right to live there rent free as long as he desires) and half of “his” 401K because it is also community property based on the length of their marriage. Suffice it to say, he was flabbergasted at what I told him!!!

These two real life examples demonstrate graphically what happens when someone dies without a Will (or a properly prepared Will). So, let ‘s give a brief recap of what happens when someone dies without a Will (the law of intestate succession).

First, we need to distinguish between separate property (property owned before marriage or acquired after marriage by inheritance or gift) and community property (if married all property is presumed community property unless it can be proven separate property by clear and convincing evidence). We must also distinguish between real property and personal property. Real property is land, minerals and assets attached to real estate (buildings, etc.). Personal property is basically everything else (e.g.: vehicles; equipment; livestock; stocks; bonds; cash; etc.)

If one who is married dies without a Will and has children surviving him, his separate real property will pass 2/3 in fee simple (outright) to his children; and his spouse will only get a “life estate” in the other 1/3 and at her death, the children will get the “remainder” interest (the other 1/3) so the kids wind up with all of this separate real property.

If one who is married dies without a Will with no children, his or her separate real property will pass 1/2 to his surviving spouse; and 1/2 to his parents – or brothers and sisters (or their descendants if both parents are deceased). If there are no parents, brothers, or sisters (or their descendants) then all of the separate real estate passes to the surviving spouse.

What about separate personal property where one dies without a Will? If married with children, 2/3 will pass to the children; and 1/3 to the surviving spouse. If no children, all separate personal property passes to surviving spouse.

What if a single person dies without a Will and has no children? In that case 1/ 2 will pass to each parent who survives him; if only one parent survives, then 1/ 2 passes to one parent and the other 1/ 2 passes to his brothers/sisters (or their descendants).

What about community property (property accumulated during marriage)? If you die without a Will and you and your surviving spouse have children (i.e.: you have no child by a prior marriage or relationship) all of your community property will pass to your spouse. **But if you have one or more children by a prior marriage or relationship**, your half of the estate will pass **to all of your children** (including any children by your surviving spouse) and your spouse will get none of your half of the community property. If there are no children then your half of the community property passes to your surviving spouse.

I conclude this Elder Law Today with this message: **You need to have a current Will, Statutory (Financial) Power of Attorney, a Medical Durable Power of Attorney, a HIPAA Release, and a Directive to Physicians.** You also may need a Revocable "Living" Trust; (1) if you own real estate in another state (2) if married and you want to keep your separate property, separate (3) you want professional management of your assets. I believe the examples above clearly demonstrate the importance of a good, well thought out, estate plan.

We are presenting 2 seminars on **Thursday, May 25, 2023.** Fundamentals of Estate Planning will be from 3:00 PM to 4:00 PM and Essentials of Medicaid & Asset Protection Planning will be from 5:00 PM to 6:00 PM. The location is the building where our office is located: the Southwest Building 4245 Kemp Blvd., Wichita Falls, Texas, Suite 514 (5th floor Conference Room). Seating is limited. Please call our office @ (940) 696-5015 for reservations.



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