

What a Will Won't Do

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Having a will is essential to a person's financial well-being and estate planning. A will can address such issues as specifying heirs, dispose of specific property to specific persons, name guardians of minor children, establish testamentary trusts, and make charitable bequests.

However, a will has limitations. In short, a will disposes the property of someone who dies (the decedent) that is not already "spoken for" (disposed outside a will). This article describes some of the ways you can have property spoken for and it will be outside the probate process.

Real Property

Tenancy by the entirety. In the case of a married couple, real property held jointly in a tenancy by the entirety (a form of joint ownership that can be used by married couples) passes directly to the surviving spouse and independent of any will. For example, Jack and Diane are a married couple who purchased property and hold as tenants by the entirety (e.g., "to Jack, and Diane, his wife"). If Jack dies before Diane, Diane becomes the sole owner of the real property by virtue of how that title is held.

Joint ownership with right of survivorship. Real property owned as a joint tenancy with a right of survivorship is also already spoken for and outside the reach of a will. Owners of real property in this manner all have an undivided interest in the whole property to the extent of their ownership interest. For example, three joint owners with an equal ownership interest each have an undivided one-third interest in the whole property. When one of the owners dies, the remaining owners acquire that the decedent's interest such that the two survivors end up with a one-half undivided interest. (An undivided interest means that each owner has rights and access to the entire parcel; there is no discrete share of property such as 33 1/3% of the area of the property.) If a parcel of real property is owned as a joint tenancy with a right of survivorship by Moe, Larry, and Curly, each of whom has an undivided one-third share of the property, and

Curly dies, Moe and Larry will each get Curly's share in proportion to their ownership interest (equal) so that Moe and Larry will each then have a 50% undivided share of the real property.

Tenancy in common. Real property owned by two or more owners as a tenancy in common own the property with an undivided interest to the extent of their ownership percentage. However, unlike a tenancy by the entirety or joint ownership with a right of survivorship, when a tenant in common dies, his or her share of the property passes to decedent's estate. For example, if there are three owners of real property owning as tenants in common and one has a 50% interest and the other two each have a 25% interest, and the 50% owner dies, the 50% interest become part of the decedent's estate and will be covered by a will.

Other forms of ownership. In addition to these listed above, there are other ways to have the property spoken for. Let's say that in the case of Jack and Diane that after Jack has died, Diane becomes the sole owner. If Diane has a child or other person(s) she would like the property to go to, she can transfer that property to those person(s) and retain what is known as a life estate. A life estate enables Diane to live on the property during her lifetime and upon her death title would pass to those person(s) on the deed.

When does a will speak for real property? So, when, if at all, does a will come in to play when real property is involved? When there is no other owner lined up. In the case of Jack and Diane above, who owned property as tenants by the entirety, Jack's death made Diane the sole owner. If the form of real property ownership does not change and Diane dies, then she is the sole owner, the real property is not spoken for, and it becomes part of her probate estate.

Mutual Funds, Retirement Funds, and Bank Accounts

Mutual funds, retirement funds (e.g., IRAs, 401(k)s, Roth IRAs, SEP Plans), and bank accounts (checking, savings, money market, CDs, etc.) all have for the owner of those funds to make a designation in case of their death.

Bank accounts can be opened jointly with a right of survivorship (not unlike joint real property ownership with survivorship discussed previously) or can be opened "in trust for" one or more persons. A joint owner has access to the account during the co-owner's lifetime and can make deposits and withdrawals. On the death of one other the other joint owners remain the owners and get the deceased's share of the account. Persons named in an "in trust for" account only get access to the account when the account owner dies; they have no rights during the owner's lifetime.

Mutual funds, stocks, and retirement funds all have Transfer on Death options that allow the owner or owners to designate who is to receive the property when the owner(s) die. These directives speak for that and property and supersede what a will might say.

Conclusion

A will is not the exclusive means for disposing of property. A person can make other dispositions of property outside a will during that person's lifetime. It is important to know what property is spoken for and which may be covered by a will. Additionally, if circumstances warrant, property can be placed in a trust, and the property will be disposed of in that manner.

Our firm has extensive experience drafting wills, trusts, powers of attorney, healthcare proxies, and living wills that will express your wishes and meet your needs.

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