Wills and Letters of Intent

A WILL HELPS ASSURE THAT YOUR WISHES ARE CARRIED OUT REGARDING WHAT HAPPENS TO YOUR MONEY, PROPERTY AND OTHER BELONGINGS WHEN YOU DIE. HOW YOU CREATE A WILL, WHAT ASSETS ARE COVERED, AND WHAT HAPPENS IF YOU DIE WITHOUT A WILL ARE IMPORTANT.

A LETTER OF INTENT FAMILIARIZES OTHER PEOPLE WITH YOUR CHILD AND EXPRESSES YOUR EXPECTATIONS AND WISHES FOR HIS OR HER LIFE. A LETTER OF INTENT IS A KEY PART OF EFFECTIVE PLANNING.

"Only those who will risk going too far can possibly find out how far one can go."

— T.S. Eliot

Wills

What is a Will?

Many people have wills (or at least have thought about writing one) and know that they take effect when they die. Many know why they have (or should have) a will and the will's general content.

What many people don't know is that wills can range from very simple to very complex documents that outline your wishes after death and that wills are important even if you don't have a lot of money or other belongings ("assets"). Wills should outline your wishes and include certain language so that your affairs are wrapped up properly and efficiently. They must be signed and witnessed.

In your will, you set out many instructions that will take place after your death. Your will should state who will receive your assets, which make up your "estate," after your death. The people who receive your estate are called "beneficiaries" (or "legatees"), and you can spell out how you want your estate divided among them.

It should also name a "personal representative" (formerly called an "executor") who will handle your estate and make sure that it passes to your beneficiaries as you have instructed. If someone dies without a will, or the person named in the will is unable to serve as the personal representative, then someone who is willing to serve may petition the court to be appointed personal representative. The court will consider the person's relationship to the deceased individual in making the appointment.

Your will can serve some other important functions, such as naming a guardian for your minor or disabled children. If you have a minor child, you can state in your will who you want to serve as guardian after the death of both parents. If you have been named the guardian of your adult child with a disability, you should also state in your will who you want to be his or her guardian upon your death. Unless there are unusual circumstances, the court will comply with your wishes. Even if you have not been appointed guardian, you should also specify who you would want to take on that role if guardianship becomes necessary after your death.

Your will can also state that a trust will be created for your child or someone else and that it will take effect when you die. This option is very important if you are planning for someone who has a disability, especially if he or she receives government benefits. A supplemental needs trust can receive that child's share of your estate so that his or her benefits will not be jeopardized.

If you decide to revise a will, you should consult a lawyer to assure that your desired changes are made in compliance with legal requirements to assure that your will is not invalidated.

How Do You Create a Will?

In order to sign, or "execute," a will, you must be competent in that you understand what assets you own and who will receive your assets when you die. You must sign the will in the presence of two witnesses. The witnesses must then sign the will in your presence. Remember that if your wishes or situation changes, you can revoke or change your will.

You should hire an attorney to prepare your will. The attorney should meet with you and discuss your wishes as to your personal representative, beneficiaries, guardians, how your estate will be distributed, and any other stipulations that may be included in your will. After your attorney drafts your will, you should not hesitate to ask for clarification of the legal provisions it contains.

Some people who have few assets write their own wills, using form books or sample wills. However, we do not recommend "do-it-yourself" wills because if your will is not written correctly, your plans and wishes may not be carried out and you could inadvertently make your child ineligible for needed financial and health care benefits.

If you already have a will and are unsure of whether it is sufficient, have an attorney familiar with disability planning review it. If you want to include a trust, have a large number or variety of assets, or have other issues that should be covered in your will, it is better to hire an attorney who has the training and expertise to address issues important to your personal situation. This is especially important if you or a family member has disability issues that should be addressed in your will.

Anyone who prepares your will for you should be an attorney. Friends, family members or other professionals who are not attorneys should not prepare a will or any other legal document for you.

What Assets Does a Will Cover?

If you die with assets in your name alone, those assets usually become part of your "probate estate" and are distributed according to your will. Your personal representative will open your probate estate and file the necessary documentation with the Register of Wills in your county. Your estate will have to be kept open for a certain period of time, usually six to nine months.

During that time, your personal representative must determine the exact value of your assets, notify your beneficiaries and creditors that an estate has been opened, and keep an accounting of all estate transactions for the Register of Wills. When all probate requirements have been met, your estate may be distributed to the people (or trusts) you have named in your will. Assets subject to this process are called "probate assets."

Assets that are not subject to this process are called "non-probate assets." These are assets you own while you are alive but that are distributed to others automatically upon your death, rather than through probate. Examples of non-probate assets are joint bank accounts, life insurance, retirement plans, annuities, and property owned by a living trust (described in the next section). If you die owning assets jointly with another person, those assets may pass to him or her at the time of your death.

If a jointly-owned asset is titled as "joint tenants with right of survivorship" or "tenants by the entireties" (for married couples only), the asset will pass to the surviving person, without becoming part of the probate estate. By contrast, if you own assets as "tenants in common" with someone else, your share will become part of your probate estate upon your death rather than pass to your joint owner.

If you own life insurance or retirement plans, the beneficiary you have named will receive the assets upon your death. Non-probate assets do not become part of your probate estate and are not controlled by your will. *For this reason, you must be careful in naming beneficiaries and make sure that your estate plan covers your non-probate assets, as well as your probate assets, so the passing of your non-probate assets is consistent with your estate plan.*

Avoiding probate may be simple and you may not have to give up much control while you are still able to make your own decisions. However, some steps required to avoid probate will limit your ability to make decisions regarding your assets. For example, you may want to retitle your savings account so that it is co-owned by you and your daughter, intending that the account will pass to her upon your death, as a non-probate asset. However, this will give your daughter the right to withdraw money while you are alive so you will have given up a significant amount of security over your finances. In addition,

if your daughter has a disability and receives government benefits, co-owning a bank account could jeopardize her eligibility for the benefits. Actions that will affect how your assets will be handled during your lifetime and upon your death should be considered carefully, with the advice of an attorney.

What Can Happen if You Don't Have a Will?

If you die without a will and you have assets in your probate estate, you will die "intestate" and those assets will pass by the law of "intestate succession." This law lists who in your family will receive your estate and the order in which they will receive it.

For example, many married individuals want their estates to go to their spouse, and to their children only if their spouse is no longer living. However, the law stipulates that if you are married and have children and you die without a will, your probate estate will be divided between your spouse and your children. Distributing your estate this way may not only be against your wishes, but may present some or all of the problems we have discussed regarding benefit eligibility and covering the cost of care if you have a child with a disability.

A will enables you to direct who will receive assets and in what amounts, and whether a trust will be created for a child or other family member with a disability. It also gives you the opportunity to choose who will fill important roles related to both your money and your family member's well-being, such as your personal representative, trustee and guardian (if needed). Your will should be consistent with, and done in conjunction with, a letter of intent.

Letters of Intent

A "letter of intent" is a letter that you write to familiarize people with your child and your expectations. It does not have to meet the special requirements of a will or other legal documents and is not legally binding. However, it should be coordinated with your will so that it clearly communicates information to the appropriate people, such as a personal representative, trustee, guardian, or service provider to help them make important decisions on behalf of your child.

Use plain language, rather than technical language, when you write your letter of intent. You should ask your attorney to review your letter to make sure that it does not contradict your will in any way and to make sure that it is thorough and easy to understand.

It is a good idea to make the drafting of a letter of intent a group effort, including input from your child for whom the planning is done, family members and close friends. The purpose is to provide guidance to others who may provide care, support, or other assistance for your child. Times change and it is impossible to foresee the future so a general outline of your expectations, hopes and wishes may be better than rigid requirements.

A letter of intent should describe your child now and explain your, and your child's, expectations and preferences regarding his or her future in a variety of areas:

- Living arrangement
- Education
- Employment or other meaningful daytime activity
- Supports and services needed in all aspects of life
- Important relationships to maintain
- Medical history, health care needs, medication, and therapies
- Abilities and needs regarding things like communication, independence in daily living and personal care, money management, and decision-making
- Likes/dislikes and preferences (e.g., social/recreational activities, religion, and foods)
- Effective ways to work with, and support, your child
- Financial information: government benefits, bank accounts, trust, life insurance
- Other "important things to know" about your child (e.g., habits, behavior, wishes)

See *Appendix E* for a list of specific questions to consider.

The information you cover and the degree of detail you provide will depend upon your child's ability to clearly communicate his or her own wishes and likes and dislikes. Include your child's name and date of birth in the letter.

Also, attach a list to the letter that includes the names and phone number of important people or agencies involved in your child's life. This might include doctors and therapists; service providers; a guardian; trustee; representative payee for benefits; and people who are important to maintain relationships with. Also include the location of important documents *(see Appendix I)*.

Your should periodically review and update your letter of intent when significant changes occur. Some parents review their letter of intent around the time of their child's birthday each year. Sign your letter and make certain that important people in your life either have a copy of your letter or know where to locate it.

Example

April 20, 1999

Letter of Intent for Mark Philip Smith
SS #: 555-55-5555
DOB: 5-17-86

Dear family and friends,

We write this letter to convey our hopes and wishes for our son, Mark Philip Smith's, future.

We hope that the information we have provided will help the people and organizations who assist Mark to know him better and to support him to be as fulfilled, happy and independent as possible.

We envision Mark living in a home that he rents, rather than a home owned or rented by a service provider. He should be capable of this with the right support. Mark needs occasional reminders to thoroughly complete his personal self care and household chores. Mark helps with meals and is becoming more independent with the use of picture cards for the recipes. Although he doesn't fully understand all money concepts, he can purchase what he wants independently in stores. We envision Mark with a bank account when he becomes an adult, with assistance to manage it.

We see Mark working in a job in the community rather than in a workshop and he has expressed this as his preference. It is too early to know what type of work Mark will choose, but he will require assistance to locate a job and likely ongoing support. Our hope is that the agency that supports him on the job will work to increase Mark's independence in the workplace and identify co-workers to provide support as much as possible.

We believe social life is as important as work. Mark likes to be with others. However, he usually needs assistance to find friends and plan activities, although we are working with him to be more independent because this is something that is important to him. Mark's preferences and wishes may change over time, and we ask those of you involved with him to take the time to truly determine what he is interested in. Some of his current interests include swimming, movies, sports and hanging out with his brothers doing just about anything.

Our hope is that Mark can live close enough to his brothers, Randy and Gary, to visit regularly. We hope Randy and Gary remain involved as much as possible, even as their lives get busy. Other important people to maintain relationships with are Mark's aunt Dottie and uncle Gordan, cousin Stacie, his friends Brandon and Jesse Frederick, and Sandy Warner who is a close family friend.

Mark has mental retardation and epilepsy. His seizures are well controlled and he typically goes several weeks without a seizure......

Planning Options

If you would like to leave assets to your child or someone else, you may name that person in your will, or name him or her as a beneficiary of a non-probate asset, such as a life insurance policy. When you die, the person will become the owner of the money or assets and may spend them, invest them, or give them away. If the person has a guardian of property, the guardian will be responsible for investing and managing the money. If your beneficiary has a disability that affects his or her decision-making, but does not have a guardian of property, giving him or her money may not be the best option.

Even if a responsible and caring guardian has been appointed, another important consideration is how the inheritance will affect the person's government benefits. If the person is receiving SSI and/or Medicaid, even an extremely small inheritance may reduce or stop the benefits. The person can reapply for benefits after the inheritance has been spent, but in the meantime he or she must spend the inheritance for food, medical care, services or other items that the benefits were covering. This would leave the person with little or no means to meet other needs or wishes.

What do you do if you want to leave money to your child with a disability but you feel that he or she does not have the skills to handle the money and/or you don't want to affect his or her government benefits? Without adequate information, some people decide to "disinherit" their child, leaving him or her nothing in the will. Unfortunately, people who receive government benefits are making due with bare necessities and even a modest inheritance placed in trust would improve the quality of their lives.

You have the option of creating and funding a supplemental needs trust so that a trustee will be responsible for investing and spending the funds for your child's benefit. The trust funds will not be directly available to your child so his or her government benefits will continue without interruption. You can decide who will receive the funds remaining in the trust after your child dies.

In some cases, parents or other family members leave money intended for a person with a disability to someone else, such as the person's brother or sister, with informal instructions to spend the money for the person's benefit. Even if the "keeper" of the money for someone with a disability used the money as intended, things could happen to take the money out of that person's control. If the "keeper" entered a nursing home, the money would be used to pay the nursing home bill and the person with a disability would not have the right to any part of it. Also, other creditors would be able to take the money to satisfy claims. If the person died, the money would pass on to his or her heirs rather than to the person with a disability.

In summary, there are various options that must be analyzed to determine which is best for you, your family members, and your financial situation.

The Financial Statement worksheet in *Appendix J* can assist you in considering all the resources you may wish to plan with.