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January 2019

Welcome to the NEWSLETTER of Fisher's Law Office, providing you with legal information you can use in your everyday life. In this issue, we discuss Wills, Probate, and Florida's laws of intestate succession. If you have any questions about any of the articles herein, please don't hesitate to give us a call.

What happens if you die without a Last Will and Testament?

It's a little known fact that the Florida legislature has provided everyone in Florida with what is in effect a Last Will & Testament. If you die without a Will, you are considered to have died "intestate" under Florida law.

Intestate succession is covered by F.S. Chapter 732. This statute provides that any part of your estate that is not disposed of in your Will, passes to your decedents as set forth in Florida's probate code.

Why would anyone write a Will if Florida Law provides one for you?

The problem with Florida's probate code is that it has a stirct set of rules on who inherits your estate when you die if you die without a Will. On the other hand, if you write a Will, you have more control over who gets your estate when you die.

For example, Florida Statute §731.102 states that your spouse inherits your entire estate if you die with no children. The statute goes on to state that if you **do** have children, your spouse is given the first $60,000 of your estate; and the balance of your estate is split between your spouse and your children.

Contents of a Typical Last Will and Testament Florida

- Most clients prefer that their spouse inherit their entire estate first and then the children inherit if the spouse passes away first.
- If there are minor children involved, it is extremely important to name a trustee in the Last Will and Testament to protect the children's money until they reach a certain age.
- Some clients want the children's money to be held in trust until age 25—others believe that their children should be trusted to have all their money at age 18—the legal age of majority in the state of Florida.
- A properly written Will also contains a clause that appoints a personal representative—the person who gathers up the assets, pays the bills of the decedent, and makes distributions to the decedent's heirs in accordance with the terms of the Will.

What are the limitations on what you can include in your Will?

Florida Statutes give important rights to spouses who may be omitted from a Will. For example, Florida Statute §732.201 creates an "elective share for surviving spouse," which requires that your spouse must receive at least 30% of the "elective estate".

The elective estate consists of a very broad group of assets that includes all of the assets that go through probate, any bank accounts in the

decedent's name that are registered as "Pay on death" accounts, "transfer on death" accounts or "in trust for" accounts. The elective estate also includes numerous other types of assets.

The purpose of the elective share is to make sure that a decedent does not give his/her spouse less than 30% of the assets upon death.

I regularly warn clients that when they write their Wills that they must provide for their spouses—even if they are separated or otherwise estranged.

Do divorced couples have a right to the elective share of their former spouses?

No. Divorced spouses are not included in the elective share. Once a divorce is finalized, generally there is no requirement to include that person in your Will.

What must one do upon getting a divorce as it relates to an estate plan?

After getting a divorce, I advise clients that it is very important to review the beneficiary designations on workplace 403(b) retirement plans ,401(k) plans, individual retirement accounts (IRAs), bank accounts, insurance policies, annuities, life insurance and other financial products that pass directly to the beneficiary upon death.

We've had sad experience in the past where a client failed to change a beneficiary designation and a former spouse had the right to inherit our client's 401(k) account. This can't happen if you *change the beneficiary designation on all your accounts after you get divorced.*

We strongly recommend that clients also rewrite their Wills upon getting divorced.

How much does probate cost?

The cost of probating an estate has a broad range. A simple estate with a bank account, a house, and other property can be probated with minimal expense and time; but a more complex estate will take more time and money to effectuate the probate process. For example, a "summary administration" for small estates can be $2,000 whereas a "full administration" can cost more depending on the effort involved to satisfy creditors, distribute assets and close the estate.

What are some ways to avoid probate?

Clients who wish to avoid probate can title their assets so that they pass directly to a beneficiary upon death.

For example, pay on death (POD) accounts, IRAs, 401(k)s, life insurance and deeds held as "joint ownership with rights of survivorship" are some of the popular tools clients use. Just a death certificate and filling out a form is all that is required to transfer such accounts.

Clients can also write revocable living trusts, by which all of their assets are transferred into living trust. After death, a trusted "successor trustee" will distribute the trust assets to the heirs named in the trust.

Are there any other special rules in the probate code that clients should be aware of?

One of the most powerful parts of the probate code is the the disposition of homestead property. Homestead property is sacrisanct under Florida law, and is specifically referred to in Article 10 Section 4 of the *Florida Constitution*. This section states that there can be no forced sale of homestead property as result of a money judgment except for the payment of taxes, mortgages and certain construction related liens.

The homestead exemption applies to the first half acre (1/2) of land within a municipality and up to 160 acres outside of a municipality. Because of this protection in the *Florida Constitution*, your homestead can never be seized to pay creditors.

Under the probate code, a Petition to Determine Homestead Real Property is filed with the court and the property passes to the heirs without the payment of any debts owed to creditors. This is a very powerful protection for Florida residents since, under the law, even if your debts far exceed the value of your house, your house can still pass to your spouse/children without having to pay your debts owed to creditors.

Willing a homestead, however, is tricky.

Florida's probate code restricts the right of people to will their homestead if they are survived by a spouse or a minor child. This is to protect families from having their homestead given to a stranger or a person outside the immediate family.

What other property is exempt under Florida's probate code?

Florida's probate code also allows for household furnishings and appliances (worth up to $20,000) to be passed to a spouse and children of the decedent without payment to creditors. The statute allows two motor vehicles to be passed to a spouse or children without payment to creditors.

What is a "family allowance?"

The probate judge has the right to order a lump sum payment (up to $18,000) to be paid to a surviving spouse for the use of the spouse and the dependent linear heirs. This allowance is in addition to any other benefit provided in the Florida probate code.

How old do you have to be to write a Will in Florida?

Florida's probate code provides that you must be 18 years of age or an emancipated minor to make a Will in Florida. This is the only pre-requisite to writing a Will.

Do Wills have to be witnessed in Florida?

Yes. Execution of Wills is an important part of the probate process. Florida law requires that a Testator must sign the Will at the end, and must have at least 2 witnesses. The witnesses must sign in the presence of the creator of the Will, and in the presence of each other. (Out of state Wills which meet the requirement of Florida law are perfectly legal in the state of Florida.) Even handwritten Wills that follow the requirements of Florida law are legal in this state, but such Wills must be properly witnessed to be admitted to probate.

What is "self proof" of a Will?

"Self proof" of a Will is a very important step which requires that the Testator and witnesses, before a notary, declare and acknowledge that the Testator has signed the instrument as his or her Last Will & Testament.

Although the self proof of Will is not an absolute requirement in Florida law, it will prevent the need for a witness to come to court and give testimony that he or she saw the Will executed.

We recently probated an estate for a 96-year-old woman without a "self-proving affidavit." As luck would have it, her lawyer, a man also in his 90's who was a witness to her signing the will was still alive and he cooperated in testifying in court to put the Will into probate.

Can a Will be revoked?

Yes. If you write a new Will which is inconsistent with the old Will the new will takes priority over the old will but the newer Will should always state that the old Will is revoked so that your intent is clear.

Fisher's Law Office Prices for 2019

Consultation (Legal Advice) - $150

Last Will & Testament - $250

Durable Family Powers of Attorney- $75

Living Will - $75

Simple, Uncontested Divorce - $3,000 plus costs

Contested, involved Divorces - $350 an hour

General litigation - $350 an hour

Personal Injury - Percentage of Recovery plus costs.

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Memberships:

- Florida Bar Association **www.flabar.org**
- BV rated by Martindale Hubbell
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