



UNIVERSITY OF MINNESOTA  
**EXTENSION**

# Ag Business Management

*Informing farm families and ag businesses about management issues.*

Estate Planning Series #3 9/2009

## Establishing a Will

Prepared By:

Gary A. Hachfeld, David B. Bau, C. Robert Holcomb, & James N. Kurtz, Extension Educators

### What Is A Will?

A Will is a legal document which lists instructions regarding the distribution and management of your assets. A Will technically directs finances only, with the exception of guardianship. A Will is usually a first step in the estate planning process. However, because of the extra expense and complication of the eventual probate process, the emerging practice is to avoid using the Will as the primary tool for estate planning.

If you are of legal age and of sound mind, you can draft your own Will. However, a Will drafted by an attorney is much more likely to encompass all the estate law provisions, insuring a legal description of your wishes. The expense of having an attorney draft your Will is minimal compared to the potential tax liability and other expenses that can be incurred if an error is made.

A husband and wife should each have a separate Will. A Will can be personalized and great latitude can be taken in how your individual Will is written. Consult with an attorney regarding this issue.

### What Happens If You Have No Will At Death?

Each state generally has a succession law that dictates how assets are distributed if a person dies without a Will, referred to as dying "intestate". In Minnesota, property held in joint tenancy goes to the surviving joint tenant. Life insurance proceeds go to the designated beneficiaries. Any remaining property is distributed according to state law. The spouse and children or next of kin are allocated a portion of the estate based on their relationship, number of survivors and the composition of the estate.

Check with your attorney to determine how Minnesota intestate laws would impact your situation. The issue with the state plan is that it is complex and is not at all flexible. It does not change as your family and financial situation changes. The state plan may provide inadequate income for the surviving spouse.

The state plan may unfairly treat a business or farming heir if assets are equally divided between all heirs. The state plan also lets a judge decide on guardians for minor children and caretakers for your property. In a Will you effectively list your wishes and establish procedure for how your estate is managed and distributed.

### Typical Articles in a Will:

A Will typically contains various articles or sections that outline your wishes regarding a given issue.

Most contain a provision naming a guardian for minor children. The individuals you select for guardians should be consulted in advance and asked if they would be willing to care for your children in the event of your death. Their care would include day-to-day physical care as well as management of their financial affairs. You can name separate guardians for their care and financial matters. A must for young couples with minor children.

Another article names a personal representative to manage and handle the administration of your estate and your Will. Most often a spouse or family member is named to this position. However, anyone may be named. The person or persons named should be someone you trust to handle your affairs fairly and in a business-like manner. The individual or individuals should be consulted in advance. Personal representatives can be paid a fee for their services.

Most Wills have several articles which establish procedures for the distribution of property. These articles should take into account contingencies, such as what if the spouse dies first, both spouses die together or the entire family dies. Similarly, the Will should address what happens if a married child dies or is divorced.

Signatures are an important part of every Will. The document should also be notarized. It affirms the fact that you personally executed the Will and that the

document lists your wishes and directives. Most Wills give special mention of the spouse. You cannot completely disinherit a spouse unless a valid prenuptial agreement has been previously executed or the spouse signs documents agreeing not to accept the inheritance.

Some Wills provide special provisions regarding special family needs. Sometimes, impaired family members are given special attention or bequests. Friends and charities are also mentioned specifically in the Will. Often, farming or business heirs are given special privileges regarding the purchase of the business assets. They may receive a "first right of refusal" or special terms for a buy-out provision enabling them to pay off the non-heirs who have an ownership interest in the business. Sometimes, certain heirs are given an "amount off the top" to compensate for past inequities or previous gifts.

### Types of Wills:

Simple Wills direct everything to the surviving spouse or to children if no spouse survives. For younger people, with small and relatively simple estates, the simple Will can be quite satisfactory. A critical aspect of the Will for the younger family is the naming of guardians if they have minor children. As families and finances grow and there is a need to protect the children further, a more complex Will may be required.

Complex Wills usually create one or more of the following provisions:

1. A trust for minor children provides a manager or 'trustee' of assets designated to the children. The trustee will care for and manage the children's property, attend to the financial care of the children and distribute the property according to your direction.
2. A marital or family trust provides a "trustee" to manage any assets for the spouse.
3. A Will with a testamentary trust can be used to reduce estate taxes since designated assets put into this trust are kept out of the spouse's estate. The surviving spouse receives the income from the testamentary trust but has no management control. Assets in a credit trust pass to children upon the spouse's death. Your designated "trustee" or "co-trustees" manage the property until the trust is terminated.
4. A granted life estate operates much like the testamentary trust, except that the spouse must manage the assets until death when it passes to the children. In a life estate, the spouse has control of the property and receives all net income from the property. The spouse, however, cannot independently sell the property. Establishing a life estate can be a complicated process, so seek legal advice. With current changes in Minnesota law, life estate as a planning tool is not very useful. Minnesota can file a claim to recover the cost of medical assistance payments from life estates and remainder interests put into place **after** August 1, 2003.

Other provisions are possible and should be reviewed with your attorney.

### After You Have Written Your Will:

Keep it in a safe place – your safe or a safe deposit box. There is only one original so you need to keep that in a very safe place. Don't forget to review your Will periodically. It is best to review it frequently, but particularly if any of these events have taken place:

- |                        |                            |
|------------------------|----------------------------|
| -marriage/remarriage   | -death of spouse or child  |
| -birth of children     | -inherit property          |
| -estate growth         | -estate law changes        |
| -divorce               | -health status changes     |
| -move to another state | -children's status changes |

If you wish to change your Will slightly, you may use what is called a codicil (addendum) to make changes in the Will. If you wish to direct certain personal items to certain friends or relatives, a letter of instruction can be drafted and included with your Will. It is referred to in your Will and allows you to direct certain household or family items to whomever you wish. Consider making multiple copies of this document and share them with your children. By sharing your Will and your reasons for what you did with your assets, family discord can be avoided.

### Summary:

A Will is the equivalent of a letter to the judge and court system which automatically starts the probate process. Probate can be costly, time consuming, and is a public process. A Will does not protect your family's inheritance from adverse actions such as law suits.

In order for you to protect your assets, avoid the probate process, and have your wishes implemented in the event you become disabled or incapacitated, you will need to do the following:

- 1- Establish a Revocable Living Trust with "lifetime trust shares" to protect some assets from any adverse actions, **making sure the trust is funded (asset placed into trust)** once established,
- 2- Develop a Health Care Directive including the listing of a disability panel consisting of your current physician, a specialist, and family members along with HIPAA designation, guardianship designation, and a Common Law Power-of-Attorney, and
- 3- Establish a pour-over will to place any new assets into the trust.

**Copyright 2009. Regents of the University of Minnesota. All rights reserved.**

**Caution:** This publication is offered as educational information. It does not offer legal advice. If you have questions on this information, contact an attorney.

*The University of Minnesota, including Minnesota Extension, is an equal opportunity educator and employer.*