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EC77-865 Have It Your Way By Making A Will

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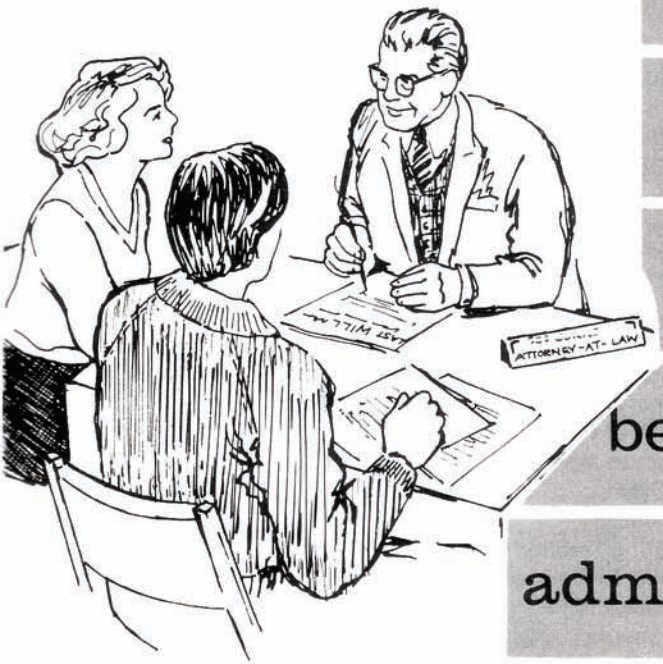
EC 77-865

HAVE IT YOUR WAY BY MAKING A WILL



wills

codicil

executor

probate

testator

beneficiary

administrator

self-proved will

heir

elective share

Institute of Agriculture and Natural Resources

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Leo E. Lucas, Director

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Have it YOUR WAY
By making a will

John R. Uhrich[1/]
David Aiken[2/]
Philip A. Henderson[3/]

Let's talk of graves, of worms, and epitaphs
Make dust our paper and with rainy eyes
Write sorrow on the bosom of the earth
Let's choose executors and talk of wills. . .

Richard II

INTRODUCTION

Making a will is not the sad and gloomy picture painted by some people. Quite the contrary! A person who makes a will is creating his or her own blueprint for the future. A will, like life insurance, social security, or retirement plans, provides security and peace of mind. The person who has a will made can rest assured that property and loved ones will be taken care of precisely in the manner he or she desires.

Too many persons postpone or even refuse to think about making a will. Any unnecessary delay or inaction may have a dramatic impact on family, relatives, friends, and others. At the very least, a person should be aware of what happens to loved ones and property when one fails to plan for the future by not making a will. A person who is dissatisfied with those results should either make a will or engage in some other type of estate planning.

This publication presents basic information about wills, one of the most important documents a person can make or possess. This information can be useful both to those who have already made a will and those who have not.

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The statutes relating to wills, called the Probate Code, have recently been changed by the Nebraska legislature. Where appropriate, changes between the pre-1977 Probate Code and the new Code, which was effective January 1, 1977, will be highlighted.

WHAT IS A WILL?

A will is a written document containing a set of instructions to be implemented upon the death of the person (testator) making the will. A will takes effect only upon death; thus, a will can be changed at any time during the testator's life. Beneficiaries named in the will acquire no rights in the property until the testator's death.

Typical provisions in a will include: disposition of property, naming an executor to administer the estate, and selecting a guardian to care for dependent children in the event one or both parents die. Generally, the testator can give property to whomever he or she wants and in any manner he or she desires.

However, the testator's power to dispose of property is qualified to some extent by statute. For example, one spouse cannot totally disinherit the other spouse (see section on "Spouse and Children Omitted from a Will"). Similarly, the testator is given a wide range of discretion in choosing an executor. The executor can be a resident of Nebraska or any other state. The only statutory restrictions are that the executor must be 19 or older and not be a person whom a court considers unsuitable for such a position. Finally, a court will generally approve and appoint as guardian the person named by the testator in the will. Only when the guardian named is considered to be unfit will a court refuse the appointment of that person as guardian.

The purposes of a will are at least twofold. First, a will tends to force a person to make decisions regarding: the disposition of property; special provisions for the spouse and children; and any provisions relative to funeral arrangements, disposition of the body, etc. The process of making a will early in life can alert the testator to means of passing property other than by will. Early estate planning and legal advice can save taxes and result in a more equitable treatment for all concerned.

Second, a will is legal evidence of a testator's intended

disposition of property. Since the testator cannot speak after death, the will speaks for him. Thus, it is important that the will says exactly what the testator intended. For this reason it is generally not advisable to write your own will even though you have a legal right to do so. A will drafted by a competent attorney can provide for the orderly disposition of a person's property and safeguard against unnecessary delay and expense in administering the estate.

WHO SHOULD HAVE A WILL?

Under the new Nebraska Probate Code anyone who is 18 or more years of age can make a will. Anyone who owns property (or who might receive an inheritance), or has minor children or other dependents, should have a will.

In the event a person dies without making a will, the Nebraska statutes determine how property shall be divided (Figure 1). These statutes are commonly referred to as the laws of intestate succession (a person who dies without a will is said to have died intestate). In disposing of property by the laws of intestate succession, the personal desires and wishes of the deceased person are not taken into consideration. The property passes to the heirs according to the rigid requirements of the law.

The laws of intestate succession may prove unsatisfactory for the following reasons.

A primary concern to many people is the minimization of estate taxes. Federal estate taxes can be more severe when a person dies without a will, particularly in large estates. Nevertheless, it is important to recognize that making a will does not, in itself, guarantee a reduction in taxes. Only through careful estate planning can estate taxes be reduced.

A major concern of married persons may be to insure that the surviving spouse is better provided for than he or she would be under the laws of intestate succession. Notice that under the laws of intestate succession the surviving spouse receives only a portion of the estate when the deceased is survived by children or parents.

Every minor child who is left without parents must have a guardian. Parents can have something to say about who the guardian

Figure 1. Laws of Intestate Succession.

	Spouse	*Children and/or their issue*	*Parents*	*Brothers, Sisters, and/or their issue*	*Grandparents and/or their issue*	*Next of Kin*	*State*
Situation I: Survived by spouse and children (or their issue);[a] children are all issue of deceased parents and surviving spouse.	First 35,000 + ½ the balance b	Remainder of the estate b					
Situation II: Survived by spouse and children (or their issue); one or more of children not the issue of surviving spouse.	50% b	50% b					
Situation III: Survived by spouse and parents. No surviving children or issue thereof.	First 35,000 + ½ the balance b		Remainder of the estate				
Situation IV: Survived only by spouse i.e., no parents, no children, or issue of children.	100% b						
Situation V: Survived by children and/or issue of children. No surviving spouse.		100% b					
Situation VI: Survived by parents. No surviving spouse, children, or issue of children.			100%				
Situation VII: Survived by brothers and/or sisters and issue thereof. No surviving parents, spouse, children, or issue of children.				100%			
Situation VIII: Survived by maternal and paternal grandparents and their issue. No surviving parents, brothers and sisters (or issue thereof), spouse, children, or issue of children.					50% Maternal GP, 50% Paternal GP or their issue c		
Situation IX: Survived by next of kin. No surviving parents, grandparents or their issue, brothers and sisters or their issue, children or their issue.						100%	
Situation X: No surviving relatives.							100%

[a] *Issue—means lineal descendants, i.e., children, grandchildren, great-grandchildren, etc.*

[b] *The surviving spouse or children are entitled to a homestead allowance of $5,000, exempt property allowance in household furniture, autos, furnishings, appliances and personal effects of $3,500, and family allowance for one year. These allowances are in addition to the intestate share.*

[c] *If there is no surviving maternal grandparent(s) or issue thereof, the entire estate passes to the living paternal grandparents or issue thereof. Similarly, if there is no surviving paternal grandparent(s) or issue thereof, the entire estate passes to the living maternal grandparent(s) or issue thereof.*

would be by nominating someone in the will to act as guardian in the event that either or both parents die. A few of the advantages in naming a guardian in a will include: an open and frank discussion between both parents as to whom they consider best suited for raising their children; contacting the prospective foster parents to see if they would be willing to accept such a responsibility; and avoiding any possible disputes among surviving family members over who should be the dependent's guardian.

The will can also specify the particular items of property each child is to receive and thereby prevent possible disputes among the children as to which of the family heirlooms each is entitled. Also, a parent may wish to provide differently for a child with special needs, such as a handicapped child. Under the laws of intestate succession the individual needs of the child are not considered; each child receives an equal share.

Married couples with no children may wish to execute a will to provide a "death in common accident" clause. Such a clause provides for the distribution of property in the event both spouses should die from a common disaster or accident. For example, suppose that a husband and wife were involved in a common accident in which the husband was killed instantly and the wife dies a short time later. Neither spouse had made a will. Under Nebraska's new Probate Code an heir must survive the decedent by 120 hours in order to inherit the property. Therefore, if the wife died within five days after the husband's death, all his property would go to his blood relatives. On the other hand, if the wife survived the husband by more than five days, his property would pass through the wife to her blood relatives. If these provisions are unsatisfactory, a will is needed to provide a different distribution of the property.

A husband and wife may also benefit by including in their separate wills a clause which states a presumption as to whom should be considered the first to die in the event of a common accident. This presumption can sometimes result in a considerable savings in estate taxes at their death.

HUSBAND AND WIFE WILLS

Not only is it important for the husband to have a will but the wife should have one also. If a wife survives her husband, her will not

only controls any separate property she may have owned but also all the property she acquired upon the death of her husband. Property that is typically acquired by the wife on her husband's death includes: property held by husband and wife as joint tenants with rights of survivorship; property given to the wife in the husband's will; life insurance proceeds payable to the wife; and other similar arrangements. This property, in addition to the wife's separate property, would become a part of the wife's estate. If she died without a will, all of the property in her estate would be distributed to her heirs according to the laws of intestate succession.

Even though a wife may presently own an insignificant amount of property, she should not delay in making a will until the time when she acquires property on her husband's death. At that future time, the wife may be unable to make her will. For example, a common accident might kill the husband instantly and result in the wife's death a short time thereafter.

Joint and Mutual Wills

In some instances, married persons have made joint and mutual wills. A joint and mutual will is a single will for both spouses with reciprocal provisions. The will usually provides for the distribution of the property first upon the death of one spouse and then upon the later death of the other spouse. The couple may also sign a separate agreement which waives each spouse's right to change the will.

The joint and mutual will is generally a poor instrument for a husband and wife. Assuming a separate agreement is signed, the death of a spouse will prevent the surviving spouse from changing the provisions in the will even though conditions may have changed substantially. Flexibility in planning an estate is lost. In addition, joint and mutual wills are often contested in court. To avoid these problems and achieve a better result, the husband and wife should each separately execute their own will.

REQUIREMENTS FOR A VALID WILL

The minimum statutory requirements for making a will include: proper age, sound mind, signature of two competent witnesses, and the signature of the testator. A court will totally disregard a will if

these statutory requirements have not been complied with. The assets of the decedent will not be distributed in the manner set forth in a will not validly executed, but instead, according to the laws of intestate succession.

Minimum Age

The new law lowers the age requirements for making a will. Prior to 1977, a person was required to be at least 19 or married in order to make a will. But after January, 1977, any individual who is at least 18 or is married may make a will.

Sound Mind

A person is presumed to be of sound mind when the will was made, unless it can be shown otherwise. The Nebraska courts have adopted a general set of guidelines for determining whether the testator possesses sufficient capacity for making a will. A person is of sound mind if, at the time the will was made, the testator:

1. Knew that he or she was making a will.

2. Knew the extent and character of the property.

3. Knew the proposed disposition of the property.

4. Knew the objects of his or her bounty, i.e., who would receive the property under the will.

If any one of these elements is lacking, the testator will not be considered of sound mind to make a will.

The mental capacity to make a will is completely different from the capacity required to be convicted of a crime, enter into contracts, etc. Perfect sanity is not required. A person has sufficient capacity to make a will even though that person is subject to: failing memory, vacillating judgment, childishness, slovenliness, eccentricities, peculiarities in habit and speech, or even delusions and hallucinations, provided they do not render the testator insensitive to family ties. Senility, the inability to transact business, or even partial insanity, do not necessarily disqualify a person from making a will.

Signatures

The will must be in writing and be signed by at least two

individuals each of whom witnessed the testator's signature on the will. The witnesses need not be together when witnessing the testator's signature nor be shown the contents of the will. The testator may also sign the will outside the presence of the witnesses if he or she later acknowledges to them that the signature is his or that the document is his will.

Witnesses

Any competent individual may witness a will. A competent witness is one who has sufficient mental capacity to appear before a court. Individuals who are fairly young and not apt to leave the community make the most desirable witnesses. Such persons are more likely to be available for testimony when the estate is finally probated. Witnesses may be required to testify regarding: the signature of the testator; the testator's state of mind; or any other circumstances which may cast doubt upon the validity of the will.

Although the new Probate Code allows an interested party (i.e. an intended beneficiary under the will) to witness a will, it is generally advisable to have two disinterested parties as witnesses. Unless there is at least one disinterested witness, an interested witness is entitled only to an amount equal to that which he or she would have received if the decedent had died without a will. Thus, the interested witness may be prevented from taking all or part of the property he or she would be entitled to under the will.

Additional information on the need and use of witnesses is contained in later sections on Self-proved Wills and Holographic Wills.

Undue Influence

In addition to the formal requirements described above, the testator must have made the will without any constraint or undue influence by others. Undue influence is any mental or physical coercion which causes the testator to dispose of his property contrary to his own wishes. Where undue influence can be established, the will may fail in its entirety or may be declared invalid only as to those gifts affected by the undue influence.

The Nebraska courts will declare a will invalid because of undue influence only where all the following conditions are met:

1. The testator was in a weakened physical or mental state.

2. An opportunity existed for a person to exercise the undue influence.

3. The person charged with undue influence benefited, directly or indirectly from the exercise of undue influence.

4. The provisions in the will are unnatural or unfair and thus apparently the result of undue influence.

Mere persuasion or giving advice would not alone constitute grounds for invalidating a will. Similarly, the mere existence of a confidential relationship between the testator and the beneficiary (e.g. guardian and ward, attorney and client, doctor and patient) does not in itself amount to undue influence. However, such a confidential relationship may amount to undue influence where the guardian, attorney or doctor received an "unfair" amount and took an active part in preparing the will.

SELF-PROVED WILL

A self-proved will is one where the testator and witnesses declare in writing before an authorized notary public that the will was validly made. This declaration is then attached to and made a part of the will.

Under the old law the testimony of one or both witnesses, or proof of the genuineness of the testator's signature, was required in order for a will to be admitted to probate. In some instances, it may have been necessary to execute a new will when one or both witnesses died. Under Nebraska's new Probate Code, a will that is self-proved may be admitted for probate without the testimony of any witnesses or proof of the testator's signature. Consequently, the self-proved will eliminates any necessity for remaking the will when a witness dies.

A will not self-proved usually requires the testimony of at least one witness at the time a will is formally probated. But if a witness is not present within the state or is unable to testify, the validity of the will may be proved by other evidence such as handwriting samples of the testator, the testimony of two disinterested parties that the signature to the will is the testator's, etc.

HOLOGRAPHIC WILL

A holographic will is one written by the testator himself. For a holographic will to be valid in Nebraska three requirements must be met:

1. The major provisions of the will must be in the testator's own handwriting.

2. The will must contain the signature of the testator someplace on the will.

3. The will must be dated.

The major difference between a holographic will and any other validly executed will is that the holographic will does not require the signature of attesting witnesses. Consequently, the holographic will is particularly susceptible to forgery, as suggested by the many purported wills of the late Howard Hughes.

A holographic will may be of some benefit to a person who has little property to leave and who cannot afford the expense of a formally executed will. The holographic will should not, however, be used as a substitute for the services of an attorney, particularly when a large estate is involved.Consulting an attorney can be beneficial in providing suggestions to reduce taxes and in drafting the will to avoid unnecessary difficulties in interpreting the will.

WILLS MADE IN OTHER STATES

The formal requirements for making a will vary from state to state. Nebraska residents who have made wills while living in other states may wonder whether such wills are valid in Nebraska. Under the new Probate Code, Nebraska will recognize the validity of a will that was validly executed in another state. For example, a will validly made by a person in Virginia and who later moved to Nebraska can properly be admitted for probate in a Nebraska court. Although Nebraska will recognize the validity of a will made in another state, it may be desirable to execute a new will in this state. Making a new will may eliminate any possible problems regarding which state law to use to interpret the will.

Each state also has its own rules to determine the meaning of a will and the legal effect of its disposition. Typical rules of

interpretation deal with such problems as: the death of a beneficiary before the testator; the apportionment of death taxes among the beneficiaries; the disposition of property subject to mortgages; etc. Nebraska's new Probate Code allows the testator to designate which state law will apply in interpreting the will. He may choose the law of the state where he lives, where his property is located, or the law of any other state.

When the testator does not designate a particular state law, the general rule is that a will leaving personal property is interpreted according to the law of the state where the testator lived at the time of his death. As to real property (i.e. real estate), the interpretation of a will is governed by the state where the property is located. For example, suppose that Smith, a Nebraska resident, made a will in which he left personal property (stocks, bonds, household goods) located in Nebraska and real estate located in Iowa. Since the will did not stipulate which law would be used to interpret the will, Nebraska law would control the personal disposition of the property while Iowa law would control the disposition of the real estate.

The designation of a particular state's law will insure that the will would be interpreted consistently with that state's laws. The testator should thoroughly disclose to an attorney the location of all of his property. This will enable the attorney to draft the will in the most desirable manner. Failure to disclose the location of property may result in a different disposition of property than desired by the testator.

REVOKING A WILL

A will is not effective until the death of the testator. The testator can revoke or modify his will at any time during his lifetime. A will may be revoked in three different ways.

First, a will may be revoked by a subsequent will which expressly or by implication revokes an earlier will. A revocation clause, such as "I hereby revoke all prior wills," is commonly used for this purpose. In the absence of a revocation clause, a subsequent will can revoke a previously executed will only to the extent it is inconsistent with the prior will. The provisions in the first will that are not inconsistent with the second will remain intact. For example, suppose that Smith

died leaving an estate consisting of $1,000 cash and a large tract of real estate. During his lifetime, Smith made two wills. In the first will, Smith left Sandy $500, Tom $500, and the residue of his estate to his wife. Smith then made a second will in which he gave $1,000 to Sandy. The second will did not contain an express revocation clause. Both wills would be read together to determine how Smith's property is divided. Sandy would receive $1,000 under the second will. Tom would receive $500 and Smith's wife the residue of the estate under the first will. To satisfy the gift to Tom $500 worth of real estate might be sold.

Second, a will may be revoked by being burned, torn, obliterated, or destroyed by the testator with the intent of revoking the will. A will should be destroyed once it no longer expresses the last wishes of the person making the will. When more than one will is found after the testator's death, it is often difficult and expensive to determine which will the testator meant as his last will and testament. The destruction of an obsolete will can avoid any possible court litigation over which will should be admitted to probate.

Third, if after executing a will, the testator is divorced or his marriage is dissolved or annulled, the divorce, dissolution, or annulment revokes any disposition made by the will to the former spouse. The former spouse will receive nothing from decedent's estate. The share that would have gone to the spouse passes to the heirs according to the laws of intestate succession. Thus, it is desirable for the testator to execute a new will after the marriage has ended.

PERIODIC REVIEW OF A WILL

Frequently, conditions change after a will is first executed. It is important for the testator to review the will periodically. If necessary, the will should be amended or revised to conform with changing circumstances. Following are some of the changes requiring a review of your will.

Changes in Family Relations

1. Divorce.
2. Death of a spouse.

3. Marriage.
4. Birth, death, marriage, divorce, adoption, or illness of a child or grandchild.

Changes in Economic and Personal Conditions

1. Increase or decrease in asset holdings.
2. Acquisition of property in a different state.
3. Change in employment.
4. Retirement.
5. Change in business interests—new partnerships or corporations.
6. Change in the health of testator or spouse.

Other Changes

1. Changes in the probate law.
2. Changes in state and federal tax laws.
3. Change of residence to a different state.
4. Death of an executor, trustee or guardian.
5. Death of a beneficiary or change in attitude toward beneficiary.

CHANGING A WILL

To change a will, the testator can simply revoke an existing will and make a new will; or the testator can leave the will intact and add a codicil to it.

Codicils

A codicil is a supplement which alters, modifies, or expands provisions of the will. A codicil must be executed and witnessed with the same formalities as a will. Since a codicil is an amendment to a will it should be attached to the original so that the codicil is not lost or destroyed.

The testator cannot change provisions in the will by simply making changes in the original document. For example, suppose that Smith's will provided for a $5,000 gift to Sandy. Later, Smith desired to increase the amount Sandy would receive. Smith drew a

line through $5,000 and wrote $6,000 above it. Sandy would not receive the larger gift at Smith's death because the change to the will was neither properly witnessed nor signed by the testator. A new will or properly executed codicil should be made by the testator whenever a change is desired.

Supplementary Statements

At the time a will is executed, the testator may be undecided or may wish to make changes later in disposing of family heirlooms or other personal property. To alleviate the necessity for executing a new will each time a change is desired, Nebraska's new Probate Code provides that a will may refer to a written statement or list to be written by the testator which disposes of these personal items. The statement must be dated, signed by the testator, and describe the items and beneficiaries with reasonable certainty. Only certain types of tangible personal property may be disposed of in the written statement. Note that money, evidences of indebtedness, documents of title, securities, and property used in a trade or business may not be disposed of in this manner.

THE SPECIFIC GIFT OF PROPERTY

There are essentially four different types of gifts that can be made by a will: a specific gift of property; a gift which is payable out of a particular fund; a general gift; and a residuary gift of any remaining property. A specific gift is made when the testator desires the intended beneficiary to receive a certain item of personal or real property.

Gifts Subject To Mortgages

Usually the testator wants to treat each family member equitably. Achieving an equitable distribution poses some unique problems for the testator when the property specifically bequeathed is subject to a mortgage or other encumbrance. Nebraska's new Probate Code makes a substantial change relating to encumbrances on specifically devised property. For example, assume that Smith, in his will, left a tract of land, Blackacre, to his son John and another tract, Whiteacre, to his son Fred. Included in the will was a general

directive to pay all debts of the decedent. It was Smith's wish that each son was to receive an equal amount of property. At the time of Smith's death, both Blackacre and Whiteacre had a fair market value of $20,000. However, there remained a $10,000 unpaid mortgage on Blackacre. Under the old law, the estate would pay the $10,000 mortgage before distributing Blackacre to John. Both Fred and John would receive an equal $20,000 gift. However, the new Probate Code provides that the estate will not pay an encumbrance on specifically devised property *regardless of a general directive in the will to pay all the decedent's debts.* Under the new Probate Code John would take Blackacre subject to the $10,000 mortgage, while Fred receives a $20,000 equity interest. Such a result is contrary to what Smith intended.

In light of this change, the person who has made specific gifts of property subject to mortgages should discuss with an attorney how this change in the law will affect the disposition of his or her property. It may be necessary to change the will or to make other arrangements so that any one beneficiary is not treated unfairly.

Alternate Gifts

A testator should seriously consider providing in his will an alternate gift for a beneficiary of a specific gift in the event the particular item of property is not in the estate at the time of testator's death. Otherwise, the beneficiary of a specific gift may unintentionally be denied a share of the estate. For example, suppose that Smith bequeathed Blackacre to his son Fred, the remainder of his estate passing to his nephews and nieces. During his lifetime, Smith sold Blackacre and with the proceeds purchased Whiteacre. On Smith's death, Whiteacre would not pass to Fred, but instead to the nephews and nieces. To avoid this result, the will could specifically provide that the beneficiary was to receive an equivalent amount of property in the event the particular item is sold, stolen, lost, destroyed, etc.

DEATH OF A BENEFICIARY

A testator should carefully examine his will upon the death of a designated beneficiary to determine whether the will needs to be changed. If the testator does not subsequently change the will, the

gift the beneficiary was to have received passes in one of two ways.

First, the will may contain a clause providing an alternate beneficiary for the gift in the event the primary beneficiary predeceases the testator. The following is a typical clause used for such purposes. "I give my property to my wife. If my wife does not survive me, the property shall go to. . .(name of alternate beneficiary)."

Second, in the event the will fails to provide an alternate beneficiary, the gift which the deceased beneficiary was to receive is disposed of in the following manner under Nebraska's Probate Code. If the intended beneficiary is related to the testator in any degree of kinship, the issue (children, grandchildren, great-grandchildren, etc.) who survive the beneficiary will take the gift. However, a gift which was to have gone to an unrelated beneficiary passes not to his issue but rather to the person who is the beneficiary of the residual estate. For example, Smith died leaving $10,000 to his brother Bill, $500 to his neighbor Ned, and the remainder of his estate to his wife Sarah. Both Bill and Ned predeceased Jones. Bill is survived by his son and Ned is survived by his two children. The $10,000 gift to Bill passes to his son. The $500 gift to Ned will fall into the residual estate and pass to Smith's wife Sarah.

GIFT'S MADE DURING TESTATOR'S LIFETIME

During his lifetime, the testator may bestow a gift upon a person who is also a beneficiary under the will. For example, suppose that Smith left $10,000 to Tom in his will. Later, Smith gave Tom $5,000 to start his own business. Smith may have intended the $5,000 gift to reduce the amount Tom was to receive upon his death. If this is true, the new Probate Code states that either Smith's will must specifically provide for a deduction of lifetime gifts or Smith must declare in writing that the $5,000 gift is to be deducted from the amount received under the will. Otherwise, Tom will be entitled to the full $10,000 on Smith's death.

In making a will, the testator should consider the possible effect of making lifetime gifts to intended beneficiaries. The testator who desires to reduce the testamentary share of a beneficiary who receives gifts during his lifetime must either: (1) so provide in his

will; or (2) execute a written statement, when the gift is made, stating that the gift reduces the share the beneficiary is entitled to under the will. The writing should be kept with the will so that it is not lost or destroyed by the time the will is finally probated.

SPOUSE AND CHILDREN OMITTED FROM A WILL

A spouse is not required by law to make provisions in a will for the other spouse. However, the surviving spouse is protected by statute against the possibility of disinheritance by the deceased spouse.

Elective Share

Regardless of what may pass to a surviving spouse by will, or by intestate succession if the decedent dies without a will, the surviving spouse may take a one-third interest, called the elective share, in the "augmented" estate (described below) of the decedent. The provisions set forth in the will for the surviving spouse would still apply and that property would be deducted from the one-third elective share. If the decedent dies without a will the intestate share received by the surviving spouse would also be deducted from the one-third elective share.

The augmented estate is computed by adding to the decedent's estate the value of two additional groups of property. In the first category are transfers whereby the decedent was deliberately transferring his property to people other than his wife in order to reduce the size of his estate and thereby reduce the share that the surviving spouse would be entitled to. Such transfers include:

1. Gifts made within two years of death, in excess of three thousand dollars to any one person.

2. Any transfer whereby the decedent's property is held in joint tenancy with rights of survivorship with someone other than his spouse.

3. Any transfer whereby the decedent retained substantial control over the property at the time of death.

The second category includes assets such as proceeds from life

insurance, pension plans, gifts, and other similar transfers received by the surviving spouse. Assets in this category are then deducted from the surviving spouse's one-third elective share. In this way, the distribution of the estate is not disturbed as long as the surviving spouse has adequately been provided for elsewhere.

Seldom will the elective share provision benefit the surviving spouse. The surviving spouse is generally adequately provided for, either in the will or by other arrangements. The following, however, is an example of a situation where the surviving spouse would benefit from the elective share provision.

Suppose that Smith died leaving an estate valued at $100,000 in which he gave $10,000 to his wife and the remaining $90,000 to his favorite charity. In addition, Mrs. Smith was the beneficiary of a $40,000 life insurance policy on Mr. Smith's life. Mr. Smith is survived by his wife and son. Three years ago, Smith gave $12,000 to each of his three brothers. A short time later, Smith transferred as a gift $60,000 into a bank account which was held in joint tenancy with rights of survivorship with his son.

Since the $36,000 was given to the three brothers more than two years prior to Smith's death, that amount would not be included in the augmented estate. The augmented estate would include the $100,000 estate, $60,000 joint bank account, and $40,000 life insurance proceeds. Mrs. Smith's elective share would be 1/3 of $200,000 or $66,667. The $40,000 life insurance proceeds and the $10,000 left Mrs. Smith in the will would be deducted from her elective share. The two items would lack $16,667 to make up the elective share. The difference ($16,667) would come out of the gift to charity and the joint bank account. Nine-fifteenths $\frac{90{,}000}{(90{,}000 + 60{,}000)}$ or $10,000 would come from the $90,000 gift to charity and six-fifteenths $\frac{60{,}000}{(90{,}000 + 60{,}000)}$ or $6,667 would come from the joint bank account.

Forgotten Spouse

The situation may arise where the testator has executed a will prior to marriage and has not subsequently changed the will to

include the spouse. In such a case, the omitted spouse may receive the same share of the estate he or she would have received if the decedent left no will. Thus, the surviving spouse will take anywhere from half to the entire estate (Figure 1). This provision for the surviving spouse reflects the view that an intestate share is what the decedent would want the spouse to have if he had given some thought to the relationship between his old will and the subsequent marriage. The other provisions in the will remain in effect but only after the spouse has been provided for.

The testator should seriously consider making a new will when he or she marries rather than relying on this provision of the Probate Code. An intestate share may be less than what the testator desires for the surviving spouse.

Pre-Nuptial Agreements

A spouse may waive, wholly or partially, all statutory rights to the other spouse's property by a written contract, agreement, or waiver signed by the spouse, before or after the marriage. Such a contract can deny the surviving spouse any right to an elective or intestate share of the decedent's estate. Typical agreements include the pre-nuptial agreement and the property settlement. A pre-nuptial agreement entered into prior to marriage is particularly advantageous to parties of second or later marriages. Such an agreement can insure that property derived from prior spouses will pass at death to the children of the prior spouse rather than to the new spouse. A spouse's renunciation of the right to share in the other spouse's property is frequently included in the property settlement when a couple is separated or divorced.

Omitted Children

If the testator dies before making provisions in his will for an omitted child, the child will receive an intestate share of the estate. However, the omitted child will not receive an intestate share if it is shown that: the omission was intentional; the testator has made provisions for the child outside the will; or that the testator, at the time of making the will, had one or more children and left substantially all of the estate to the parent of the omitted child.

A will may contain a clause providing for children born after the making of a will. The testator should review his or her will upon the birth of a child to determine whether the new born child is adequately provided for.

EXEMPT PROPERTY AND ALLOWANCES

The new Probate Code grants to a surviving spouse and certain children of the deceased a homestead allowance; an exempt property allowance; and a family allowance. The allowances are paid to the spouse and children prior to the payment of claims by unsecured creditors, beneficiaries, or heirs. Thus, the spouse and children are guaranteed a certain minimum amount of property which is exempt from and has priority over these claims.

Homestead Allowance

A surviving spouse of a decedent who was domiciled in Nebraska is entitled to a homestead allowance of $5,000. The surviving spouse may select any property of the estate to satisfy the allowance. If there is no surviving spouse, the $5,000 will be divided among minor and dependent children. The spouse or children take the homestead property subject to existing mortgages. Also, creditors are entitled to any excess over the $5,000. For example, suppose that a surviving spouse selects as her homestead exemption property having a fair market value of $7,000. The decedent's creditors are entitled to the $2,000 in excess of the $5,000 homestead exemption. The property may be sold to pay up to $2,000 to the creditors.

Exempt Property

In addition to the homestead allowance, the surviving spouse is entitled to a value of $3,500 in household furniture, autos, furnishings, appliances, and personal effects. If there is no surviving spouse, the $3,500 will be divided among the minor and adult children of the decedent.

The $3,500 is in excess of any security interest in these personal items. For example, suppose that the decedent owned an auto valued at $3,500 but on which there remained a $1,000 security interest payable to the bank. Since the net value of the auto would only be

$2,500 the spouse or children can select an additional $1,000 of property to satisfy the $3,500 limit. Notice that the bank does not forfeit its right to collect the $1,000. If that amount is not paid, the car may be sold to pay the secured debt. The spouse or children would then be entitled to any funds in excess of the debt.

Family Allowance

The surviving spouse and minor children whom the decedent was obligated to support are entitled to a reasonable amount of money for their maintenance during the period the estate is being administered. This support is called the family allowance. The amount of the allowance is determined by taking into account the family's previous standard of living and other family resources available to meet current expenses.

These allowances are in addition to any share passing to the children or spouse by will, unless the will provides otherwise, by intestate succession or by elective share. Thus, a total of $8,500 plus an amount for the family allowance will come off the top of the estate for the benefit of the spouse and children.

SUMMARY

A will is one of the most important documents a person will make. It is not advisable for a person to write his own will. An attorney is best qualified to draft the will in accordance with the wishes of the testator, the person making the will.

A will is a written document which contains a set of instructions to be implemented upon death. A will may contain such provisions as the disposition of property; naming an executor to handle the estate; and selecting a guardian to care for dependent children in the event one or both parents die. A will can be changed at any time before death.

Anyone who owns property or has a family should consider making a will. Not only is it important for a husband to have a will but a wife should have one also. A married couple should avoid the use of joint and mutual wills as they destroy flexibility in estate planning and may result in unnecessary court litigation. Remember

that if you don't make a will, state law disposes of your property, and that disposition may be contrary to your wishes.

A person must be of sound mind, 18 or married, and under no constraint or undue influence to make a legally acceptable will. In addition, the will must be signed by the testator and the signature witnessed by at least two individuals. Beneficiaries in a will should not also be witnesses as they may be denied all or part of their benefits under the will to them. A self-proved will can be admitted for probate without the testimony of the witnesses.

A holograph is a will made by a testator himself and is valid even though it is made without witnesses. The holograph should not be used as a substitute for an attorney, however, particularly when a large estate is involved.

A will validly executed in another state may be admitted for probate in a Nebraska court. Some problems of interpretation may arise when a person disposes of property located in different states. A testator may want to designate in the will a certain state whose laws will be used to determine the meaning and legal effect of a disposition in a will.

The original will should be placed in a safe-deposit box or some other special place for safe keeping. A copy of the will should be kept in a place where the testator can easily review its contents. It is important to periodically review the will to keep it up to date. If necessary, the will should be revoked or changed. Otherwise, the will may do more harm than good. A will may be revoked by a subsequent will; by being burned, torn, or destroyed; or by the dissolution of a marriage. A will can be changed by a codicil or by rewriting. Avoid altering or writing on the original will without the advice of an attorney.

A person who has made a specific gift of property subject to a mortgage should discuss with an attorney how the new Probate Code will affect the disposition of his or her property. It may be necessary to change the will or to make other arrangements so that no single beneficiary is treated unfairly.

There are certain contingencies the testator may wish to provide for in the will. First, the testator may want to provide an alternate gift to a beneficiary in the event a particular item is sold, stolen, lost,

destroyed, etc. Second, the testator may wish to designate an alternate beneficiary for a gift in the event the primary beneficiary dies before the testator dies. Third, the testator may wish to include a provision that reduces the property to be received by a beneficiary under a will when the beneficiary has received gifts from the testator during his or her lifetime.

A spouse is not required by law to provide in a will for the other spouse. However, the law does protect the surviving spouse against total disinheritance. Regardless of what may pass to the surviving spouse by will or intestate succession, a surviving spouse may take a one-third interest, called the elective share, in the decedent's "augmented" estate. When a testator executes a will prior to marriage and does not subsequently change the will to include his or her spouse, the omitted spouse may receive an intestate share of the estate. The surviving spouse may waive any right to an elective or intestate share of the estate by a contract such as a pre-nuptial agreement or property settlement.

A surviving spouse and the children are entitled to a homestead allowance of $5,000; exempt property allowance in household furniture, autos, furnishings, appliances, and personal effects of $3,500; and a reasonable amount of money for the maintenance of the family during the period the estate is being administered. These allowances to the family are given a preference over unsecured creditors of the estate and other beneficiaries in the will.

Finally, remember that wills are an important estate planning device for everyone—young, old, married, single, wealthy and the not so wealthy. By making a will, you can write your own blueprint for disposing of your property the way you see fit.

Glossary of Terms

Administrator—see personal representative.

Augmented Estate—the value of the decedent's property to which is added transfers made by the decedent to persons other than the surviving spouse for less than full market value and transfers made by the decedent to the surviving spouse in addition to any share passing to the surviving spouse by will or intestate succession.

Beneficiary—commonly known as one who is entitled to receive personal or real property under the provisions of a will. Other names for a beneficiary include a devisee or legatee.

Codicil—a supplement to the will which alters, modifies or expands the provisions of a will.

Elective Share—entitles a surviving spouse to a one-third interest in the "augmented" estate of the decedent.

Executor—see personal representative.

Exempt Property—entitles a surviving spouse, or if no surviving spouse, adult as well as minor children, to $3,500 in a decedent's household furniture, autos, furnishings, appliances, and personal effects in preference over unsecured creditors, beneficiaries, or heirs.

Family Allowance—entitles the surviving spouse and minor children of the decedent to a reasonable amount of money for their support and maintenance during the period the estate is being administered.

Heir—person who inherits property according to the laws of intestate succession.

Personal Representative—individual or corporation appointed in a will by a testator or by the court to take care of a person's property after his death. Also called an executor or administrator.

Probate—process of formally proving the validity of a will.

Self-proved Will—testator and witnesses declare in writing before an authorized notary public that the will is validly executed. Such a will can be admitted for probate without the testimony of any of the witnesses.

Testator—one who disposes of property in a will.

Will—any legal document which disposes of personal and real property, appoints a personal representative, conservator, guardian, or trustee, or remakes an earlier executed will.

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