MSU Ag Facts — Extension Bulletin E-1458, January 1981, FILE 17.152

"A Will" — Its Use in Estate Transfer

By Ralph Hepp and Myron Kelsey
Department of Agricultural Economics

The property you accumulate during your lifetime must be distributed at your death. You put your life's blood into building up the assets, but what happens to them when you die? They are distributed, but perhaps not the way you would have liked. It all depends on whether you had a personal will.

It is impossible to die without a will of sorts. If you don't have a formally drawn up will or a handwritten (holographic) will, the state laws of descent and distribution take over. They act as an "average" will with the result that they don't take into consideration the problems and wishes of the individual. All your individually-held property is put in a pot, so to speak, stirred, and distributed according to the laws.

For the vast majority of Michigan residents, the state "will," as represented by the laws of descent and distribution, provides a very unsatisfactory means of transferring property. The estate generally gets hit with the maximum state and federal tax bite. The deceased has no say in who will act as the personal representative in settling his estate. If a man and his wife die without wills in a common accident, the courts will be forced to appoint a guardian for their children. This would perhaps not be the person the couple would have chosen.

It is the desire of the probate court to do exactly what the deceased would have done with the property had the person been present to express his or her wishes. A properly executed will is the best way to tell the probate judge what those wishes are.

What Is A Will?

A will is, very simply, a legal document by which a person disposes of property, to take effect at death. It affects only assets held in his sole name or the share of ownership of assets held in tenancy in common. It does not include things like life insurance policies or joint property, which are passed by other means.

A will is one of the oldest instruments known to man and one of the most difficult to destroy legally. The primary advantage is that it changes the law to conform with the individual's needs and wishes.

In the thousands of years of its development, a language of wills has developed. Words convey very specific meanings to judges who have the responsibility of probating wills. For this reason, it is highly advisable to have a will drawn up by a competent attorney with experience in drafting wills.

A last will may be made by any person over the age of 18 and of sound mind to dispose of all the estate, both real and personal. The advantages of a will are numerous and important to most estates.

By making a will —

- Your property can be distributed as you wish.
- The cost and time for settling the estate may be reduced.
- You can name a personal representative, a person you wish to take care of your business.
- You can name a guardian for your children, someone you would like to care for them.
- A testamentary trust may be created.
- Family quarrels may be avoided.

Distribution

One of the first advantages usually considered is the power of a will to enable the owner to distribute property to best fit the situation and desires. Through a will, the testator (one who makes a will) can not only make unequal distribution of property where deemed proper, but can also make specific requests that would be impossible without a will. For example, a father can make sure his oldest son gets his grandfather's watch, or a mother can hand down a special piece of furniture to the daughter who always appreciated it.

This ability to guide the distribution of property is very important in the case of young families with minor children. A husband can arrange through a will for his wife to receive all of the property directly. Without a will, approximately one-half of the property would be in the name of the children. The wife could not touch it without permission of the court. It would be necessary for her to become the legal guardian of the children's property with all of the related complications, such as reports to the court and bonding.

Tax Savings

A will can be used to take advantage of the various legal methods of reducing state and federal death taxes. Two principle means are (1) dividing property to take maximum advantage of the marital deduction and (2) use of testamentary trusts. The latter avoids the large taxes that result on the death of the second spouse when much of the estate is in one person's hands.

Both husband and wife should have wills. There are many reasons for this, but one involves taxes specifically. If a husband and wife are both killed as a result of the same accident, but one survives the other, if only briefly, their property will be subject to double probate and extra taxes. A good will contains a special provision to protect the estate against such an occurrence.

In fact, due to the passing of joint property, the wife may need a will even more than her husband. Although much of the property may be held in joint ownership when the husband or wife dies, the surviving spouse then holds the total estate in fee simple ownership. Because of the much larger size of estate left by the surviving spouse, the benefits from having a will—and the penalties from not having one—will be proportionately greater.

Guardianship

Consider, for example, what would happen if both you and your spouse died without a will. The court would have the duty of deciding on the guardianship of your minor children. Parents should make this choice, not some judge who doesn't have any idea how the parents would have desired their children to be reared.

Although the naming of a guardian in a will is only a recommendation to the court, it is usually followed if the court regards the nomination as reasonable for the interests of the children.

It is possible to have two guardians, one responsible for the children and their care, the other responsible for the financial affairs of the children, perhaps a trust.

Without wills specifying their choice for guardian it is possible that a couple's children might be raised by a close relative whose child-raising abilities the parents had highly criticized during life.

Personal Representative

Every estate must have a personal representative who is responsible for managing the property for the estate, guiding it through probate court, and settling inheritance and estate taxes.

If you do not designate the person you would like to carry out these duties, the court will appoint someone to administer the estate. Naming a person who is familiar with your affairs, qualified, and trustworthy gives you one more method of controlling the distribution of your property. This can either be a family member or an outsider, like a trust company. A combination of family member with a trust department may be an excellent compromise.

The testator can avoid a sizeable cost to his estate by specifying in his will that the personal representative serve without a surety bond. This, of course, would require confidence in the character and ability of the representative named.

Through your will, you may also give your personal representative powers of management and investment. Under these conditions your representative can sell or lease property without applying for permission to the court each time. If there is a business, the personal representative can continue or dispose of it, and do any number of other things you specify. Without a will setting forth these powers, the representative may not be able to take these steps and will be able to take others only with the permission of the court. With a will, the choice is yours.

Charities

Through a will it is also possible to leave sums of money or property, outright or in trust, to your favorite charity, hospital, or church.

Another advantage of transferring property by will is that the property owner can retain full control of the property until death.

Can Be Changed

Once a will has been drawn, signed, and witnessed, it can—and probably periodically should—be changed. This allows the property owner to keep pace with changing family and property situations.

For the typical situation, everybody should have at least three wills in their lifetime. When they are first married and before their property has accumulated to any great degree, husband and wife should have wills leaving everything to the surviving spouse. Later on, when the children are partially grown and the couple's property has begun to accumulate, they should have wills leaving part—say half—to the spouse, with the

other half in a trust for the children's education which the surviving spouse would control.

When the parents reach retirement age, because of changing family and property circumstances, they should usually consider a third will. Wills should be periodically reviewed, especially if there are any general revisions of the tax laws.

Cost Of A Will

The cost of making a will should not deter anyone from doing it. The cost isn't high. While attorney fees for drafting a will vary, a simple will can usually be drafted for less than $100. Naturally, if the will includes special provisions like a trust, the cost would be higher. Any attorney will provide an estimate of the will's cost before it is drafted. Ask them.

Quite often a properly prepared will can result in saving many dollars for the estate at a later time. The planning and legal counsel can save dollars and time and assure that your estate will be handled properly.

Joint Ownership

One of the most common reasons for failing to make wills is the belief that it is unnecessary when a married couple own all their property together in tenancy by the entirety. While the will does not direct the disposition of jointly held property for the first spouse to pass away, the survivor needs a will to distribute the property to the family.

A will would be needed in cases where a common accidental death took the couple or adequate time was not available for the preparation of a will. If the circumstances of death are not known, a payment to the estate would require a will to distribute the new assets.

While jointly held property has advantages for many married couples, there may be separate ownership of property requiring a will for distribution. The use of trusts for tax savings and property management purposes, special bequests by each individual, second marriages and other reasons can be given why all property may not be jointly held. In business situations, the transfer of business property to a partner may be needed and money compensation given to the surviving spouse.

Misconceptions

Some people fail to make a will because they think a will can be broken, so why make one. While there have been well publicized cases involving will contests, proper drafting of a will can avoid such action. For a will contest to be effective, the person contesting the will must prove that the testator was of unsound mind or acted under undue influence. Advance planning can reduce the chance of a will contest on these grounds.

Other people associate wills and probate and think if they don't make a will their property is not probated. This is not the case. If property is probated, the will gives instructions to probate court on its distribution. The opposite, however, is not true. Making a will does not cause property to be probated.

Property Distribution Without A Will

In the absence of sound plans worked out by the deceased and reflected in a will, property will be distributed at death according to a rigid formula of law contained in the revised probate code. They apply only when there is no will and are arbitrary and inflexible.

The State of Michigan has made these laws to meet the ends of impartial justice. They supposedly reflect how the Legislature thinks the "average" property owner would like to have his property distributed among his heirs. However, because these rules are arbitrary and inflexible, seldom will the wishes of the deceased be carried out.

The law specifies different ways of distributing the estate, depending on what heirs survive the deceased.

Married with children — Property distribution for a married person with child, children, or descendants is divided between the surviving spouse who receives the first $60,000 plus one-half the remaining balance of the property and the children who receive one-half the property divided equally.

Married without children and without parents — All property to the surviving spouse.

Married without children, but with at least one parent surviving — The surviving spouse receives the first $60,000 plus one-half the remaining balance of the property and the parent or parents receive one-half the property.

Widow or widower with children — All property to children divided equally. Grandchildren take their deceased parents' share.

Unmarried — In cases of an unmarried person, or widow or widower without children or descendants, the distribution is: If the parents survive, all to the parents or survivor. All property goes to brothers and sisters, divided equally, if no parents survive. Nieces and nephews take their deceased parents' share. If no parents, brothers, or sisters survive, the property divided equally is received in equal degree by next-of-kin. If no-kin, all to the state.

Limitations

Although a person can control property for a period of time after death, there is a law against perpetuities. This would prevent, for example, an individual from leaving the property to an eldest son with the stipula-

tion that in each generation after that it be passed to the eldest son. The law against perpetuities requires that the property be vested in someone within 21 years after the death of two individuals living at the time the instrument or will takes effect.

The exception to this rule involves trusts and charities. You can establish a trust in which the income from your property goes to maintain a scholarship fund, or provide income to a church or charity.

A second major limitation of the power of the will provides that a will cannot take precedence over the amount of property a spouse may receive under the laws of succession. It is possible that a person may leave a spouse out of the will, but the spouse in turn can choose to take the share of the property under the laws of descent and distribution. If the spouse does so, the remainder is distributed according to the terms of the will. In effect, it means that a surviving spouse cannot be disinherited unless they so choose.

A will also cannot take precedence over a waiver of spouse's rights—a written agreement made between spouses before or after their marriage. This situation is most common with a second marriage where children and property were brought into it from the first marriage.

Joint Wills

One of the main things we were warned against over and over by judges, lawyers, and CPAs was the joint will. Husband and wife sign one document as their will. This becomes a contract and when one spouse dies, the other is bound to all the terms of the will. In many cases there are reasons why the surviving spouse would like to change the will or put it into a different form because of changing family and financial needs. With a joint will this would be impossible.

Summary

A will is just one of the many tools of estate planning. Through preparation of a well-designed will you can insure that your property will be distributed at your death as you wish. One of the main advantages of a will is that it can help you plan for the unexpected and look after the welfare of your family in case you or your wife—or both—dies while your family is young and your assets still growing.

Once the single copy of the will is signed and witnessed as required by law, put it in a safety deposit box or file it with the probate court or your trust company so it will be safe. Remember that it isn't a finished product, but should be reviewed regularly.

Wills should be changed as conditions change. Kids grow up. Friends and relatives die. You accumulate more property. Even a person who is alive and poor can end up dead and rich—if the cause of his death involves negligence and a lawsuit for personal injury against the negligent person.

Who should have a will? You should.

This publication has been updated from information originally prepared by the authors for use in *Michigan Farmer* magazine.

MICHIGAN STATE UNIVERSITY
COOPERATIVE EXTENSION SERVICE

Issued in furtherance of cooperative extension work in agriculture and home economics, acts of May 8, and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Gordon E. Guyer, Director, Cooperative Extension Service, Michigan State University, E. Lansing, MI 48824.

Michigan State University Printing 0-12830

1P-10M-1:81-UP. Price 15 cents. Single copy free to Michigan residents.