

Why It's Important to Have a Will Prepared During or Immediately After Divorce

When going through a divorce, it's difficult to think of anything else. Many people are focused on how time with their children may change, how they will they pay bills, where will they live, and how the divorce will impact their lives overall. All these concerns are important, but the divorce process eventually ends. At that time many people settle into the "new normal" and resume their lives. It's important during the divorce process to think beyond the immediate and begin planning for your children's future if you pass on.

Property May go to Spouse

Since Texas is a community property state, all property acquired during a marriage belongs to both spouses. If a person dies while a divorce is pending, the surviving spouse will receive all the community property. A Will may designate that the deceased's one-half share of community property be distributed to other designated beneficiaries. Additionally, if the deceased has separate property, his or her spouse will receive one-third of that separate property if the divorce has not yet been finalized. A Will may designate that no separate property be left to a spouse.

Names Your Beneficiaries

If a single person dies intestate (without a Will), that person's children will inherit the estate in equal portions. Although this sounds simple, it is not. The court must have a hearing to determine exactly who the children, or heirs, are. This is called an heirship determination. It is costly and time consuming. The court must appoint an Attorney Ad Litem to determine that your child or children are in fact your only children. Once the Attorney Ad Litem has done his or her due diligence, a hearing will be held. Two disinterested witnesses who knew the deceased must testify. This process can take months and cost thousands of dollars, which come out of the estate.

With a Will, this is avoided. It does not matter who your children are, because the Will bequests property to only those who you have designated as your beneficiaries. This may or may not be your children.

Designates Person Who Will Independently Administer the Estate

A Will usually names a person as Independent Executor of the Estate. Without a Will, the Court must appoint such a person once an Application for Probate has been filed. The person appointed can be an adult beneficiary, a next of kin, or even a creditor. If the beneficiaries are minors, your ex-spouse may apply on behalf of the children. This means that your ex-spouse could oversee the administration of your estate, which includes collecting assets, paying debts, etc. A Will prevents this by naming the person you wish to be in charge of these tasks.

If the children are minors when they inherit, the estate administration will likely be dependent rather than independent, no matter who the Court ultimately appoints as Administrator. Under a dependent administration, the Administrator must post bond and

get court approval before any action. This can be costly because it requires an attorney to serve as a go between for the Administrator and the Probate Court. This further depletes the estate.

Designates Person to Oversee Beneficiaries' Inheritance

Without a Will, once the heirs have been determined and administration of the estate is complete, the heirs will receive their property. If the children are minors, or under the age of eighteen, someone must be appointed as guardian of the children's property, or Guardian of the Estate. Once again, the person to whom the Courts will look to for this task is usually the children's surviving parent. Measures will be enacted to prevent mismanagement of the funds. These measures will require court approval for spending and an annual accounting of expenditures. However, anything that requires court and attorney involvement is costly, and these costs are usually reimbursed out of the children's assets.

A Will allows you to set up a contingent trust for minor beneficiaries. This allows you to designate a trustee to oversee the funds at the trustee's discretion and avoids a situation in which your ex-spouse may be in charge of managing the children's assets.

Designates Ages at Which Beneficiaries May Have Control Over Inheritance

In addition to allowing you to name a trustee to oversee the children's assets, the contingent trust allows you to designate the age, or ages at which the minor children will receive assets. This prohibits the disposition of large sums of money to a person too immature or irresponsible to handle it responsibly. Often, people elect for assets to be distributed at up to three different ages. For example, a person may elect that one-third of the assets be distributed at 22, one-third at 25, and one-third at 30.

Without a Will, the beneficiaries will gain control of all assets at eighteen. Most teenagers are not emotionally mature enough to handle large sums of money and might squander it. A Will is especially important in this case to protect your beneficiaries' assets for an extended period.

Designates Person to be Guardian of Children if the Other Parent Predeceases You

Whether or not there is a Will, if a person dies with minor children the children's surviving parent will continue to be "guardian" over those children. However, a Will still should provide for a guardian of the minor children, or "Guardian of the Person" if the other parent dies first. Without a Will the Court will appoint a guardian for the children, and it may not be who the deceased would have elected.

These are just a few of the reasons why it is important to have a Will prepared without delay. It's unwise to wait until legal action, such as divorce, is concluded. McNamara Law Office, LLP can help you with your legal matter and Will so you do not have to worry about preparing a Will later.