# REST IN PEACE:
# SIX REASONS NOT TO DIE IN FLORIDA WITHOUT A WILL

The title of this booklet is "Rest in Peace: Six Reasons Not to Die in Florida Without a Will." The beginning of this booklet lists those six reasons. Thereafter, I have provided answers to some of the most commonly asked questions I receive regarding wills.

1. **IF YOU DON'T HAVE A WILL, YOUR ASSETS MAY NOT GO TO THE PEOPLE YOU WANT THEM TO GO TO.** The fundamental purpose of a will is to insure that your assets are disposed of according to your desires. If you don't have a will, the Florida Statutes will dictate what happens to your assets. As you might expect, the first choice of persons to receive your assets are your spouse and children. If you have no surviving spouse or children, your assets go to your parents. If you have no surviving parents, your assets go to your siblings, etc. To many people, this statutory plan of distribution may be acceptable. However, what if you want to leave everything to your spouse? Or, what if

you want to disinherit one of your children, or include a stepchild? Perhaps you want to leave some money to charity. These are all situations where you must have a will if you want to accomplish those objectives.

2. **IF YOU DON'T HAVE A WILL, YOU WILL NOT BE ABLE TO CHOOSE WHO WILL BE THE PERSONAL REPRESENTATIVE OF YOUR ESTATE.** The personal representative (also known as the "executor") is the person who works with the attorney to settle your estate. It is standard practice that you will nominate a personal representative in your will. Typically, you also choose an alternative personal representative in case your first choice is unable or unwilling to serve. When a person dies without a will in Florida, the law provides that the personal representative is to be chosen by a majority of the heirs. For feuding families, this could obviously be a real nightmare.

3. **IF YOU HAVE MINOR CHILDREN, BY HAVING A WILL YOU ARE ABLE TO NOMINATE WHO WILL BE THE**

**GUARDIAN OF YOUR CHILDREN IF YOU AND YOUR SPOUSE BOTH PASS AWAY**. Obviously, this means that if you don't have a will, you have probably not made this nomination anywhere in writing. The guardian acts as the parent for your children in all respects. This guardian will determine where your children live, what school they will attend, what religion they will practice and what their day to day life will be like. The odds are very much against you and your spouse dying in a common accident. But, should that happen, you can imagine the additional stress that will be placed on the families in deciding who will be the guardian of your children. Therefore, in my opinion, if you have minor children, you should definitely have a will for this reason and also the reason stated in number 4 below.

4. **IF YOU HAVE YOUNG CHILDREN, BY HAVING A WILL YOU ARE ABLE TO STATE AT WHAT AGE YOUR CHILDREN WILL GET YOUR MONEY IF YOU AND YOUR SPOUSE BOTH PASS AWAY.** First, let's talk about what happens if you don't have a will and you and your spouse pass away

leaving minor children. Obviously, Florida law does not allow us to simply hand over your money to your minor children. The law will require that a guardianship of the property be established which involves court costs and attorney's fees. The court will choose who will be the guardian of the property, that is, who will have control of your assets and manage your assets on behalf of your children. The person chosen by the court may or may not be the person you would have chosen. But, all in all, the real down side to this scenario is that the law will require that your money be given to your children as they reach age 18. As you can imagine, an 18 year old might be more tempted to spend this money on something like a new car than to use it for college expenses.

If you have young children, you need a will that provides that, if both you and your spouse pass away, all of your assets will be placed into a trust for the benefit of your children. The terms of this testamentary trust are contained within the body of your will. The trust will provide that the money is to be spent on your children for their health, education, welfare and

maintenance. Your trust will name a trustee, who has two basic duties.

- First, the trustee will decide how to invest your assets in such things as stocks, CD's and mutual funds.
- Second, your trustee will make the discretionary decisions on how to spend the money on your children. Remember that, typically, your trust states that the money is to be spent on your children for their health, education, welfare and maintenance. "Health" and "education" are easy to define. For example, the trustee will definitely pay for your child's college education, assuming there are sufficient assets. "Welfare" and "maintenance" are open to broader interpretations. For example, when your child turns 16, he may ask the trustee to buy him a new Corvette to get to school. The trustee may agree that getting your child a car is a good idea but, hopefully, will conclude that a Toyota would be a more reasonable car for your child.
- Last, and most important, your trust will determine at what age your children will get your money. I typically recommend age 25

because that gets your children through college and allows them to get a taste of the real world for a few years before this chunk of money is handed over to them. You can also provide that your child will get the money over a period of years. For example, if you know your child is a bit of a spendthrift, you might give him or her one-half of the money at age 25 (with the assumption that they will blow it) and the remaining one- half at age 30 (under the theory that they will be older and wiser and will save this money for when they need it.) Remember, that up through whatever age you pick, the money is being spent by the trustee on your children

5. **YOU WON'T HAVE A CONVENIENT WAY TO DISPOSE OF YOUR PERSONAL PROPERTY**. The Florida Statues allow you to make reference in your will to a separate written list disposing of your personal property such as china, silver, jewelry, rugs, furniture and automobiles. When I do a will for a client, I prepare a page that has 20 blank lines on it. Each line has room for you to describe the personal property and who gets it upon your

death. At your convenience, you can add or subtract items from this list at any time.

The beauty of this list is that the client does not need to come back and see me each time they add or subtract items from the list. It is a way to modify your will without all of the formalities of the original execution. Florida law does not allow you to leave cash bequests on this list.

For the typical clients who are ultimately leaving everything to the children, this personal property list serves two purposes.

The first purpose is the "exception to the rule" purpose, the rule being that, ultimately, your children will get all of your personal property. So, that, if you want to leave an item of personal property to a friend, neighbor, sibling or someone other than your children, this list is the place to do it.

Purpose number two is to help your children decide how to divide your personal property and household contents upon your death. It has been my experience that, upon the client's

death, the children will go into the home and have an argument over who gets which items of personal property. You can help avoid that problem by listing which child will get which items and covering the more valuable (monetary and sentimental value) items that you own. A client of mine once suggested a great way to handle the disposition of the personal property using this list and I now pass this idea on to my other clients. The client had three children and she asked them to each make a list prioritizing what of her personal property they would most like to have upon her death. She then compared the three lists and completed her personal property disposition page. Obviously, there were conflicts on the childrens' lists and some give and take and compromise was necessary

6. **YOU MAY MISS THE OPPORTUNITY TO GET ACQUAINTED WITH AN ATTORNEY**. Having a will prepared is probably the most common opportunity for people to meet an attorney. I think this is important because, if a legal emergency ever arises, you will already know an attorney to call for advice. The

attorney who prepared your will may not necessarily be the attorney who handles your legal emergency. But he or she could certainly give you some general advice to get you through the emergency. And the attorney could probably make a recommendation to you of another attorney who could help you.

## COMMONLY ASKED QUESTIONS REGARDING WILLS MUST I HAVE A WILL?

Florida law does not require that you have a will. However, it is my experience that almost everyone needs a will. Usually, people's biggest obstacle to getting a will done is they don't like to think about their own death.

## I DID MY OWN WILL. IS IT LEGAL?

In Florida, all it takes to make a legal will is a written document with your signature and two witnesses. If you meet these two requirements you have a legal will, but you may not have a very good will.

## I HAVE A WILL THAT WAS DONE IN ANOTHER STATE. DO I NEED A NEW ONE NOW THAT I LIVE IN FLORIDA?

The Florida law provides that, if your will was legally valid when you executed it in the other state, it is valid in Florida, even if the legal requirements are different for the two states. For example, maybe the other state requires only one witness. It will be valid in Florida although Florida requires two witnesses.

It is still my recommendation that, if you plan to remain a Florida resident, you have a new will done by a Florida attorney. I have two basic reasons for saying this. First, Florida law allows for a self-proved will. Historically, when someone died with a will, the first thing that had to be done was to locate one of the witnesses to the will. That witness would then appear before a probate judge or clerk, review the original will, and take an oath that the signatures are his or her signature and the decedent's signature. This process of proving a will can be very difficult and expen- sive if the witnesses cannot be found or if they are located in another state. If your will is self-proved, this entire procedure is not necessary. The other reason is to take advantage of the personal property disposition procedure discussed in Paragraph 5 above.

## DOES HAVING A WILL AVOID PROBATE?

No. Whether or not you have a will has nothing to do with avoiding probate. The will only directs what happens to those assets that go through probate.

## IF I DON'T HAVE A WILL, DO MY ASSETS GO TO THE STATE OF FLORIDA?

No. The only time your assets go to the State is when your heirs can't be found or when you have no heirs at all. Even in those situations, the State holds the money for the heirs or potential heirs for 20 years before it belongs to the State.

## WHAT ASSETS WILL BE GOVERNED BY MY WILL?

Generally, only the assets that are owned solely in your name go through probate. If you are married and you own everything jointly with your spouse, those joint assets will automatically belong to your spouse upon your death. Those jointly owned assets will not go through probate and, therefore, your will does not govern their disposition. Upon your spouse's death, the assets will go through probate and will be disposed of pursuant to your spouse's will.

There are other assets that do not go through probate and, therefore, will not be governed by your will. For example, life insurance proceeds and IRA accounts where you have named someone other than your "estate" as the beneficiary.

## MAY I CHANGE MY WILL BY CROSSING OUT CERTAIN PARAGRAPHS AND/OR WRITING IN NEW LANGUAGE?

No, any change to your will must be done with the same formality as when you originally signed it, to wit, your signing before two witnesses. Therefore, you may not simply cross out a "$10,000" bequest and hand-write in the number "$5,000." The written document changing your existing will is called a codicil.

## I DON'T WANT TO LEAVE ANYTHING TO ONE OF MY ADULT CHILDREN. IS THAT OK?

Yes. Under the Florida Statutes, there are only a few times when a person cannot be "cut out" or disinherited from your will. The most common example of someone who cannot be disinherited is your spouse. Under Florida law, your spouse is entitled to at least 30% of your estate. This entitlement is called the “elective share.” So that, if

your will leaves everything to your children and nothing to your spouse, your spouse would have the right to take his or her elective share and, therefore, take 30% of your estate in spite of what your will says. Your spouse can waive his or her elective share in a pre-nuptial or post- nuptial agreement.

The only other obligation you have under Florida Statues involves your home. This only applies to you if you are married and/or have minor children. This also only applies to you if you own your home in your own name because, remember, if you own it jointly with your spouse, it will automatically belong to him or her upon your death and your will and the Florida Statutes will not govern its disposition.

Let's assume you are married with no minor children, you own your home solely in your name, and your will leaves everything to your children and nothing to your spouse. In that situation, upon your death, in spite of what your will says, your spouse is entitled to a life estate in the home and, only upon your spouse's death, will your home go to your children. Owning a life estate in property entitles you to the use and benefit of the property

until the moment of your death. Thereupon, the ownership of the property reverts to someone else, called the remainderman. The rationale for this law is simple. It is to prevent you from leaving your home to a "friend" and leaving your spouse homeless.

## WHAT IS A LIVING WILL?

A living will is a document in which you ask that you not be kept alive by artificial means. It is a two-step process. Step one is that a doctor must declare you to be in a terminal condition and that your death is imminent. Only then does your living will come into play. Step two is for your designated representative to make the final decision to "pull the plug." Both things must happen. Historically, we have talked in terms of disconnecting you from a machine, like a respirator. In Florida, you can now go further and also ask that you not be given food and water through a tube if that is the only thing keeping you alive. Keep in mind that you must first be in a terminal condition. Furthermore, the living will states that you are to be given all the medication you need to keep you pain free.

If you are competent, obviously you could make your own step two decision. Assuming you are not competent, in my living will form, I have the client name their first choice for who will make this step two decision and an alternative in case the first choice is not available. When my client's choice is "let all of my kids decide," I have the client specify whether they are to decide by majority decision or by unanimous decision.

## WHAT SHOULD I DO NOW?

I offer free initial office consults regarding the preparation of your will documents. Call me, Attorney Tom Olsen, at (407) 423-5561 to schedule your office conference.

## QUESTIONS, COMMENTS, SUGGESTIONS?

Did you read something in this booklet that was not clearly explained? Do you have a question about this topic that was not answered? Have you found a typographical error or a legal inaccuracy in this booklet? Please contact me with your questions, comments or suggestions. Your thoughts and suggestions are greatly appreciated.

# Notes: