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FREQUENTLY ASKED QUESTIONS:

WHAT IS A WILL AND WHY DO I NEED ONE?

A Last Will and Testament is a legal document that provides for the disposition of your assets at your death. When you create a Will, you not only get to control who receives your assets but also when the assets are distributed to your beneficiaries. You also can choose who will administer your estate after your death (called a Personal Representative). If you have minor children, you may also name who will be the children's guardian. Under Florida law, you can prepare a separate list to dispose of your personal property.

After a Will is created, it is important that you update your Will for changes in circumstances such as deaths, marriages, divorces and changes in the value of your estate.

WHAT HAPPENS WITHOUT A LAST WILL AND TESTAMENT?

If you die without a Will, this is called dying "intestate." Unfortunately, without a Will, your assets will be distributed in accordance with the Florida Statutes which may not be in accordance with your wishes. For example, although you may want your children to receive your assets, you may not want them to receive all of your estate at age eighteen. Also, when you don't have a Will, the court will appoint the person who will administer your estate.

If a person dies intestate, the decedent's probate assets will be distributed to the decedent's heirs in the following order of priority:

A. Surviving Spouse and no Descendants

If there is a surviving spouse and no surviving descendants of the decedent, the surviving spouse receives the entire intestate estate.

B. Surviving Spouse and Descendants

i. If there is a surviving spouse and one or more descendants (with the descendants all being the descendants of the surviving spouse as well as the decedent) and the surviving spouse has no other descendants, the surviving spouse receives the entire intestate estate.

ii. If there is a surviving spouse and one or more descendants of the decedent (one or more of who are not lineal descendants of the surviving spouse), the surviving spouse receives one-half of the intestate estate and the descendants share the remaining half.

iii. If there is a surviving spouse and there are one or more descendants of the decedent (all of whom are also descendants of the surviving spouse), and the surviving spouse has one or more descendants who are not descendants of the decedent, the surviving spouse receives one-half of the intestate estate and the descendants share the remaining half.

iv. If there is no surviving spouse but there are descendants, the descendants share the estate, which is initially broken into shares at the children's level with a deceased child's share going to the descendants of that deceased child.

C. No Surviving Spouse, No Lineal Descendants

If the decedent didn't leave a surviving spouse or lineal descendants, the intestate estate goes to the decedent's surviving parents, and if none, then to the decedent's brothers and sisters and descendants of any deceased brothers or sisters. The law provides for further disposition if the decedent is isn't survived by any of these relatives.

D. Exceptions to Above

The above provisions are subject to certain exceptions for homestead property, exempt personal property, and a statutory allowance to the surviving spouse and any lineal descendants or ascendants the decedent supported. Regarding homestead, if titled in the decedent's name alone, the surviving spouse receives a life estate in the homestead with the lineal descendants of the deceased spouse receiving the homestead property upon the death of the surviving spouse. If there are no lineal descendants, the surviving spouse receives full ownership of the homestead outright.

WHAT IS A PERSONAL REPRESENTATIVE?

The Personal Representative is the person who manages your estate after your death. It may be either an individual, a bank or a trust company. In Florida, the term "personal representative" is used instead of terms such as "executor, executrix, administrator and administratix."

The role of the Personal Representative is to faithfully administer the estate in accordance with Florida law. Some of the duties of the Personal Representative are:

- Identify, gather, value and safeguard the decedent's probate assets.
- Serve a "Notice of Administration" to provide information to interested persons.
- Publish a "Notice to Creditors" in a local newspaper to provide proper notice to any potential creditors and also conduct a search to ascertain any "known or reasonably ascertainable creditors" of the decedent and notify them of the right to file a timely claim in the probate proceeding.
- File an "Inventory" with the probate court of all probate assets.
- Either object to or pay claims filed in the probate proceeding.
- File any necessary tax returns and pay applicable taxes.
- Pay expenses of administering the probate estate.
- Pay statutory amounts to the decedent's surviving spouse or family.
- Distribute probate assets to beneficiaries.
- Close the probate process.

IN FLORIDA, WHO MAY SERVE AS A PERSONAL REPRESENTATIVE?

To qualify to serve as a Personal Representative, an individual who is of legal age (i.e., 18 years of age or older) **must be either a Florida resident or a spouse, sibling, parent, child or other close relative of the decedent.**

A trust company incorporated under the laws of Florida, or a bank or savings and loan authorized and qualified to exercise fiduciary powers in Florida may serve as the Personal Representative.

If the decedent had a valid Will, the Judge will appoint the person or institution named assuming the person or bank or trust company is qualified. If the decedent did not have a Will, the surviving spouse has the first priority to serve. If the decedent was not married at his or her death, or the spouse does not wish to serve, the person or institution selected by a majority in interest of the decedent's heirs will have the second right to be appointed. If the heirs do not agree, then the Judge will appoint a Personal Representative.

Florida law provides that certain persons may not serve as Personal Representative. For example, if a person has been convicted of a felony or is mentally or physically unable to perform the duties, they may not serve as Personal Representative.

WHAT IS PROBATE?

Probate is simply a court-supervised process for identifying the assets and liabilities of a decedent, paying the decedent's final bills/debts/taxes and distributing the assets to the decedent's beneficiaries either pursuant to the decedent's Last Will and Testament or in accordance with Florida law. Probate is necessary to transfer ownership of the decedent's probate assets to his or her beneficiaries. The probate process also ensures that the decedent's creditors are paid.

The Florida Probate Code is found in Chapters 731 through 735 of the Florida Statues and the rules governing Florida probate proceedings are found in the Florida Probate Rules, Part I and Part II (Rules 5.010-5.530).

WHAT ASSETS ARE SUBJECT TO PROBATE?

Probate assets are those assets that the decedent owned in his or her individual name at the time of death. For example, real estate and bank/brokerage accounts in the sole name of a decedent are probate assets but a bank/brokerage account owned by the decedent and payable on death or transferable on death to another person, or held jointly with rights of survivorship, are not subject to probate.

DOES A WILL AVOID PROBATE?

No, a Will does not avoid the probate process. The necessity of probate is based on how assets are titled at the time of death. If a person dies with a Will and he/she owns assets that are subject to probate (as defined above) then a probate proceeding is still necessary.

IF I HAVE JOINT OWNERS/BENEFICIARIES ON ALL OF MY ASSETS, CAN I AVOID PROBATE?

Joint ownerships can be established when two or more person's title bank accounts and other assets in more than one name with the intent that the survivor will be the sole owner. Assets established with a beneficiary named will automatically pass to the beneficiary upon the death of the owner. Although these forms of ownership can negate the necessity of probate, they do have disadvantages. For example, if you have a joint owner on an account and that owner is sued or has a judgment entered against them, you have now subjected your joint assets to the other joint owner's

creditors. There is also the possibility of a simultaneous death wherein you and your joint owner/beneficiary may die together. For married couples, joint ownerships can cause an increase in estate taxes without proper planning. Finally, the proration of administrative expenses for your estate may not be addressed properly with this type of ownership.

WHAT IS A REVOCABLE TRUST AND WHY IS IT MORE ADVANTAGEOUS THAN A WILL?

A "Revocable" or "Living" Trust is a legal document created by you to manage your assets not only during your lifetime but to also distribute your assets at the time of your death. The Trust is commonly referred to as a Revocable or Living Trust meaning that you can change or amend the Trust during your lifetime as long as you are not incapacitated. The person who creates the Trust is generally referred to as a "Grantor" or "Settlor." The person who manages the trust assets is called the "Trustee." You may serve as your own Trustee or you may appoint another person, bank, or trust company to serve as Trustee.

The Trust has many advantages, such as:

1. If you become incapacitated, the person you name as your Successor Trustee can continue to manage your trust assets (i.e, pay your bills, handle your investment decisions, sell assets, if necessary). This avoids the need for a court-appointed guardian to handle your affairs.
2. If the title to your assets (i.e. real estate, bank account and investments) is changed into the name of your Trust prior to your death, these assets are not considered probate assets and are not subject to the probate process.
3. The Trust can have federal estate tax advantages for married couples.
4. Trusts are private documents and do not generally become public record unlike a Will, which is filed with the probate court.

DO I NEED A POWER OF ATTORNEY/HEALTH CARE SURROGATE DESIGNATION/LIVING WILL?

Yes! These documents are important and allow you to name someone else to make decisions on your behalf especially during the time period that you may be incapacitated.

- A **Durable Power of Attorney** makes it possible for someone else to handle your financial affairs without the need for a guardianship proceeding.
- A **Health Care Surrogate Designation** names a person to make health care decisions for you when are not able to do so yourself. This form also can provide for authorization so that someone else can obtain copies of your medical records and communicate with your doctors.
- A **Living Will** is a written declaration by an individual specifying directions as to the use of life-prolonging measures.

ARE MY OUT-OF-STATE ESTATE PLANNING DOCUMENTS STILL VALID IN FLORIDA?

If you have moved to Florida from another state, it is advisable to have your estate planning documents reviewed by a Florida attorney. The attorney will ensure that your documents have been executed in accordance with Florida law and that the Personal Representative named is qualified to serve in Florida. Also, many out of state documents provide that they will be governed by that state's laws and as such, it may be necessary to amend your documents.

SHOULD I ESTABLISH DOMICILE IN FLORIDA?

Domicile is defined as where you intend to permanently reside. Although you may have several residences, you may only have one domicile. Florida's favorable tax structure makes it attractive for persons to declare Florida as his/her domicile. Florida does not have a state income tax or state estate tax.

If you have recently moved to Florida or are considering moving to Florida, there are several steps that you should consider taking in order to sever ties to your former state:

1. File a Declaration of Domicile with the County Clerk's office.
2. Apply for the Florida Homestead exemption.
3. Obtain a Florida driver's license and vehicle registration.
4. Register to vote in Florida and actually vote.
5. Obtain Florida professional advisors and update your estate planning documents with a Florida attorney.
6. Transfer your bank and brokerage accounts to Florida banks and brokerage firms.
7. File a change of address notice with your former post office.
8. Become affiliated with local clubs/organizations/churches.
9. File your federal tax returns with the IRS office for Florida residents.
10. If you have property in another state, make sure you spend the majority of your time in Florida…. after all, it is the Sunshine State!