What is a will?

A will is a document that sets forth how a person's probate property will be distributed upon death. To be valid, a will must meet certain formal requirements as provided by state laws.

Who may make a will?

Any person who is at least 18 years old and of sound mind may make a will in Ohio.

How is a will made?

With limited exceptions, a will must be written and signed. A will must be witnessed by at least two persons in a special manner provided by law, and it must be executed in strict accordance with the law. The easiest way to ensure that these conditions are met is to have the signing of the will supervised by an attorney.

May a will be changed?

A will may be changed as often as the person who wrote it wishes. Changes are frequently made by the simple device of an addition called a *codicil.* Changes to a will often result from changes in circumstances after a will has been made, such as tax law changes, marriage, birth of children, divorce or even a substantial change in the nature or amount of a person's estate. All changes in circumstances require careful analysis and reconsideration of all provisions of a will and may make it advisable to change the will to reflect the new situation. However, changes should not be made without the assistance and advice of a lawyer to ensure changes will be valid and will not adversely affect other portions of the will.

How long does a will last?

A will is effective as long as it is not revoked. A will is most often revoked by the execution of a new will or codicil replacing the old, or when the person who made the will destroys it with the intent of revoking it.

Does a will increase probate expense?

No. It costs no more to administer an estate when a decedent leaves a will than when there is no will. Often it will cost less. When there is a will, the executor distributes the estate to the parties named in it. When there is no will, the probate court must determine who the legal heirs are and then distribute the estate to them. In either case, administration under the supervision of the probate court is necessary.

A will may reduce expenses of administration in a number of ways. A will can reduce taxes and expenses by taking advantage of the *charitable* or *marital deduction* provisions of federal and Ohio estate tax laws. In many situations, a will can also reduce costs by waiving the requirement of a fiduciary bond for the executor. These examples illustrate that a will can save money for you and your family if it is drafted by a lawyer who is trained in this area of the law.

How large an estate is necessary to justify a will?

Everyone who owns any real or personal property should have a will regardless of the present amount of the estate. Remember that a will provides for the way that a person's probate

property will be distributed upon death, regardless of size and value. Further, estates grow in value almost unnoticed through the repayment of mortgages, appreciation of stocks and other investments, inheritances from relatives, and other sources.

May I dispose of my property to any person or entity I choose under my will?

Yes. However, Ohio law gives a surviving spouse and minor children certain rights over property that cannot be defeated by a will. Talk to a lawyer about these rights.

What happens to property held in the names of more than one person?

Property held in the names of more than one person may not automatically pass to the survivor upon the death of one of them. However, there are some forms of ownership in which property does pass automatically to the survivor or to a designated beneficiary. Sometimes it is to your advantage to hold property in this manner. Other times it can be disadvantageous. An attorney can advise you as to the consequences of holding property in joint tenancy with the right of survivorship, or in other ways that avoid probate, and the advantages that you might gain. For more information on ways to avoid probate and to learn more about nonprobate property, see the following Ohio State Bar Association publications: "What you should know about . . . Living Trusts" and "What you should know about . . . Probate."

Does a will let me avoid estate taxes and other 'death' taxes?

Whether or not there will be an estate tax depends primarily upon the value of a person's estate. Deductions also are available for debts, expenses of administration, or distributions to a surviving spouse or charity. A properly drafted will might reduce the amount of taxes that have to be paid. An estate-planning lawyer is skilled not only in the laws of wills and property, but also must be familiar with both state and federal estate tax laws.

What happens if I do not make a will?

When a person dies without a will, or dies *intestate,* as the law calls it, the probate property of the deceased is distributed to the nearest family members according to a formula fixed by law. In other words, if you do *not* make a will, you do not have any say about how your probate property will be distributed. Nonprobate property generally passes to the designated beneficiary or survivor.

In Ohio, for example, if a husband dies without a will, leaving two or more minor children, and the surviving wife is not the natural or adoptive parent of any of the children, the wife would receive $20,000 plus one-third of the remainder of the probate estate, and the balance would be given to a guardian for the minor children. The widow or other suitable person would need to be appointed guardian of the children by the probate court and would need to give the court a surety bond. When each child reaches age 18, his or her share of the guardianship estate would be required to be made fully available to the child, regardless of his or her maturity level. Such proceedings can be expensive and can create legal problems that might have been avoided had the husband made a will.

Who will manage my estate?

If you make a will, you may name the person you want to manage the administration of your estate (the *executor*). If you do not make a will, the probate court will appoint someone (the *ad*

ministrator
), whom you may or may not know, to handle your estate.

Can life insurance take the place of a will?
No. Life insurance is only one kind of property that a person might own. If a life insurance policy is payable to an individual, the will of the insured has no effect on the disposition of the insurance proceeds. If the policy is payable to the estate of the insured, the disposition of the proceeds may be directed by a will; however, this would subject the proceeds to possible Ohio estate tax, depending on the size of the estate. The careful person will have a lawyer and a life insurance counselor work together on a life insurance program, particularly in the area of estate planning.

Who should draft a will?
No sensible person would engage "just anyone" to fill teeth, take out an appendix, or adjust a sensitive and complicated instrument. The person who wants these services performed with a minimum of risk to self and property will engage a trained professional person.

The drafting of a will requires professional judgment. A lawyer can help you avoid pitfalls and choose the course best suited for your situation.

What does it mean when someone dies "intestate"?
Dying *intestate* means that a person has died without a will stating how his or her property (called an *estate*) is to be distributed.

What is the role of the probate court?
In each of Ohio's 88 counties, there is a division of the common pleas court called the probate division, commonly referred to as the probate court. A primary job of the probate court is to supervise the legal process by which all debts, taxes and other financial affairs of people who die in that county are lawfully resolved, and to ensure that the money and other property left, after debts are paid, are distributed to the persons legally entitled to receive them.

Who handles the estate?
When the person who has died (the *decedent*) leaves a will, the probate court appoints the person named in the will to serve as *executor* of the estate. If the person's will did not name anyone to be the executor, or if the person(s) named in the will refuse or cannot act, then the probate court will appoint someone to act as the
administrator
of the will. The executor (or the administrator) is responsible to the court to ensure that the decedent's financial affairs are resolved and the remainder of the estate is distributed according to the instructions in the will.

When someone dies intestate, the probate court will appoint an administrator of the estate. Like the executor or administrator of the will, the appointed estate administrator will report to the court to ensure that the decedent's financial affairs are resolved and the remainder of the estate is distributed according to the law.

When appointing an administrator of the estate, Ohio law requires that the court ordinarily appoint the surviving spouse of the decedent, of if none, or if the spouse declines, the court will appoint one of the next of kin of the decedent. The administrator must be an Ohio resident. If there is no surviving spouse or next of kin resident of the state, or if the court finds such person(s) to be unsuitable, some other suitable person will be appointed as administrator. Before the court issues official *letters of appointment* naming an administrator (or executor), the appointed person must sign an acceptance statement that states his or her duties and acknowledges that the court can fine or remove an administrator (or executor) for failure to perform those duties faithfully. The administrator (or executor) must also post a bond (paid from the decedent's estate) to cover potential losses that the estate might suffer through error or mishandling of property during the administration process (although a will may waive the bond).

What are the duties of an administrator of an intestate estate?

The duties of an administrator are similar to those of the executor of a will, except that an administrator must follow more defined instructions of the probate court and must distribute the property in accordance with the statute of descent and distribution rather than by the terms of a will. The basic duties of an administrator are:

- **Inventory and appraisal.** The administrator must identify and determine the fair market value of all financial assets and property that were owned by the decedent at the time of death. The administrator must file an inventory listing all of the decedent's so-called probate assets and their date-of-death values with the probate court within three months of the administrator's appointment, unless an extension is granted.

It is important to understand that most estates include what are known as *non-probate assets*, which generally *do not have to be included in the inventory filed with the probate court*. Non-probate assets are assets that legally pass from a decedent to a named beneficiary or to a co-owner at the time of death, by title, by contract, or by law, without having to go through the probate court. Non-probate assets include: insurance policies, IRAs and retirement benefits that are payable on death to a beneficiary; and a home, car or bank account that the decedent owned jointly with rights of survivorship to another person. In many cases, many of a decedent's assets may be non-probate assets. The administrator must identify and report non-probate assets for tax purposes, but *these assets are not otherwise included in the probate estate for which the administrator is responsible to the probate court*. When this pamphlet refers to collecting or distributing a decedent's assets, it refers only to those assets that are subject to probate court process even if other property is taxable.

In valuing and reporting assets and liabilities, if the value is "readily ascertainable" (for example, shares of stock in a publicly traded company or the balance in a bank account), then no professional appraisal is required. However, items such as jewelry, art objects, antiques, real estate and any other items whose value cannot be readily established must be appraised

by a qualified person in order for the inventory to be approved by the probate court and for the tax returns to be acceptable to the taxing authorities.

- **Collecting assets.** The administrator must collect all assets of the decedent. This is very important because it is these assets that will be distributed to the heirs after debts and taxes have been paid. Complications can arise in this process if assets legally owned by a decedent are in the possession of someone else at the time of death, or if property belonging to the decedent has been concealed or misappropriated by a third party. Sometimes collecting assets may require the administrator to complete a lawsuit in which the decedent was involved at the time of death, or to file a new lawsuit to satisfy a legal claim the decedent had not fully asserted while alive. For example, if the deceased was killed in an accident it may be necessary to file a suit to recover damages for wrongful death.
- **Payment of debts and expenses.** Creditors (people to whom the decedent, or his or her estate, owes money) have six months from the date of death to present their claims against the estate. In most cases, any claim not submitted within six months is barred forever. Claims must be in writing and sent directly to the administrator or mailed to the decedent's address, and must be received by the administrator within six months. In addition to ordinary bills the decedent owed at the time of death, other debts typically include expenses to keep up property; local, state and federal taxes; hospital and funeral expenses; and expenses of administration including probate court costs, bond premiums and fees charged by appraisers, attorneys and the administrator.

Even after accepting a claim as valid, the administrator must be certain there will be sufficient assets to pay all claims, including those not yet presented. Certain debts have priority. Generally, costs and expenses of administering the estate, funeral expenses and taxes must be paid first. If there are sufficient cash assets in the estate to pay debts, they will be paid out of cash. If there is not enough cash, then estate property will be sold (personal property first and then real estate) to raise the cash needed. If the total assets in an estate are not sufficient to pay all of the valid debts, claimants must be paid according to a priority schedule established by law.

- **Distribution of assets.** After all debts, taxes, costs and expenses of the estate have been paid, the administrator must distribute the balance of the estate to the decedent's heirs according to a formula prescribed in Ohio's statute of descent and distribution. Because an administrator may be held personally liable for an error in making a distribution that cannot later be recovered, legal advice should be obtained before making a final disposition of estate assets. Sometimes an administrator will make a partial distribution of certain assets before all claims have been resolved. In such cases, it is prudent for the administrator to advise persons receiving early partial distributions that they may be required to return some or all of the money or property to the estate if it is needed to satisfy valid claims.

What is the statute of descent and distribution?

The statute of descent and distribution, also known as the *intestacy* statute, is the law that

defines how the probate assets in an intestate estate will be distributed to the decedent's heirs after all claims, expenses and taxes have been paid. Generally, the statute favors those heirs most closely related to the decedent.

Following is a *partial summary* of some basic guidelines in Ohio's statute of descent and distribution:

Please note that the following discussion uses lay person's language and not precise legal terms or definitions, and does not include an exhaustive definition of the persons who are entitled to inherit property, nor does it cover all inheritance situations provided for in the statute.

- If a decedent is survived by a spouse and no surviving children or descendants of deceased children, the entire estate goes to the spouse.
- If a decedent is survived by a spouse and one or more children or their descendants, and if all the children who survive or who have descendants are also the children of the surviving spouse, the entire estate goes to the surviving spouse.
- If a decedent is survived by a spouse and one child or the child's descendants and if the surviving spouse is not the natural or adoptive parent of the child, the spouse receives the first $20,000 from the estate plus one-half the remainder of the estate. The balance of the estate passes to the child or, if the child is deceased, to the child's descendants.

- If a decedent is survived by a spouse and more than one child or their descendants, the spouse receives the first $60,000 if the spouse is the natural or adoptive parent of one, but not all of the children, or the first $20,000 if the spouse is not the natural or adoptive parent of any of the children. The spouse receives one-third of the balance of the estate and the children will receive two-thirds of the balance of the estate in equal shares. Descendants of a deceased child divide that child's equal share.
- If there is no surviving spouse, but surviving children or their descendants, each of the children receives an equal share of the estate. Descendants of a deceased child divide that child's equal share.
- If the decedent has no surviving spouse or children and no descendants of deceased children, the estate goes to his or her surviving parent(s) or, if both parents have died, in equal shares to brothers and sisters or their descendants.

The statute also defines other possible family situations not covered in this summary. Readers of this pamphlet are urged to consult an attorney for clarification of this information, and to seek professional advice before taking any action related to administration of an estate.

What is an administrator's account?

Within six months after his or her appointment, every administrator of an estate is required to file a report, called a *final and distributive account,* with the probate court. In certain circumstances, such as when an Ohio or federal estate tax return is due, an account is due 13 months after appointment and once a year thereafter until a final and distributive account can

be filed. This account must include an itemized statement of all receipts, and disbursements, as well as all distributions made by the administrator during the reporting period. When the administrator files the final and distributive account with the court, and after it is approved by the probate court, the administrator is released from his or her duties.

What are characteristics of an effective administrator?

One of the keys to being an effective administrator is to be highly organized. In the administration of a decedent's estate, it is essential to keep complete and accurate records and to carry out all procedures required by the probate court in an orderly manner. Also, keeping a positive relationship with the heirs is helpful. This is especially true when the administrator is one of several surviving relatives of the decedent. An administrator is likely to encounter fewer problems and complications if he or she keeps all the decedent's heirs informed of what is going on and treats them as equals.

Who should assist the administrator?

Serving as an administrator involves serious legal and financial responsibilities, and can expose the administrator to financial liability if claims and assets are not properly handled. The administrator of an estate should not rely on casual advice from friends and family members regarding duties to the court and to the decedent's heirs. A lawyer can provide the administrator with trained legal advice and professional judgment regarding the complicated duties and laws involved to help avoid pitfalls and make the proper decisions.

Contact the Law Office of Michael J. Davis

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Michael J. Davis is located in Mason, Ohio, and serves clients throughout Ohio, including Lebanon, Maineville, Mason, Morrow, Springboro, South Lebanon, West Chester, Warren County, Butler County, Hamilton County, Clermont County and Clinton County, Ohio.