The advantages of having a Will

by P. Herbert Schmidt

If one's gay lover is not protected by a will or other legal instrument, they are S.O.L. in the event of your death.

In any discussion of Wills, some mention should be given to what happens when one dies without a Will. In beginning this discussion, it should be noted that in some jurisdictions, it is not a requirement that all estates be probated or that any estate be probated. This is regardless of whether or not the decedent died with or without a Will. Therefore, in the most drastic of situations, since it is not a requirement that a person's estate be probated, someone who has easy or ready access to the property of the decedent could dispose of or otherwise secrete the assets of the estate prior to the intervention of the state, the Courts, or other interested parties. For example, in the state of Oregon, the jurisdiction of the Probate Court is not invoked until the filing of a petition by an interested party. An interested party is ipso facto anyone interested enough to file a petition for the probate of a decedent's estate. In other words, people usually file petitions for the probate of an estate in order to protect their interests in the decedent's estate.

Almost all Will forms provide for the appointment of a Personal Representative, and in any event, when a petition for the probate of an estate is filed, a Personal Representative will be appointed. Therefore, when one dies intestate without a Will, there is no Personal Representative to step in and immediately petition for the probate of an estate in order to protect the assets thereof and it is not until an interested party comes forward to petition for the probate of an estate that a Personal Representative is finally appointed to garner and protect assets of the estate. In short, the assets of a decedent's estate are totally unprotected and their management unsupervised until the Personal Representative or Executor of an estate is appointed. Having a Will deposited with a good friend or an attorney specifying who the Personal Representative or Executor is to be, and having that person made aware of the fact that they are the Personal Representative speeds up the process, generally speaking, by which one's estate falls within the jurisdiction of the Probate Court and thereby receives the protection of the Court and hopefully the kind administrations of a competent Personal Representative.

Some of the more obvious complications of dying intestate (without a Will) is that you have little or no control over the disposition of your estate after your death. If you have a dear friend or a special child, or intended your business to be carried on in a particular manner, forget it. When you die intestate your dreams, hopes, aspirations and wishes are buried with you. Often times, many of your friends and family members will be aware of your wishes, but the law will transfer all of your estate's assets to your nearest blood relatives regardless of those wishes and this, many times, results in bitter family disputes. Sometimes it even results in expensive legal battles in which there are no winners. This is especially the case when the decedent has, for many years, loved someone but, for whatever the reason, they have never gotten around to formalizing their relationship. In Oregon, there is no such thing as a common law marriage, while it is the case in other jurisdictions. In any event, said loved one has little or no rights in the decedent's estate, absent statutes which recognize common law marriage, and then the loved one has rights only to the extent of his or her contributions and even then he or she must petition the Court to enforce same.

This is especially true in the case of gay households where there is obviously no common-law marriage to begin with. If one's gay lover is not protected by a Will or other legal instrument they are S.O.L. in the event of your death.

Another problem is that many decedents, prior to their death, will have tried to make their own Will without meeting all the formalities necessary at law for same to be honored as a Will. One of the classic examples is the attempt of a decedent to have made a holographic Will. A holographic Will is only honored in some jurisdictions and is definitely not honored in the state of Oregon. A holograpahic Will is an instrument written entirely in the hand of the decedent with the intent to pass on his worldly belongings to others after his death. Needless to say, in a state such as Oregon, such an instrument is wholly and entirely useless and in the case of any state of this Union in which all the formalities of a Will are notmet, whatever it is that the decedent has concocted prior to his death, is also wholly and entirely useless. This also leads to a great deal of bitterness when a loved one finds the decedent's entire estate passing on to someone else despite the existence of a written instrument.

Therefore, in order to avoid these complications, it is best that a Will be properly prepared and properly witnessed. The crux of the matter is that when one dies without a Will, regardless of anyone else's wishes, the decedent's estate passes on to his lineal descendants at law according to a strict plan and no one, least of all the decedent has much say in the matter. Also, when one dies intestate (without a will) and leaves minor children, the Court must appoint a Personal Representative for the estate of the decedent, who could be paid from the assets of the decedent. The Court must also appoint a guardian for the children and a Trustee to administer the estate during the children's minority, both of whom could be paid from the assets of the estate and these individuals are selected without the benefit of what the decedent would have wanted. The result here is that much of the estate is eaten up in bureaucratic-like processes and total strangers take over the administration of the decedent's estate.

Therefore, the advantages of having a Will are apparent. To name a few:

1. The testator gets to choose where and to whom his property will go.
2. The testator gets to nominate who is to serve as his Personal Representative to manage his estate after his death.
3. The testator gets to nominate any Trustee he wishes to see appointed to manage specific portions of his estate that he wishes to place in trust for specific purposes.
4. The testator gets to nominate who he wants to serve as guardian of his minor children.
5. The testator can select the manner in which he wishes his bodily remains to be disposed of.
6. His Will will smooth out the administration of his estate, if properly drawn, thereby minimizing the expenses of administration.
7. If the testator's estate is large enough to incur estate or inheritance taxes, then, if his Will is properly drawn, it will minimize his estate tax burden and the inheritance tax burden upon his heirs and devisees.

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