

or descent, the probate court has jurisdiction and must either rule on the will or determine who are the legal heirs. Thus, even if you have no will, your heirs must go to court to administer your estate or to obtain a determination that administration is not necessary.

### **Is an "Agreement to Pass Property at Death to Surviving Spouse" a substitute for a will?**

No, for such an agreement is usually incomplete. Under Idaho law, both spouses may join in signing a document which allows the surviving spouse to inherit all of the property upon the death of the first spouse. This agreement will only be enforceable if it is filed in the county recorder's office(s) where the parties live and in each county in which they own land in Idaho. The agreement must be signed before a notary public and all of the property owned by the parties is treated as community property. The problem is that either spouse may own separate property which is not covered by this agreement. In addition, this agreement does not provide for the distribution of the property once both spouses are gone, or for real property outside the state of Idaho.

### **Can a will reduce taxes?**

By having a will drawn, you may be able to reduce inheritance and estate taxes, and may be able to eliminate them completely.

### **What is a living will?**

A "living will" is for the purpose of expressing your wishes as to the extent of medical care you will receive in the event of an accident or illness which renders you unable to communicate with your physician. Idaho law provides that artificial life-sustaining treatment may be withheld from a person who is terminally ill or in a vegetative state if that person has so indicated his or her wishes in a living will and has executed a valid power of attorney appointing another adult person to implement the expressed health care decisions for the principal.

### **Idaho Trial Lawyers Association**

The Idaho Trial Lawyers Association is an association of attorneys regularly engaged in the trial of lawsuits. This brochure is presented to you as a courtesy of the Association and your local attorney with the hope that it will be of assistance to you in both understanding the law and your role as a participant in any litigation.

The Idaho Trial Lawyers Association has as one of its fundamental purposes the improvement of our court system in order to bring fairness and justice to all our citizens and to increase both understanding and appreciation for the American judicial system and the jury trial.

After reading this brochure, if you have any questions concerning your special needs for an adequate will, do not hesitate to call an attorney of your choice for assistance. Let the attorney know what questions you have. It is suggested that you write down your questions prior to meeting with the attorney in order that all your questions are answered directly and promptly.



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This pamphlet has been provided to you as a courtesy of:

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# Have You Made A Will?



## What is a will?

There are two types of wills recognized in Idaho. The holographic will is a handwritten will. It must be signed and dated. The formal will must meet certain standards according to Idaho statutes. For example, the formal will must be typed, signed and dated by you and witnessed by at least two witnesses.

In Idaho:

1. You, the maker of the will (called the Testator or Testatrix) must be at least 18 years old.
2. You must be of sound mind at the time you sign the will.
3. Your will must be written.
4. Your will must be witnessed in the special manner provided by law for wills.
5. It is necessary to follow exactly the formalities required for the signing of a will.
6. To be effective, your will must be proved to be valid, and accepted by the Court.

No will becomes final until the death of the testator/testatrix, and it may be changed or added to by the testator/testatrix by writing a new will or by writing a "codicil" which is simply an addition or amendment executed with the same formalities as a will. A will's terms cannot be changed by writing something in or crossing something out after the will is signed, and those efforts may in fact invalidate the will.

## What are some of the results that can be accomplished by a will?

1. A trust can be created in a will providing that the estate or a portion of the estate will be kept intact with income distributed or accumulated for the benefit of members of the family or others.
2. The expense of bond premium often required of the person managing your estate if there is no will can be avoided.
3. The testator/testatrix may name a Personal Representative of his/her choice. A Personal Representative is one who manages an estate, and may be either an individual, bank or a trust company subject to certain

limitations.

4. Minors can be cared for without the expense of guardianship proceedings.
5. You decide who gets your property instead of the laws making the choice for you.

## What happens when there is no will?

When the deceased has no will (or dies "intestate" as the law calls it), the real and personal property of the deceased is distributed according to a formula fixed by law. In other words, if you fail to make a will, the inheritance statute determines who gets your property, not you. The law has a rigid formula that makes no exceptions for unusual need.

When there is no will, the court appoints a personal representative, known or unknown to you, to manage your estate. The cost of probating may be greater than if you had planned your estate with a will.

## May a person dispose of his or her property in any way he or she wishes by a will?

Under Idaho law, a person may dispose of all his or her separate property in a will. "Separate property" is property acquired before a marriage or received as a gift or inheritance that comes just to you during your marriage. Each person is also allowed to dispose of one-half of the community property accumulated. "Community property" is all property accumulated during a marriage other than separate property. The remaining half of the community property goes to the surviving spouse.

While any sort of property may be transferred by will, there are some particular interests in property which cannot be willed, such as the community property share of the surviving spouse. Neither spouse may completely disinherit his or her spouse, since the law gives a surviving spouse a choice to take either his or her share under the will or receive what is granted under the Idaho Code. How-

ever, it is often possible to disinherit any or all of the children over 18 years of age.

## Must a person leave his or her children at least one dollar each?

No, not even a cent. This popular misconception arises from the fact that when a will fails to make provision for or "remember" a child, the law "presumes" that the testator/testatrix merely forgot. To meet this, the drafter of a will in olden times frequently gave "to my son, John, the sum of one dollar." Today an accepted provision is "I have intentionally made no provision for my son, John."

Children born after a will is signed, or a minor or dependent child will still have certain rights in the estate under particular circumstances.

## How long does a will last?

A will is "good" until it is changed or revoked in a manner required by law. A will may be changed as often as the person likes so long as that person is sane and not under undue influence, duress, or fraud, and provided it is changed in the required manner. Changes in circumstances after the execution (signing) of the will, such as tax law amendments, deaths, marriage, divorce, birth of children, or even substantial change in the nature or amount of a person's estate may raise questions as to the adequacy of the will. All changes require a careful analysis and reconsideration of all the provisions of a will and may make it advisable to change the will to conform to the new situation.

## Does a will increase probate expenses?

No, if there is property to be administered or taxes to be paid or both, the existence of a will does not increase probate expenses. A will frequently reduces expenses. If there is real or personal property which would pass by will