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SPECIAL REPORT: Problems with Dying Intestate

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According to the First Union Securities, 70% of Americans die without a will. Although I do not know if this statistic is correct, I am confident that a large number of people die without a will. Dying without a will can be a complicated and expensive matter. For example, I was recently contacted by an illegitimate child who wanted to know if he was entitled to a share of his father's estate. The father had recently died unmarried without a will and was survived by other children.

Under Virginia law, a child born out of wedlock is a child of the mother. The child is also treated as a child of the father if: (1) the biological parents participated in a marriage ceremony before or after the birth of the child, or (2) the paternity is established by clear and convincing evidence. No claim based upon a relationship between a child born out of wedlock and a parent will be recognized unless an affidavit and a suit by such child is filed within one year of the date of death of the parent.

Clear and convincing evidence of the father's paternity includes, but is not limited to, the following:

- He cohabited openly with the mother during all of the ten months immediately prior to the birth,
- He gave consent to a physician or other person charged with the responsibility of securing information for the birth record that he be named as the father,
- He allowed the common use of his surname by the child,
- He claimed the child as his child on any statement, tax return or other document filed and signed by him with any state, local or federal government,
- He admitted before any court having jurisdiction to try and dispose of the issue of paternity that he is the father of the child,
- He voluntarily admitted paternity in writing, under oath,
- The results of scientifically reliable genetic tests, or
- Other medical, scientific or anthropological evidence.

In another case I recently had, a single man died without a will, and his real property passed to numerous heirs. These heirs could not agree on the disposition of the real property, and none of them had a large enough share in the property to undertake litigation for its sale.

If you die without a will, the rules for the disposition of your estate are not simple. Frequently, they result in expensive and time-consuming estate administration and litigation.

Is there a better way? **Yes!** Everyone should have a will that disposes of his or her estate as he or she sees fit. For example, in the above case involving the child born out of wedlock, the father within a will could have expressly included this child or any other children born out of wedlock in his estate plan or he could have expressly excluded them from his estate plan.

In the above case involving the inheritance of real property by numerous heirs, the decedent within a will could have directed his executor to sell the real property and distribute the sales proceeds to the beneficiaries.

There is no one will or set of will forms that is appropriate for everyone. An experienced elder law attorney can craft a will that disposes of your estate as you see fit. This will minimize the expense and time involved in estate administration and the potential for disagreements among your family. The money and time saved by well-drawn estate planning documents will easily pay the attorney's fees for preparing these documents.

ABOUT THIS HANDOUT

This guide is provided as a courtesy to help you recognize potential estate planning issues. It is not intended as a substitute for legal advice. It is distributed with the understanding that if you need legal advice, you will seek the services of a competent elder law attorney. While every precaution has been taken to make this explanation accurate, we assume no responsibility for errors or omissions, or for damages resulting from the use of the information in this explanation.



Hook Law Center focuses its practice on estate and tax planning, planning for long-term care and aging, retirement and investment advice, trust and estate administration and probate, guardianships for those unable to make sound decisions, and the unique situations associated with special needs.

Learn more about the Hook Law Center at www.HookLawCenter.com.

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