

WHAT HAPPENS IF I DIE (WITHOUT A WILL)?

I recently made a series of estate planning presentations to employees of the U.S. Customs Service. In talking with the attendees afterwards, I learned that many of them were unaware of the need for a Will, and hadn't realized what would happen to their property if they died without one. As a result, I thought that information about dying without a Will might be of interest generally, and have therefore attached below a rough transcript of the portion of my presentation dealing with this issue.

Dying "intestate" means dying without a valid Will. You didn't make a Will before you died, or your Will doesn't meet the requirements of Illinois law, so it can't be used. That's intestacy. What's the practical effect of dying intestate?

You've probably all seen the cop shows where a perp is arrested, and is read his rights. The police officer will say something like, "If you do not have an attorney, one will be provided for you." In a sense, the same thing is true of dying intestate. If you don't have a Will, one will be provided for you. The problem is that your Will has, in essence, been drafted by a bunch of politicians in Springfield and by a judge or two, who have decided what you probably would've wanted to do if you had made a Will.

A Will essentially accomplishes three things: it allows you to give away your probate property (property that you own in your own name); it allows you to nominate an executor to wrap up your affairs; and, finally, it allows you to nominate a guardian for your minor children. Obviously, if you don't have a Will, these things need to be accomplished in different ways.

If you die intestate, your probate property will be distributed pursuant to Illinois intestacy law, and will pass to your heirs (closest relatives). Who are your closest relatives? That depends on your family situation, and the intestacy law covers pretty much every possibility. For the typical nuclear family (husband and wife plus kids), upon the death of the first spouse, half of his or her probate property will pass to the surviving spouse, and half will pass to the kids. In this situation, as in many others, what the intestacy law requires may not be what you would've wanted.

I think that most married people would want their surviving spouse to receive all of their property when they die, so that the surviving spouse can live comfortably and can support the children. That's not what Illinois law says, though, so you can have a situation where your children inherit a significant amount of your property, even if they aren't at an age where that's appropriate, and even if the receipt of this property creates significant estate tax problems. (Simply put, property passing to a husband or wife usually isn't subject to estate tax, while property passing to anyone else – including children – may be subject to the tax.)

Similar problems exist for unmarried people. Let's say that you're single, with no children, and your parents have already died. You're survived by two siblings: one is your best friend, and one you hardly know. Under Illinois intestacy law, your siblings would split your probate property equally – again, probably not the result you would've wanted.

Intestacy also affects the role of executor. Because you haven't named anyone to carry out the terms of your Will, someone – probably a spouse, parent or siblings – will need to petition the court to become administrator of your estate. This person will pay your bills

and debts, and then distribute your property pursuant to the Illinois intestacy law I just mentioned. Needless to say, the person who petitions to become administrator may not be the person you would've chosen. But the court doesn't have the inside knowledge that you have – the judge won't know that your brother, who's seeking to become administrator of your estate, can't balance his checkbook. Furthermore, your administrator will be required to purchase an insurance policy (called a surety bond), paid for out of your estate, to ensure that he or she doesn't run off with the estate's property. A well-drafted Will can eliminate the need for a surety bond.

Guardianship is a final concern, and the problems here are similar to those just mentioned with respect to an executor. The court doesn't know who would make the best guardian for your minor children, and the judge will probably choose a close relative to carry out this role if you die without a Will. Again, this person may not be the person you would've chosen. *For more information regarding Wills and intestacy, please consult a qualified estate planning/probate attorney.*

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