FLORIDA WILLS, TRUSTS, AND PROBATE ESTATES
QUESTIONS AND ANSWERS

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This article is not intended as legal advice but is provided for general information.

1. **What is a will?**
    A. A will is also known as a last will and testament. It is a writing that specifies who is to receive the assets of a deceased person. We call the deceased person the decedent.
    B. Of all the legal documents prepared by lawyers, wills still require the most formality in signing. The will of a Florida residence decedent that was not signed in accordance with the requirements of Florida law is void.
    C. Florida residents must sign wills at the end of the document in the presence of at least two witnesses who are both present at the same time and place with the person making the will. We call the person making the will the testator.
    D. Wills are usually signed in the presence of a notary public in addition to the witnesses so that the will is self-proving in case of death. Self-proving wills can be admitted to probate after the death of the testator without having the witnesses come to the courthouse.
    E. The testator should keep the original will in a safe place because it must be presented to the court at the time of his or her death. A copy of the will may not be admitted to probate (except in unusual circumstances). Florida has no provision for pre-filing wills prior to death so the testator should keep the will in a safe deposit box at a bank or another safe place.
2. **What is a personal representative or trustee?**
    A. The personal representative is the person or company appointed to administer the affairs of a decedent's estate. The antiquated terms administrator and executor are no longer used in Florida. The court appoints a personal representative whether the decedent died with a will or without one. Lawyers often refer to this person as the PR.
    B. The trustee is the person or company named to administer a trust. Not all wills have trusts.
    C. The will and trust should name a bank, trust company, or trusted Florida resident as personal representative and trustee, and it should list several alternates to serve in case any of those named predeceases the testator.

D. The will may name a nonresident as a personal representative only if he or she is the testator's parent or lineal ascendant, child or lineal descendant, spouse, brother, sister, uncle, aunt, nephew, or niece, or the spouse, lineal ascendant or lineal descendant of any of the foregoing. While this list seems long, there are many relatives who cannot serve as personal representatives in Florida unless they are Florida residents. For example, if a married couple names the husband's nonresident brother as personal representative of both their wills, Florida law allows the brother to serve as personal representative for the husband's estate but not for the wife's. Very few states still have this restriction, so there have been comments by lawyers suggesting that this law be changed. This restriction does not apply to trusts: a nonresident may serve as trustee of a trust in Florida.

3. **What is probate?**
   A. Florida law requires a probate court proceeding upon the death of an individual domiciled (permanently residing) in Florida or owning real property in Florida if the individual owns any assets. The probate proceeding is the law's way of assembling the decedent's assets, paying debts and taxes, and passing title to the decedent's beneficiaries.
   B. Many of the disadvantages of probate have been eliminated in Florida. For example, the inventory of assets owned by the decedent and the accounting of financial transactions are now sealed from public view, and probate proceedings for most estates must generally be completed within one year and are often completed within six months. Nevertheless, probate avoidance is still desirable in many cases and can be accomplished in a number of ways.
4. **What is a testate estate?**
   A. If a Florida resident dies with a will, he or she has died testate. The will names the personal representative and beneficiaries of the estate. Making a will is the means by which an individual determines the beneficiaries who will inherit his or her property at death and the personal representative who will be responsible for collecting the assets, paying claims and expenses, and distributing the assets.
   B. To be effective, a will must be filed with the probate court after the individual dies, a petition for administration must be filed, and an order admitting the will to probate must be entered by the court. Thus, the estates of persons who die with wills must be probated just the same as the estates of persons who die without wills. The only difference is that those with a will have the ability to name the beneficiaries who will receive their property at their death and to name who they prefer to be the personal representative.
5. **What is an intestate estate?**
   A. If a Florida resident dies without a will, he or she has died intestate. Because there is no will, the law specifies who will receive the decedent's assets, instead of the decedent's will specifying this.
   B. Generally speaking, the law of intestacy in Florida says that the following persons are entitled to receive the residuary (what is left after payment of claims, debts, taxes and expenses) of the probate assets of a Florida resident who dies without a will:
      (1) If the decedent leaves a surviving spouse but no descendant (child, grandchild, etc.), then the surviving spouse is entitled to receive the residue.

(2) If the decedent leaves at least one descendant but no surviving spouse, then the descendants are entitled to receive the residue.
(3) If the decedent died before 10/1/11 and leaves a surviving spouse and one or more descendants, all of whom are descendants of both spouses, then the surviving spouse is entitled to the first $60,000 and one-half of the remaining residue, and the descendants share the other half.
(4) If the decedent died on or after 10/1/11 and leaves a surviving spouse and one or more descendants, all of whom are descendants of both spouses, and if the surviving spouse has no other descendant, then the surviving spouse is entitled to receive all of the residue.
(5) If the decedent leaves a surviving spouse and one or more descendants, one or more of whom are not descendants of both spouses, then the spouse is entitled to one-half of the residue and the descendants are entitled to the other half.

C. Florida law provides that the surviving spouse is entitled to preference in being appointed the personal representative of an intestate estate. If there is no spouse, then a majority of the heirs may select the person entitled to preference. In any case, the court makes the final decision.
D. Florida intestate estates commence with the heirs or creditors filing a petition for administration with the court asking for appointment of a personal representative.

6. **What is a revocable living trust and how does it avoid probate?**
   A. A revocable living trust is a writing that creates a form of ownership in which assets originally owned by the grantor of the trust are legally re-titled in the name of a trustee who manages the assets for the benefit of the trust's beneficiaries named in the writing.
   B. Creating a revocable living trust, also called an inter vivos trust or just a living trust, is the most effective means of avoiding probate and guardianship with respect to the trust's assets. It is safer than using joint ownership to avoid probate because the trustee named by the grantor does not personally own the assets of the trust, as is the case with joint property.
   C. Frequently, the living trust names the grantor as the initial trustee and initial beneficiary. This means that the grantor both manages the trust assets as trustee and is entitled to the benefit of the assets as beneficiary for life. However, instead of naming the grantor as the initial trustee, a grantor may name a bank, trust company or trusted individual as the initial trustee.
   D. The trust also lists the beneficiaries entitled to receive the assets when the grantor dies. This part of the trust is similar to a will's dispositive provisions (the paragraphs of a will that say who gets what). The trust also names who will be the successor trustee after the initial trustee dies or becomes incapacitated.
   E. A trust is created by signing a written trust agreement. The trust agreement would be prepared by a lawyer and signed by the person creating the trust (called the settlor or grantor). It must be signed with the same formality as a will, so it is usually signed when the will is signed.
   F. After the trust is created, assets of the grantor must be transferred to the trust. The trust avoids probate as to the assets conveyed to the trust because upon the grantor's

death or incapacity the assets of the trust are owned by the trust and not by the grantor. Of course, assets which have not been transferred to the trust and which remain titled in the grantor's name at death are subject to probate after the grantor's death the same as they would be without a trust. Therefore, most assets should be placed in trust if probate and guardianship avoidance is the primary goal.

G. However, special attention needs to be given to assets such as homestead, life insurance, annuities, IRAs, retirement accounts, and other assets that avoid probate on their own through valid death beneficiary designations or that may be exempt from claims of creditors or that may have adverse tax consequences if placed in trust. Therefore, legal and tax advice is necessary when funding a trust.

H. In the early 1990's, Florida law governing trusts changed so that after the grantor dies the trustee named in the trust must file a notice of the existence of the trust (but not the terms of the trust) with the probate court. Creditors have two years to file claims, but this can be reduced to three months by filing a probate proceeding and publishing and serving notice to creditors. For that reason, it is advisable to open a probate proceeding for the purpose of administering the claims process upon the grantor's death, even when there is a living trust.

7. **What are joint tenancies?**

A. Joint tenancies are any form of ownership involving more than one owner, such as joint tenancy with full rights of survivorship, tenancy in common, and tenants by the entirety. Joint tenancies may be held in many types of assets, including real estate, bank accounts, stocks, etc.

B. Assets held jointly with full rights of survivorship pass automatically by operation of law to the surviving joint owners and do not require probate. Bank accounts, stocks, and mutual funds are frequently held as joint tenants with full rights of survivorship.

C. It should be noted that joint assets held as tenants in common do not avoid probate. Assets in which an individual's name appears as a tenant in common must be probated.

D. Assets held by a husband and wife as tenants by the entirety pass automatically by operation of law to the surviving spouse and do not require probate on the first death. In addition to probate avoidance, separate creditors of just one spouse cannot reach tenancy by the entirety property in Florida.

E. One disadvantage of jointly-held property is that probate is not avoided when the last joint owner dies. Probate will be required upon the death of the last surviving joint owner.

F. Another disadvantage of joint ownership is that it constitutes true ownership. This means that any joint owner can withdraw, sell or convey his or her interest in the asset without approval of the original owner and creditors of a joint owner can reach the joint owner’s interest in the property (except for tenancies by the entirety in real property).

G. Adding a child's name to a bank account as joint owner can constitute a gift to the child and can be problematic because the child's creditors could reach the asset. Similarly, the child's spouse could claim an interest in the assets jointly held with a child if the child divorces. Therefore, it is generally not advisable to add a child’s name as joint owner of a bank account, house, or other asset.

H. Another disadvantage of joint ownership is that it does not avoid a guardianship. For example, if a married couple owns a home and one of them becomes incapacitated, necessitating the sale of the home to pay medical bills, a guardianship may be required since one spouse alone cannot sign a deed conveying the home. A durable power of attorney might be used to convey the home, but not everyone has one.
I. These disadvantages of joint ownership have led Florida residents to create living trusts to avoid probate and to avoid the disadvantages of joint ownership.

8. **What is a bank account held "in trust for"?**
   A. Bank accounts that are set up "in trust for" named beneficiaries to whom the balance in the account shall be paid at death are called Totten trusts and do not require probate.
   B. A Totten trust account owner is allowed to make withdrawals from the account during his or her lifetime, which makes this trust different from other types of trusts.
   C. One disadvantage of a Totten trust is that if the beneficiary dies before the account owner dies, then probate will be required.
   D. Another disadvantage is that a Totten trust may avoid probate, but it will not avoid a guardianship and it is not a substitute for a power of attorney.
   E. The beneficiary cannot have any access to the account while the account owner is alive, even if the account owner is incapacitated and needs the beneficiary's assistance in withdrawing funds to pay medical bills. A guardianship or power of attorney would be required in that case.
9. **Do life insurance proceeds avoid probate?**
   A. Life insurance proceeds payable by valid death beneficiary designation to someone other than the insured's estate need not be probated.
   B. This does not mean that the proceeds avoid estate taxation. It just means that the proceeds are paid directly by the insurance company to the beneficiary without going through probate.
10. **Do IRA, 401(k), Pension, Profit Sharing and other retirement account proceeds avoid probate?**
   A. The owner of an individual retirement arrangement (IRA), 401(k), pension, profit sharing, and other retirement accounts may designate the beneficiary entitled to receive the account at his or her death by signing a written beneficiary designation.
   B. It is important to keep copies of these written beneficiary designations, as well as proof that the institutions received them and have them on file. If the owner dies and the institution claims it does not have a beneficiary designation, then the account would be a probate asset.
   C. The proceeds of the retirement account would then be paid directly to the beneficiary without going through probate. They are usually still subject to estate tax, and often income tax as well, so taxes might greatly dilute the value of these assets upon the owner's death.
11. **What is disinheritance?**
   A. Florida law does not require an individual to leave any property to anyone other than the surviving spouse. Thus, an individual can cause children and other relatives not to inherit anything (disinherit) by making a will that omits them.
   B. But, there are a few exceptions to this.

12. **What is elective share?**
    A. Florida law provides that the surviving spouse is entitled to take an elective share in an amount equal to 30% of the elective estate.
    B. The determination of what is meant by “elective estate” is a legal question best left to an attorney.
13. **How does homestead pass upon death?**
    A. Florida law provides that the decedent's homestead cannot be passed by will to anyone if the decedent is survived by a spouse or minor child, except that it can be passed to the spouse if there is no minor child.
    B. If the decedent leaves no will and is survived by a spouse and lineal descendants, the spouse receives a life estate and the lineal descendants receive the remainder.
14. **What is a pretermitted spouse or child?**
    A. If a Florida resident marries after making a will and the will does not provide for the spouse, the spouse is generally entitled to a share of the estate as a pretermitted spouse. This share is equal in value to the share the spouse would have received if the resident had died without a will. Thus, it is important to make a new will after getting married.
    B. Similarly, if a child is born to or adopted by a Florida resident after making a will and the will does not provide for the child, the child may be entitled to a share of the estate as a pretermitted child. This share is equal in value to the share that the child would have received if the resident had died without a will. Thus, it is important to make a new will after a child is born.
15. **What is exempt property of a decedent?**
    A. The following property of a deceased Florida resident is exempt from the claims of his or her creditors (except for persons having liens on these items): household furniture, furnishings and appliances in his or her usual place of abode up to a net value of $20,000, two motor vehicles held in the decedent's name and regularly used by the decedent or his or her immediate family as their personal vehicles, and certain other property.
    B. Unless the decedent's will leaves the exempt property to others, the surviving spouse is entitled to the exempt property. If there is no surviving spouse, the decedent's children are entitled to it.
16. **What is a guardianship?**
    A. Guardianship is to the living what probate is to the deceased -- a court proceeding to oversee the rights and property of an individual who is unable to manage on his or her own.
    B. The court may appoint a guardian for a minor (someone under the age of 18 years). The minor's parents are often appointed guardians.
    C. The court will also appoint a guardian for a person who has been found to be incapacitated. Florida no longer uses the term incompetent to describe those who are unable, through mental or physical disability, to care for themselves or their property.
    D. Guardians must file many papers with the court and must follow many rules. The guardian must file annual accountings with the court, and the court must audit the accountings. These requirements are intended to protect the ward (minor or incapacitated person), but the expense and public nature of a guardianship can be

counter-productive to the ward. For this reason, guardianship avoidance through the use of more effective estate planning techniques, such as living trusts, have become popular.

17. **What is a durable power of attorney?**
    A. One person (the principal) may give another person (the agent or attorney in fact) the power to sign documents, write checks, convey real estate, and do other acts for him or her by signing a written power of attorney.
    B. Most powers of attorney cease to be effective when the principal becomes incapacitated. However, a durable power of attorney remains effective when the principal is incapacitated so the agent can continue to sign documents, write checks and do other acts for the principal. Thus, a durable power of attorney may avoid a guardianship.
    C. However, all powers of attorney cease when the principal dies, so a power of attorney will not avoid probate.
    D. Florida law no longer allows general powers of attorney so powers of attorney must specify in detail the powers that are granted.
    E. Florida also no longer allows springing powers of attorney
18. **What is a declaration of preneed guardian?**
    A. Florida law allows an individual to sign a declaration naming the persons, banks or trust companies the individual would prefer to act as guardian of the person and property in case the individual is determined to be incapacitated.
    B. Such a declaration of preneed guardian must be signed and filed with the Clerk of Court before becoming incapacitated.
    C. The law also allows a parent to name a guardian for his or her minor children by filing a declaration of preneed guardian for minor.
19. **What is a health care surrogate or proxy?**
    A. Florida allows an individual to name a health care surrogate to make health care decisions for the individual in case the individual is unable to make or communicate a choice regarding a particular health care decision. The law also allows a health care proxy to do this if no health care surrogate is named.
20. **What is a living will?**
    A. Florida recognizes a living will which can be signed by a person to state whether or not his or her life should be artificially prolonged if he or she is incapacitated and has a terminal condition or end-stage condition or is in a persistent vegetative state and his or her physicians determine there is no reasonable medical probability of recovery. Many individuals state that they would not want life sustained in this situation so they sign a living will.
    B. Sometimes a living will is confused with a living trust. They are quite different legal documents. A living trust has to do with property; a living will has to do with health care.
21. **How should motor vehicles be titled in Florida?**
    A. In Florida, everyone whose name appears on a vehicle title is legally responsible for the negligent acts of the driver. This is called the dangerous instrumentality doctrine.
    B. Therefore, in order to reduce the risk of liability for accidents arising out of motor vehicles, they should be titled in the name of the principal driver only. A husband

should own his car, and a wife should own hers. Their cars should not be jointly owned. Children should own the cars they drive if they are over the age of eighteen (18) years.

22. **What is a personal liability umbrella insurance policy?**
    A. Most auto insurance and homeowner liability insurance policies limit their coverage to less than a million dollars, but claims exceeding that amount are not unusual today. Liability claims in excess of the policy limits must be paid by the insured.
    B. A personal liability umbrella insurance policy can be obtained from one's insurance agent to raise the coverage to a higher limit.
    C. In addition, one should ask his or her agent to include uninsured/underinsured motorist coverage as part of the umbrella policy to increase the insured's own protection from uninsured and underinsured drivers.
23. **How should life insurance be owned?**
    A. In Florida, the cash value of life insurance owned by the insured is exempt from the claims of the insured's creditors. In addition, creditors of an insured cannot reach the proceeds of life insurance on the insured if someone other than the insured's estate is named as beneficiary.
    B. The person whose life is insured should be the owner of the life insurance policy, and the policy should name a beneficiary other than the estate of the insured, in order to avoid creditors claiming life insurance cash value and proceeds for payment of the insured decedent's bills.
    C. Cash value of life insurance owned by an individual's spouse or anyone other than the insured is not exempt from claims of that owner’s creditors and, therefore, can be reached by creditors of the spouse or other owner of the life insurance. In addition, the proceeds of life insurance that are paid to an individual's estate may be reached by the creditors of the individual.
24. **How much title insurance should I have on my real estate?**
    A. Title insurance should be maintained equal to the fair market value of the real estate. Most people remember to increase homeowner's insurance coverage when they receive their annual premium statements, but title insurance premiums are paid only when the policy is issued (usually when the real estate is purchased) so most people forget to increase title insurance coverage. This means that the coverage on their home for defects in title is limited to the amount stated on the policy when they bought their home.

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