WILLS & TRUSTS

Irving J. Sloan

Oceana's Law for the Layperson

Legal Almanac
Second Series

WILLS & TRUSTS

Successor volume to
How to Make a Will,
How to Use Trusts

Revised & Edited by

Irving J. Sloan

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PREFACE

This edition of **Wills & Trusts,** successor volume to **How to Make a Will, How to Use Trusts**, makes this volume, which was the second title in our Almanac Series since its publication as Volume 2 in 1948, the most popular title in the series of ninety available topics. Such a record clearly suggests the importance of the law of wills and trusts to the public. It also suggests the usefulness a survey review of the law in layman's language holds for the general reader. The publisher is pleased and gratified that the response to this volume has been so consistently receptive for more than four decades.

Through these many years the rationale for the largely unchanging material dealing with the making and execution of wills has been that there is very little change in these areas. As a simple introduction for the reading audience to the need for a will, the mechanics for creating one, and the forms of simpler wills, the work remained adequate.

By 1975, however, the original Almanac was expanded to adapt to contemporary needs. These are reflected by the fact that the size of estates were no longer a problem reserved to the very wealthy. People now in their middle years had begun to inherit from their parents, adding these assets to their own. Even younger people faced the prospect of combined accumulation of their own growing wealth together with the accumulated wealth passed on by prior generations. Under the circumstances, the matter of a person's will had become involved with much more than a simple instrument of disposing of one's assets. Strategies of setting up appropriate types of trusts, and matters of tax planning, had become items of compelling usefulness. The selection of strategies that both save money and expedite the handling of estates became crucial. Thus, it was in this context that the editions of this Almanac since 1975 have included discussions describing trusts while a person is alive (*in-*

ter vivos) and trusts taking effect at death (testamentary). Beyond these, a detailed analysis of the marital deduction has been included in this volume.

Presented in this latest volume are a number of new chapters as well as updated and revised material in several of the chapters which have appeared in the more recent editions. For example, the chapter on The Federal Estate Tax has been expanded to include new aspects of the law as well as to update earlier material. The State Death Taxation chapter has been included as a new chapter on a topic that has taken on increasing importance since the last edition. The chapter explaining the implications and results of what can happen if you die without a will (Intestacy) is also a new discussion whose absence until now would appear to be a gap deserving to be filled. An all-important Glossary of Legal Terms has been extensively expanded from the earlier edition.

It might also be worth noting that the readability style of much of the material in this new edition has been changed to make a better fit, as it were, for today's reader.

It is on the premise that an informed layman is the key to a lawyer's ability to do the best possible job for his or her client that this work, in its present form, has been conceived and developed.

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CHAPTER I

HISTORICAL DEVELOPMENT OF WILLS

It is questionable whether instruments resembling a will, as we use the term today, were known to any early society except the Roman. Blackstone, the great English legal historian, wrote that in Rome wills were unknown before the laws of the Twelve Tables were compiled. Wills were allowed at Rome by the Twelve Tables, and they were executed with a great deal of ceremony before five citizens, the transaction taking the form of a purchase of the inheritance. Later, the praetors required seven witnesses who were required to place their seals and signatures to the instrument proving the transaction. Justinian's legislation provided for the signing by the testator and by witnesses and sealing by the witnesses.

For about three centuries preceding the Norman conquest the power of testamentary disposition was recognized and sanctioned in England. In the eighth century English law was familiar with an instrument executed in anticipation of death and by which the owner of property could have altered the course of intestate succession. The right to dispose of land and personal property by will was recognized by Anglo-Saxon folk law. The middle and lower classes seldom availed themselves of the right to make a will. But this does not necessarily mean that the right was confined to people of high rank, such as the king, bishops, and other nobles. It is probable that these were the only people who had enough property to be interested in the execution of a will.

Two important events took place in England that greatly affected the law of wills. Before the Norman Conquest there were no separate ecclesiastical courts in England. The Church and civil authorities were united both in administering the law as well as in making it. Under William I, the ecclesiastical courts were separated from the secular, resulting in a division of jurisdiction. The ecclesiastical courts acquired to personal property, and the secular courts retained jurisdiction over succession to freehold estates, including jurisdiction over wills of real prop-

erty. Important changes in the substantive law took place with respect to the two classes of wills.

Regardless of whether the feudal system existed in England before the arrival of the Normans, or was introduced by them, there is little doubt but that the system received its greatest development in England after their arrival. Feudalism had its influence in bringing about the abrogation of the right to devise land. Legal title to a freehold interest in land could pass only by a livery of seisin (a ceremonial delivery of land) or by proceedings in a court of record. Obviously a dead man (the testator) could not make such a livery of seisin, and the devisee, when the time came to enter, was confronted by the heir, from whom he had to obtain livery of seisin, the result probably being a refusal. A second factor was the lord's interest in the estate of his deceased tenant. The lord's right of escheat and wardship were subject to being defeated by a will. As long as feudal considerations controlled the law, the interests of the lord in the estate of his deceased tenant were protected against this possibility.

The development of the doctrine of primogeniture (the first-born's exclusive right to inheritance) was another factor that contributed to the abrogation of the right to devise land. The king's courts were interested in protecting the interest of the eldest son against any possible infringement by the making of a devise, from a military and political standpoint. These factors contributed to the disappearance of the right to devise land by the thirteenth century, except in a few localities where the jurisdiction of the king's justices did not extend. The borough courts in the cities had jurisdiction over burgage tenures, and the right to devise land was still recognized in these localities.

The restraint upon the power of devising land not surprisingly gave way to the demands of family affection and the desire for complete or independent dominion over land. The development of the doctrine of primogeniture and the later desire of the father to make some provision for his younger children was a compelling factor in the demand for a revival of the right to devise land. Landowners discovered that with the aid of the clerics, who controlled the court of chancery, they could dis-

pose of their lands by will. They did so by means of the use (a trust in real estate). The way of doing this was to make a feoffment (a gift of a freehold accompanied by a livery of seisin), to hold the legal title to the use of the last will of the feoffor, and the latter could then devise the use which devise was sustained in equity as an appointment by will. The feoffee was regarded as trustee for the person designated by the last will of the feoffor. The court of chancery supported the devise of the use as a disposition binding in conscience. The use was not subject to the feudal rules governing estates in land. This practice continued in England about a century, until the use became, by the *Statute of Uses* (1535), the legal estate. The *Statute of Uses* again destroyed the right of devising lands; but the disability was removed five years later by the *Statute of Wills* (1540).

In any case, before the enactment of the *Statute of Wills* in England the power of testamentary disposition of personal property was limited, unless the testator had no wife nor children. Whether this restriction was the early common law in England or a custom that existed only in some countries, it was recognized in the reign of Henry II as the doctrine of "reasonable parts" and, according to Glanville, as a part of the common law. According to this doctrine, if the testator had both wife and children he could dispose of only one-third of his personal property by will, while the other two- thirds was regarded as the reasonable share of the wife and children respectively. If he did not have a wife or children, but not both, he could dispose of one-half, the remainder belonging to the wife or children, as the case might have been. This restriction gradually disappeared. It was removed in a number of provinces by a series of statutes. The *Wills Act* (1837) in England extended the power to dispose of all of one's property, real or personal, which one was entitled to, either at law or in equity, at the time of one's death, by will.

The *Statute of Uses* had practically destroyed the right to devise lands in England. The demand for the right was so great that the *Statute of Wills* was passed, giving the right to devise all lands which were held in socage tenure and two-thirds of land held in knights' service. The right was given to "all and every person and persons," without any mention of age or sex.

And the only specific requirement with regard to manner of execution was that the devise be in writing. about two years later Parliament passed a statute entitled "The Bill Concerning the Explanation of Wills" to explain and interpret the *Statute of Wills*. Wills made by married women, persons under twenty-one years of age, idiots, or insane persons were declared to be invalid by a provision of the latter statute. These two statutes sanctioned the power of devising lands only with respect to fee simple estates. Copyhold lands and estates *pur autre vie* remained undevisable. Both came within the description of real estate and so were not devisable at common law.

The only requirement of the *Statute of Wills* regarding the manner of execution of devises was that they should be in writing. The writing did not have to be made by the testator nor signed by him. Wills of personal property were not even required to be in writing to be valid. But it was customary to put them in writing, they were made before the testator's last illness. The opportunity for the perpetration of fraud was probably the compelling factor leading to the passage of the *Statute of Frauds* (1676). The fifth section of this Statute required devises not only to be in writing but signed by the testator, or by some person in his presence and by his express directions, and that they should be attested and subscribed in the presence of the testator by three or four credible witnesses.

The *Statute of Frauds* did not prohibit the making of verbal wills of personal property. But it did, however, subject them to strong restrictions in the manner of execution. Where the value of the estate bequeathed was more than thirty pounds the Statute required that the oral or nuncupative will had to be proved by oaths of at least three witnesses who were present at the making of the will. That they did bear witness that such was his will, and that such a will had to be made in the time of the last sickness of the testator in his home or where he had been resident for ten days or more before the making of the will. Also, the Statute provided that no testimony was admissible to prove an oral will (nuncupative will), unless the testimony had been reduced to writing within six months after the making of the will. Oral wills made by soldiers in military service or by mari-

ners or seamen at sea were exempt from the provisions of this Statute.

The *Wills Act* established the same requirements for the execution for wills of realty and wills of personal property. It provided that *no* will (except those of soldiers in actual military service or mariners or seamen at sea) should be valid unless signed at the foot or end thereof by the testator, or by someone in his presence and by his direction. It further required that such signature was to be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and that such witnesses shall attest and subscribe the will in the presence of the testator. This Statute sanctions the power of disposing by will any realty or personal property to which the testator is entitled at the time of his death, and if it is not devised or bequeathed would devolve upon his heir (or heirs) at law or upon his executor.

The *Wills Act* is still in force in England, qualified by a provision that relaxes the rule concerning the position of the testator's signature at the foot or end of the will.

Some of the colonial assemblies in America enacted laws regulating the substantive law of wills which were based upon the English *Statute of Frauds.* In some of the colonies the provisions of this Statute were followed by usage. Legislation in the earlier states is based upon his Statute, while in those states which were admitted later into the Union regulate the law of wills based upon the *Wills Act.* There are statutes in every state regulating the substantive and procedural law of wills, and the two English statutes are models for most of the substantive law in this country.

The substantive law of wills in Louisiana is based upon the French civil law and New Mexico's law has a Spanish background.

Clearly, then, the origin and history of the law of wills in this country is essentially an English one and perhaps more than any other area of American law, it holds the greatest English orientation.

CHAPTER II
GENERAL PRINCIPLES OF WILLS

1. WHAT IS A WILL?

After your death, it is too late to think about the people to whom you wish to leave your property. It is too late then to decide who will own your house, who will drive your car, who will wear your jewelry, and who will get those shares of stock you had nursed so carefully for twenty years. You may have told everyone just what you wanted, but that is no assurance that it will be done. In fact, because you left no will, it is possible that it cannot be done. Now is the time to make your will.

A will is the legal declaration of a person's intent to be performed after death. In early times, a will applied only to real property while personal property was disposed of by a Testament. Today the distinction has been eliminated,and the instrument, referred to as "Last Will and Testament," disposes of both real and personal property.

2. DO YOU NEED A WILL?

Of course you do. The answer is the same whether you are a millionaire or whether your only property is the shirt on your back.

Suppose you have nothing whatsoever; no money in the bank; no war bonds; no car; no job. You, nevertheless,have some earning potential and some life expectancy. If you should be run down by a truck on the way out of the house tomorrow morning, someone of your relatives would have the right to sue the owner of the truck, and to recover a substantial sum based upon your earning potential, your life expectancy, your pain and suffering, your hospital bill, expenses of your burial and the circumstances of the persons dependent upon you. To whom do you want this sum to go? Unless you have a will, you may have nothing to say about it. You won't be here and the money will be distributed in accordance with laws of intestacy, which govern

when a person dies without a will, or when the will is so defective that it cannot be recognized. The laws of intestacy vary from state to state (see Chapter Four), but the distribution is fixed by law. Your wishes do not control.

Suppose John and Mary are a happily married couple with three children. They own a very comfortable house which they bought in John's name. John dies without a will, believing that a will is unnecessary since Mary will have the house. After John's death, Mary finds that she cannot carry the house and decides to sell it. However, Mary cannot sell without extended court proceedings. Mary owns only one third of the house, while each child owns two ninths. A special guardian must be appointed and the sale must be approved by the Surrogate's or Orphans' Court. Even then Mary may not touch the money without a court order each time she finds it necessary to make some expenditure.

Helen and Bill have no children, and their house is in Helen's name. But when Helen dies, Bill is not the sole owner. Helen's father, who opposed their marriage, and who has not spoken to Bill for years, comes in for his share of the house and of the stocks which were bought by Bill from his savings, and very carefully placed in Helen's name for her protection.

Tom and Sally separated by mutual consent and went separate ways. Sally went back to work, and accumulated a comfortable nest egg before she died. She had forgotten about Tom, but he nevertheless receives his share of her estate. Her two sisters with whom she lived, receive something, but Tom gets the lion's share.

The time to make your will is now, while you are still alive. Telephone your lawyer today for an appointment.

3. PROPERTY NOT SUBJECT TO DISPOSITION BY WILL

Not everything which a person considers "property" may be disposed of by will, and care should be exercised to take appropriate action to pass title to property or rights which are not included in one's estate.

a. Insurance policies: Unless an insurance policy is made payable to the estate, its proceeds cannot be affected by his will. A direction in a will than the policy in the Rock-Bound Life Insurance Company, now payable to son John, is to be paid to wife Mary, will be of no effect. Son John will collect and wife Mary will realize that it pays to consult a lawyer.

b. United States Savings Bonds: Bonds held in the name of one person payable on death to another do not pass under a will. A provision in a will directing that such bonds be delivered upon death to a person other than the one named in the bonds will be of no effect.

c. Jointly owned property: Property owned by two persons, as joint tenants, with the right of survivorship will pass by operation of law and cannot be disposed of by will. This may be because of the nature of the property, or the technical legal title by which it is held, or because the person attempting to make the will is married, or for some other reason (See Chapter Three). If property is owned by two persons, as joint tenants with the right of survivorship, the survivor becomes the sole owner of the property despite any provisions to the contrary in the will of the other joint owner.

d. Exempt Property: In most states there is a small exemption set aside for the widow and surviving children which cannot be taken away by will and which is not included in the estate for tax or accounting purpose.

e. Rights under the will of a Third Person: A person may will only such property or rights as he/she possesses at the

date of death. If he/she dies on January 1st, and on January 2nd, his/her uncle Beelzebub dies, leaving him/her a million dollars, the fact that in his/her will he/she disposed of property to be given him/her by the uncle will be of no effect. He/she must have had the property or a right to the property at time of his/her death.

4. WHO MAY MAKE A WILL

The power to make a will is now regulated by statute in all American jurisdictions. The various restrictions are discussed in this paragraph.

a. Age

(1) Minimum–In most states, the minimum age is eighteen years. Below this age, a person may not make a will. However, the age varies from state to state. In some states, a different age is required for the execution of wills of real and personal property. In all such instances, greater age is required for the disposition of real property.The minimum age requirement in each state is set forth in Chart No. 1.

It should be noted that except in Arizona, Maine, New Hampshire, Texas, Washington and Wisconsin, marriages do not constitute an emancipation, or enable a person below the minimum age to make a will. In the states named, however, the marriage of an infant, within certain restriction, emancipates him or her to the extent of permitting the execution of a will, recognizing such a will as valid. In Maine, a woman under twenty-one, who is either married or a widow, may execute a valid will, but unmarried men under twenty-one are still held to be lacking in testamentary competence. Washington and Wisconsin also permit any minor in military service, regardless of his or her marital status, to execute a will. A will executed by an infant is a nullity and its property passes as if no will whatsoever had been made. The fact that a person below the minimum ages does not change or revoke his or her will on attaining