



What Will Become Of Your Property ?

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Foreword

This publication presents a general discussion of the Virginia laws of descent and distribution. These laws govern the distribution of a deceased person's property in absence of a valid will. The publication was prepared to remind you of your responsibility to decide how you want your property transferred at your death. Also, it is intended to point out some of the things that you should consider before discussing with your lawyer what you want done.

This is not an attempt to give you legal assistance. Rather, you are advised to seek the advice and counsel of a lawyer in the preparation of any legal papers necessary for carrying out your plans for transferring your property.

This publication is intended primarily for persons owning real and personal property in Virginia. If you own property in another state, you should find out how that state's laws of descent and distribution operate.

The laws of descent and distribution, as presented in this publication, were in effect at time of publication. It is important to remember that these laws may be changed by future legislation. Your lawyer will be aware of any changes.

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What Will Become Of Your Property?

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Your Privilege And Responsibility

The property you own, whether a farm, a business in a town or city, or stocks and bonds, represents a valuable asset to you, your family, your community, and the Commonwealth. You can promote the welfare of all three by providing for an orderly transfer of your property.

You have the **right** to say how you wish your property distributed after your death, and you have the **responsibility** of providing for as orderly a transfer as possible in keeping with your wishes. Research by the Research Division, Virginia Polytechnic Institute and State University, shows that in Montgomery County, Virginia from 1900 to 1946—

- The majority of farm owners who died left no will.
- Farms of many who died intestate (that is, without a will) were divided into tracts too small to be operated as economic units. For example, in the settlement of 15 estates, the land was subdivided into 67 tracts.
- Property of 42 estates was devised by will and in only one case was the disposition of property identical to that which would have taken place if the owner had died intestate.

If you do not exercise your right by preparing a valid will, state laws provide distribution for you. But the distribution made by the laws may not conform to your wishes. The laws are specific. There are no provisions for variations in their application to adjust the transfer of your property according to the needs of your family.

By studying this publication, you should be in a better position to decide what should become of your property. You have two ways of transferring it. You may dispose of any property you wish during your life, or prepare instructions (in the form of a will) to be carried out after your death, or you may use a combination of the two. While this publication gives more information concerning the second method, you should also examine other possibilities.

The information is not intended to substitute for the counsel and advice of your lawyer. The safest and most businesslike course to follow is to discuss your situation with your lawyer and have him prepare your will and supervise its signing.

Objectives In Transferring Your Property

The most difficult decision in answering the question of "what will become of your property" is deciding what you want to achieve by its distribution. Decisions on the transfer and distribution of property are always difficult to make. It is easier for the individual to let the laws of descent and distribution apply than it is to exercise the right of directing the disposition of one's property. However, inaction can create greater problems for your heirs and cause many hard feelings. You and your spouse should decide how you wish to distribute your property and then decide the best way and means of accomplishing it. It may be desirable to make this a family affair by discussing some aspects with your children. The following discussion sets forth some of the common purposes for directing the distribution of your property. These may or may not coincide with your purposes.

Security for Surviving Wife^{1/}

The chief consideration in preparing for the distribution of your property after death is to provide for the security, comfort, and happiness of your wife. Life expectancy for a woman is approximately five years more than a man's, and she probably married at an earlier age. Thus, there is a good probability that she will survive her husband by several years. Her care, comfort, and happiness during these widowed years will depend greatly upon her interest in your estate and the life insurance benefits she receives at your death.

Under the Virginia laws of descent and distribution, your wife has certain rights in the real and personal property you own. Her dower interest, a lifetime interest in $\frac{1}{3}$ of the real property, has first claim on real property and cannot be denied her. However, the laws of descent and distribution sometimes fail to provide adequately for a widow. This is especially true if the estate is small, there is little life insurance, or prolonged illness requiring expensive medical care preceded death.

Under the laws of descent and distribution, a widow, incapable of self-support, may be forced to share an estate with adult, self-supporting children. Within a short time, the widow may be left dependent on the kindness and consideration of the children. This is not satisfactory even under the best circumstances. Wives can be provided with a larger share of the estate than is allowed under the laws of descent and distribution. There are various ways to do this, but the most frequent is preparation of a will. Many times the wife is given a lifetime interest in some property. Under such an arrangement, the widow receives the income from that property during her lifetime. The home, unless she already has title to it, would normally be included in this arrangement.

The number of widows who know practically nothing about their deceased husband's financial and business affairs is surprising large. Yet, on becoming widows, they are immediately faced with making decisions in which a knowledge of such matters is necessary. It is important that your wife know:

- Where your valuable papers, including your will, are kept.
- What checking and savings accounts you have.
- What property you own, what you owe, and what contracts are in force.
- What insurance policies and retirement plans you have.
- Where and what business and personal records are kept.
- What persons you normally consult on business, legal, and personal matters.

A knowledge of these matters will add a great deal to the comfort of your wife during the first trying months of widowhood. It will also greatly facilitate the ease of handling your estate by your executor or administrator.

Equitable Inheritance

The laws of descent and distribution provide for equal distribution of property among children. Equal inheritance, although desirable in principle, often does not provide what parents consider equitable treatment of the children. For example, circumstances frequently arise when one child has remained at home with his or her parents during their aging years. This child may not only contribute to the welfare of the parents, but also contribute a great deal to the maintenance of the productivity of the family business through his labor, management, and, in some cases, the expenditure of a part of his income. Other

situations in which parents may desire an unequal distribution of their property are: (1) when one child was given an expensive education while the others were not, (2) when one child received considerable financial aid in getting established in his life work or acquiring their own home and the other children did not receive equal assistance, (3) when one child contributed financial assistance to the parents, and (4) when one child has some physical or mental handicap.

In such situation, you can distribute as you desire by preparing a will in which you specifically state your wishes with respect to each child. Otherwise, they share equally in your estate.

Continuity of the Business

The period required to settle an estate can be extremely critical in any business previously operated by the deceased. Frequently, several months, or even years, elapse between the time of death and the final settlement of an estate. Unless some means can be found immediately for the continuity of that business, much that was put into it can quickly disappear. In the case of a farm, repairs to buildings and fences and fertility practices necessary for maintenance of cropland and pastures may be deferred until future ownership is known. Thus, uncertainty as to ownership of the property tends to create a situation in which cash expenditures have to be kept to a minimum. The result, then, is a decline in productivity. If at all possible, you should consider providing, in your will, for the continued operation of your business during the time required to settle your estate.

A similar decline in productivity may occur when the settlement of an estate results in the heirs acquiring undivided interests in the business. This condition arises in intestate inheritance. It also occurs when property is devised, or bequeathed by will, to two or more heirs. Unless the heirs are acquainted with the business and have a mutual interest in it, the business may be operated under unstable arrangements for a considerable period of time. During this time, cash expenditures, especially to improve or maintain the business, may have to be kept to a minimum. This could result in a rapid decline in productivity and sizeable reduction in the value of the firm.

Life estates are another type of ownership under which the productivity of business and condition of the property tend to decline. Life estates can mean an exploitation of the assets as the life tenant endeavors to obtain the largest possible cash income during his tenure. Generally, the life tenant cannot designate who will own the property

after his death. Thus any improvements made in the business can not pass to his heirs unless they hold the remainder interest.

Minimizing Tax Liability

In considering what will happen to your property, you will want to consider the tax liabilities which arise with any transfer. If you sell the property now, you will be liable for both state and federal income tax on any gain you have made. Under the federal income tax, only ½ of the capital gains is subject to taxes, while the entire capital gains are subject to the state income tax.

Property given as a gift might also be subject to state and federal gift taxes. Tax liability can be minimized by using the exclusions permitted by these laws.

Property conveyed at time of death may be subject to the state inheritance tax, with rates varying from 1 to 15% and federal estate tax, with rates varying from 3 to 37%.

Regardless of how you transfer your property, one of your goals will likely be to minimize the tax liability which will result. Determining what your tax liability will be, can be extremely complicated and should be discussed with your lawyer or a tax specialist. A tax specialist can advise you on ways to minimize the total tax liability involved in the transfer of your property.

A detailed discussion of taxation is not possible in this publication. You can, however, secure information on these taxes by writing the Department of Agricultural Economics, Extension Division, Virginia Polytechnic Institute and State University, Blacksburg, Virginia, 24061. Ask for MB-60, Inheritance, Estate, and Gift Taxes. This will be helpful in discussing taxes with your lawyer and tax specialist.

Your Property

Before deciding how your property can, or should, be transferred, you should consider the kinds and value of property you own. There are two kinds of property, real and personal. Real property includes land and permanent improvements. Personal property includes all other property, such as; livestock, farm equipment, merchant's stock, household goods, bank accounts, stocks, bonds, and negotiable notes. The manner in which title to property is held, is important to you for two reasons. First, it determines whether you can devise or bequeath the property. Second, it determines whether the property is to be included

as a part of your estate for taxation purposes. Under certain conditions, property which cannot be devised or bequeathed will be considered as a part of your taxable estate.

Ways of Owning Property

If the title to your home, farm, or other business, is in your name alone, you have sole ownership and may use this property as you wish or transfer it to another by sale or gift.^{2/} Also, with certain limitations, you may, by preparing a valid will, control its transfer after your death.

If you hold life estate in real property, your right to the property is usually restricted to the **use** of the property during **your** life. Furthermore, this property does not become a part of your estate. At the time of your death, the possession of the property reverts to the person or persons holding the remainder interest.

Co-ownership exists when two or more persons hold title. The co-owners have no separate rights to any distinct portion of the land; rather, each has an undivided interest in the entire property. The usual ways whereby co-ownership exists, are tenancy-in-common, joint tenancy, and tenancy-by-the-entirety.

Tenancy-in-common exists when two or more persons own undivided interest in property without rights of survivorship. Either can give, sell, or devise **his** share. If either dies, **his** share becomes a part of his estate.

Joint Tenancy exists when property is owned jointly by two or more persons with survivorship rights. In Virginia, the deed or will creating a joint tenancy must state specifically that survivorship is intended, or, for all practical purposes, a tenancy-in-common will result. All shares in property held in joint tenancy must be equal, however, the joint tenants do not have to be related. When one joint tenant dies, his undivided interest is distributed equally among the other joint tenants. Thus, if your home is owned by you and your wife, as joint tenants with survivorship, and you die, your wife takes ownership of the entire property. You cannot control the disposition of joint tenancy property by a will. You may sell your interest, and in event you do, the joint tenancy ceases to exist and tenancy-in-common results.

Tenancy-by-the-entirety is a type of co-ownership between husband and wife. This is similar to joint tenancy except that, once it is established, neither party can break the arrangement without the consent of the other. If either dies, the survivor takes full ownership.

Co-ownership also may exist with personal property. Your bank accounts, both checking and savings, may be held as either individual or joint accounts. If yours is a joint account with survivorship rights, it becomes the property of the survivor. However, if it is an individual account you may transfer it to another by will. Likewise, stocks, bonds, and other personal property may be held in joint ownership, with or without rights of survivorship.

When husband and wife hold property, either as joint tenants or tenants-by-the-entirety, the property is not considered as a part of the estate of the person who dies first. However, the value of the entire property must be included in determining both the Virginia inheritance tax and federal estate tax. With property held by joint tenancy or tenancy-by-the-entireties, the estate is liable for tax on the value of the entire property even though the deceased contributed nothing to its acquisition. Minimizing tax liability requires detailed records that will substantiate the source of funds used to acquire the property.

Whether or not rights of survivorship exist, is an important factor to consider in deciding on the distribution of property. Even though you cannot convey any property in which your spouse has survivorship rights, you need to recognize that your spouse might predecease you, and provide for that contingency. Therefore it would be desirable for both husband and wife to have separate wills.

What Becomes Of Your Property If You Die Without A Will?

What becomes of your property, if you die intestate, that is, without a will, depends upon the relationship of the heirs to you. Table 1 shows how the Virginia laws of descent and distribution provide for the distribution of property to four classes of relatives. (If these relatives or their descendants do not survive you, the law provides for the property to be passed on to others.)

Under the law, your personal property will be used to pay funeral expenses, cost of administering the estate, and debts. Any surplus will be distributed as shown in Table 1. If your personal property is not adequate to pay all of these expenses, the real property left after the widow's dower has been assigned or released will be used to pay the balance. Any real property remaining after the dower is assigned and other claims are paid will be distributed according to Table 1.

Table 1.—Disposition of Real and Personal Property of Person Dying Intestate

Husband is survived by:				Disposition of real property ^{4/}	Disposition of surplus personal property ^{5/}
Wife	Children ^{1/}	Parents ^{2/}	Brothers and Sisters ^{3/}		
X	X	<u>6/</u>	<u>6/</u>	To children, subject to dower interest of wife and any unpaid debts	1/3 to wife 2/3 to children
X	—	<u>6/</u>	<u>6/</u>	To wife	All to wife
—	X	<u>6/</u>	<u>6/</u>	To children	All to children
—	—	X	<u>6/</u>	To parents	All to parents
—	—	—	X	To brothers and sisters	All to brothers and sisters

Table based upon the "Code of Virginia," 1950 Edition, 1968 Replacement Volume 9. See Sections 64.1 and 64.1-11 for distribution if heirs-at-law are other than those listed in table. In the table, X indicates a surviving party while a dash (—) indicates that the party does not exist. In every case, the words "husband and wife" can be interchanged, and the word "curtesy" substituted for dower.

- 1/ The word "children" includes one or more child of the deceased, or the descendants of any deceased child or children.
- 2/ The word "parents" includes either or both parents, surviving the deceased.
- 3/ The phrase "brothers and sisters" includes one or more or the descendants of any deceased brothers or sisters.
- 4/ The real property, except for the widow's dower interest, is subject to payment of any debts of the estate which remain after personal property has been expended.
- 5/ Surplus personal property is that property which remains after funeral expenses, cost of administration, and debts of the deceased, have been paid.
- 6/ Insofar as distribution is concerned, it makes no difference whether or not persons in this class survive the deceased in this particular situation.

Wife's Interest in Husband's Estate

The wife's interest depends on whether the husband is survived by children or their descendants (Table 1). Her dower interest has first claim on the real property. Dower^{3/} is a lifetime interest in land which equals 1/3 of the value of all the deceased husband's real property. The widow can claim her dower in the land regardless of whether or not her husband left a will. If the husband left a will, the surviving wife may claim her dower instead of accepting the provisions of the will. In order to do this, she must file a "declaration of renunciation" within a year after the will is filed for probate.

Frequently the court assigns certain land to the widow as her dower. The widow has the right to use this land during her life. She can farm the land herself or rent it. The income she receives from this land is hers. She can dispose of her right to use the land by releasing her dower interest. However, she cannot sell the land since she has only a life interest. At her death, possession of the land goes to the person or persons who previously acquired title. Ownership of the land after the widow dies depends upon who was given title at the time the dower was assigned or at some time prior to its assignment.

If the husband dies testate, but did not recognize the dower rights of his wife in his will, the widow can claim her dower, and the court will assign dower lands to her. Possession of the dower lands at the time of her death reverts to the devisee named by the husband in his will.

Sometimes it is impractical to assign dower in land and the court awards commuted dower to the widow. Commuted dower is present value of the dower interest. The amount depends upon the age of the widow and the value of the real estate. It is calculated as follows:

1. Take $\frac{1}{3}$ of the value of the real property. In actual practice this is easy to determine, for the land is usually sold and the sales price is used as the value. Example: Land sells for \$45,000; $\frac{1}{3}$ is \$15,000. Her dower interest is based on this and her life expectancy.
2. Take 5% of the dower interest. (By statute, the widow is allowed a 5% return.) Example: .05 times \$15,000 equals \$750. This represents the annual income which might be received as the dower interest.

Table 2.—Annuity Table for Computing Dower for Selected Ages ^{1/}

Age of person	Present value of \$1.00 annually	Age of person	Present value of \$1.00 annually
25	16.960	50	12.466
30	16.330	55	11.158
35	15.574	60	9.750
40	14.682	65	8.283
45	13.645	70	6.815

^{1/} For complete Annuity Table see "Code of Virginia."

1950 Edition, 1959 Replacement Volume, Section 55-269.

3. Use the annuity table (Table 2) to determine the annuity factor and multiply the annuity factor by the annual income factor. Example: The widow is age 40. The annuity factor is 14.682 and 14.682 times \$750 equals \$11,011.50.

In this particular illustration, where the widow is age 40 and the real estate sold for \$45,000, the widow would receive \$11,011.50 as commuted dower in lieu of any interest in any land of her deceased husband. This is less than $\frac{1}{4}$ of the value of the land. The older the widow is, the less she will receive as commuted dower.

The widow is entitled to dower, or commuted dower, regardless of the debts against the estate **unless she has previously signed away her dower rights**. If there is a deed or trust or a mortgage against the real estate and if this has been executed jointly by husband and wife, then dower would be assigned only in that land in excess of the lien. Real estate left after the assignment of dower is subject to any claims against the estate which are not satisfied by the sale of personal property.

If the deceased husband is not survived by a child, or any descendant of a child, the wife acquires title to all the real property which remains after the payment of debts against the estate. But, in event this is less than a dower interest, she may elect to take her dower unless she has signed it away.

The widow has claim to $\frac{1}{3}$ of the personal property which remains after the debts against the estate are paid. If the husband was not survived by any child or their descendants, the widow gets all personal property after debts are paid. Her interest in the property is absolute. She can use or dispose of it as she wishes.

Husband's Interest in Wife's Estate

The husband's interest in his wife's estate is comparable to a wife's interest in her husband's estate. Instead of the dower right, he has curtesy right in any land owned by his deceased wife. Curtesy, like dower, is a lifetime interest in land equal to $\frac{1}{3}$ of the value of all real property. The wife cannot deny curtesy by provisions of her will. The husband also may elect to claim curtesy instead of accepting the provisions in the will.

A husband's interest in the personal property of his deceased wife is the same as a widow's in that of her deceased husband. In other words, the husband gets $\frac{1}{3}$ of the personal property after the debts are

paid, if there are children or their descendants. He gets all of it if there are neither children nor their descendants and he has absolute rights to use or dispose of it.

Children’s Interest in Parent’s Estate

The children^{4/} and the descendants^{5/} of any deceased child have first claims over other heirs to any real property which remains after the assignment of dower or curtesy and the payment of debts against the estate. In addition, the children have rights in the personal property left after the payment of debts. If the deceased is survived by a spouse, the children get $\frac{2}{3}$'s of the personal property; otherwise, they get all of it. Debts against the estate can completely wipe out the children’s interest but cannot destroy the dower interest of the widow.

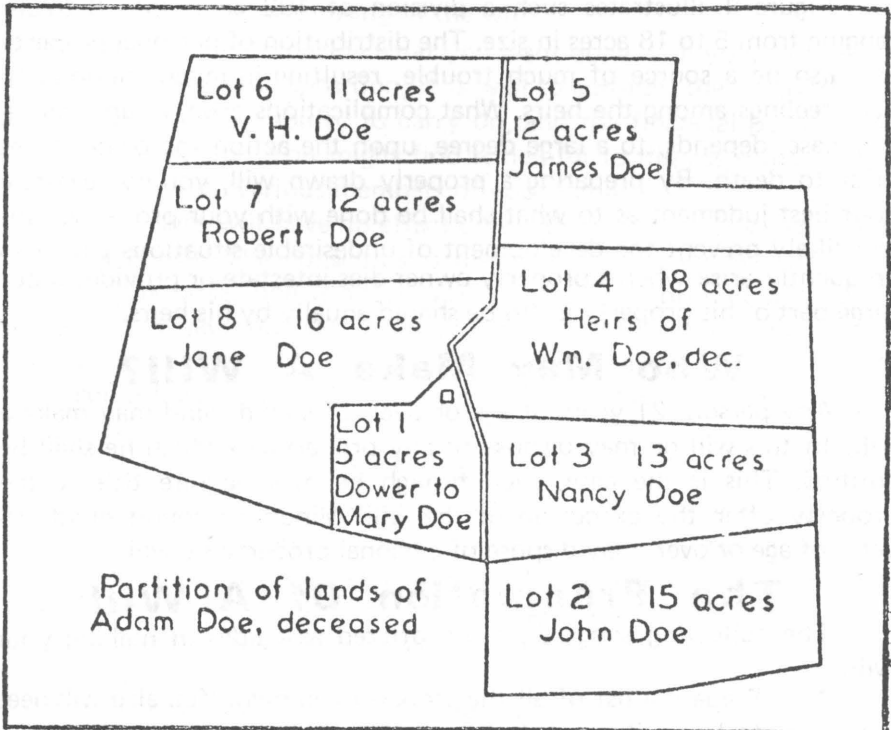


Figure 1.—In this example, Adam Doe died intestate as owner of a 102-acre farm. In the settlement of his estate, the farm was partitioned into 8 tracts. One tract was assigned to his widow as her dower, one to each of his 6 living children, and one to the descendants of a deceased son.

After the assignment of the dower land to the widow, either by court action or by mutual agreement between the widow and the heirs-at-law, title to the remainder passes to the heirs. If there is only one heir, the estate usually can be settled without major problems. When more than one heir is involved, many difficulties may be encountered. In some cases it may be necessary to partition the land into small tracts or uneconomic units for distribution to heirs. If the heirs are unable to reach a mutual agreement, it may be necessary to sell the land and divide the proceeds. Sometimes the land may be held as an unsettled estate for several years. When a suit is initiated to obtain settlement of the estate, the court may find that the land "is not susceptible to partitioning among the heirs" and order it to be sold. In other instances, the court may order a division of the land so that each heir gets a tract.

Figure 1 illustrates such a division of 102 acres into 8 tracts, ranging from 5 to 18 acres in size. The distribution of personal property can also be a source of much trouble, resulting in much friction and hard feelings among the heirs. What complications arise, in any particular case, depends, to a large degree, upon the action the owner takes prior to death. By preparing a properly drawn will, you can exercise your best judgment as to what shall be done with your property. This will likely prevent the development of undesirable situations which so frequently arise when a property owner dies intestate or provides that a large part of his property is "to be shared equally by his heirs."

Who May Make A Will?

Any person, 21 years of age or over, of sound mind may make a will. In this will he may dispose of any property to which he shall be entitled. This is the case, even though he may acquire title to the property after the execution of the will. Minors of sound mind, 18 years of age or over, may dispose of personal property by will.

The Preparation Of A Will

The following suggestions are offered as guides in making your will:

- Prepare a list of all the property you own. You also will need to know if property is owned by you alone or jointly, and, if jointly, whether the rights of survivorship exist. You might want to estimate the value of the various properties you own.
- Consider carefully how you want your property distributed at your death. Ask yourself questions such as: Is all property,

or part of it, to go to the surviving spouse? In fee simple? Or as a life estate? If the property goes to the wife for her life only, to whom will it go upon her death? What share is the son, who has been working with you in the business, to receive? What is to happen to personal property that might be a key factor in your business? Do you want each child to share equally in the net value of the estate? What personal property do you want to give to various persons?

- Discuss with your lawyer what you want to do and consider his advice carefully. If you have a complex situation, you may want him to draw up a rough draft of a will which you can study carefully before making your decision.
- After reaching a final decision as to what you want to do, have your lawyer draw up a will and have him supervise the signing and witnessing of the will.

It is up to you to decide what you want done with your property. In exploring possible disposition, it is well to consider the composition of your family, their ability to carry on, and the financial position of the surviving spouse. You might find it helpful to discuss some of the aspects of this with various members of your family.

Your wishes will have no effect unless they are properly expressed in a written will. The consensus is that you should not prepare your own will. Likewise, one is encouraged not to use a printed will form. Printed forms have resulted in many law suits because questions were raised as to whether the printed form conveyed the actual intentions of the person using it. The safest course is to obtain the advice and counsel of a lawyer.

A Valid Will

A will may be complicated or relatively simple, depending upon what you have and how you want to dispose of it. Virginia law describes specifically the manner in which you can exercise the rights to transfer property by a will. There are three primary requirements:

- The provisions of the will are to take effect only at death of the maker.
- The will must be properly signed by you.
- Your signature must be witnessed by two competent persons.

If the legal requirements are not satisfied, the will is void. It cannot be accepted for probate and the property must be distributed as if no will had been left.

To be valid, a will must express the intention of the maker that the will becomes effective only at his death. The will must be in writing, since property cannot be devised or bequeathed in Virginia by the spoken word. The will may be written on practically anything, providing it satisfies the other legal requirements and is suitable for filing in the office of the clerk of the court.

A will must be dated, signed by the testator (maker), and by at least two competent witnesses. Since the signature of the maker of the will in Virginia must be verified by two persons who sign as witnesses, it would seem best for the maker to acknowledge the will as being his and sign it in the presence of the witnesses. The witnesses also should sign at that time. It is important that the two witnesses sign the will in the presence of the testator, at his specific request, and in the presence of each other.

Although only two witnesses are required by law in Virginia, it frequently is recommended that there be three witnesses to the will.^{6/} It is also good policy to use as witnesses persons who will not benefit by the will.

After your will has been prepared, it should be filed in a safe place such as a safe deposit box or your lawyer's office.

Among Your Rights

You have the right to nominate an executor who will manage your estate during settlement. You can request that no security be required of the executor. If no executor is named or if the person named is unable or unwilling to handle the estate, the court will appoint an administrator. Although members of the immediate family have preference in being appointed administrator, there is no assurance that the person you would have preferred will handle your estate.

You also have the right to nominate a guardian for any minor children. The court will normally honor this request.

A will is subject to change at any time prior to death, and changes should be made whenever the will no longer expresses the wishes or desires of the maker. **You should re-examine your will periodically to be sure it meets your wishes or desires.** For example, a change in the amount or kind of property may call for a change in your will. Likewise, birth, marriage, or death within the family may call for a change. A child born after preparation of a will shares in the estate as if his deceased parent died intestate.

Codicils

Changes in a will can be made either by preparing a new will or by the addition of codicils to the present will. Codicils must be executed in the same manner as a will. They must be dated, signed, and witnessed, but these witnesses do not have to be the same as on the will. When codicils are executed properly they become a part of the will. In many cases, however, it is more desirable to prepare a new will. **A new will voids any previous will.**

Selected Factors Affecting Provisions in a Will

It has been mentioned that failure to satisfy certain basic requirements voids a will. There are other factors or situations which also affect wills, but do not necessarily void the entire will. Some factors affecting provisions in a will are:

- Lack of testamentary intent means that no will exists.
- Failure of the testator to have his signature witnessed by, or to acknowledge the will in the presence of, two witnesses voids the entire will.
- If it can be proved in court that undue influence was exerted on the testator when the will was prepared, the entire will is void.
- Execution of a subsequent will voids any will previously drawn.
- Any children born after the execution of a will, which contains no provision for them, can claim the share of the estate to which they would have been entitled if the parent had died intestate. Devisees and legatees named in the will must contribute proportionately to the children's share in the estate.
- Refusal of the spouse to accept the provisions of the will by renunciation within a year after the will is filed for probate enables the spouse to claim dower (or curtesy) interest at the expense of the devisees.
- Debts against the estate can defeat the entire will or affect devisees.
- A will should be offered for probate as soon as reasonably possible after the death of the testator since a long delay in probating can work against, or invalidate, various provisions of it.

Other Means of Transferring Property

Thus far your attention has been called to the action you need to take before your death to direct the disposition of your property after your death and what will happen if you do not take such action. However, there may be advantages in transferring part of your property during your lifetime. It is not possible in this publication to describe fully all alternatives available; however, the major ways of transferring property are discussed briefly. In viewing these possibilities you may wish to refer back to page for the discussion of ways of owning property.

Gifts

Your children's need for assistance may be much greater in their early years than it would be at the time of your death. If the financial future of you and your spouse appears to be well assured, you may wish to consider conveying some of your property as gifts to your children. The transferral of real estate by gift may be made with fee simple title to the property or with reservation of a life estate for you and your spouse. Transferral by gift might be one method you could use to minimize the tax liability of your estate.

Outright Sale

You may find that no one in your family wishes to continue to operate your business. If you are having trouble in hiring satisfactory management and labor, the sale of the assets of that business may be the most satisfactory solution for you as you reach retirement. However before you make the final decision, you should carefully examine the tax liabilities that will be incurred with any sale.

Incorporation and Transfer of Stock

Under Subchapter S of the Internal Revenue Code, the owner of a business has the opportunity to incorporate his business, but elect to be taxed as if it was operated as a partnership. By taking this election, the owner avoids double taxation at the federal level, but is subject to the state corporate tax of 5% of the taxable corporate income as well as personal income tax on any returns received from the corporation. Some owners of family businesses have been encouraged to incorporate because of Subsection S.

There are various advantages, as well as disadvantages, to incorporating a family business. Normally, the idea is to establish a business organization which will outlive its present owner, or owners, and permits division of ownership among heirs without physical division of the assets of the business.^{7/}

When a corporation is formed, shares of stock are issued as evidence of ownership. Each stockholder's interest in the business is determined by the amount of stock he owns. Shares of stock may be bought, sold, or transferred by distribution, or by will, to the heirs of a deceased stockholder without necessarily disrupting the corporation. Thus, if you incorporate your business and deed the property to the corporation, you may transfer the ownership of your share of the business to your heirs by designating, in a will, the distribution of the shares of stock which you desire. In this way, physical division of the property can be avoided, unless the heirs decide to dissolve the corporation.

Trusts

The trust is a legal instrument where management, control, and legal title to the property, are placed in the hands of a trustee for the benefit of specified beneficiaries. The trustee may be a person or a corporation. The trust instrument contains the rules for operation of the trust, often names the beneficiaries, and states who is to receive the trust property when the trust has served its major purpose.

Living, or *inter vivos* trusts, are created during the lifetime of the grantor. The grantor has the option of creating a revocable trust, or an irrevocable trust. The grantor retains control of the revocable trust and may amend or revoke the trust. He may also retain the right to receive income from the trust during his lifetime. In this case, the property in trust will be considered a part of his estate for taxation purposes for he retained control of the property. The grantor may also create an irrevocable living trust in which all control passes to the trustee and a named beneficiary, usually other than the grantor, receives the income. In this case, the property in trust is usually excluded from the estate for taxation purposes unless it was established in contemplation of death within three years prior to death.

Testamentary trusts are created by will to serve a stated purpose. The purposes vary according to the wishes of the grantor, but are often established to provide for minor children or invalids that outlive their parents. The trust instrument may direct that when each minor child

achieves the age of 21, or at some other time, he is to receive his prorata share of the trust property.

A high degree of fiduciary care is imposed on the trustees. This limits their discretion and affords protection to the beneficiaries. Regardless of the type of trust, you should not make an arrangement to create a trust without the advice of both an experienced lawyer and an experienced trustee. The experienced trust officer can help create a satisfactory trust and avoid many pitfalls.

FOOTNOTES

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1/ This discussion is in terms of the wife surviving, but a large part of it applies equally well when husband survives and the wife has ownership in the property.

2/ Any transfer of real property, however, is subject to the dower (or curtesy) rights of the spouse unless those rights have been released by the spouse.

3/ The place of dower rights of the widow (or the curtesy rights of the surviving husband) in today's economy is a subject that needs study. In the Encyclopedia of the Social Science, the statement is made that "the most recent tendency has been both to abolish dower altogether and to give the surviving spouse a definite interest in all kinds of property left by the deceased." According to information in the 1969 Edition of Martindale-Hubbell Law Directory, in 27 of the 50 states, dower rights do not exist. A study of the place of dower rights in our economy should indicate whether there is need for a change in this section of the law.

4/ Adopted children or children of a former marriage share equally in the estate of the deceased.

5/ Descendants of any deceased child get the interest of their deceased parent.

6/ If you own property in another state, 3 witnesses should be used always. To devise real property in another state, it is necessary that the will be acceptable for probate in both states. Since some states require 3 witnesses, the safe course is to use 3.

7/ Other reasons for incorporating may include (1) to reduce the liability of the owner or owners, in case of business failure, to the extent of the investment in the business, and (2) to facilitate the obtaining of additional capital. But these reasons sometimes may not turn out to be as advantageous as they might appear at first.