Dying Without a Will Complicates Passing of Community Property

Most people can't tell you what happens to their property if they fail to make a will before they die. If you care about your family, you should learn what happens because you may not like the result.

If you haven't made a will, then the State of Texas has written one for you. Today we will discuss dying without a will and how it affects the passing of community property and the increased costs that are incurred.

The State of Texas presumes that all property acquired by persons while married is community property, unless you can prove it is separate property, which is property that you owned prior to marriage or that you received during marriage by gift devise or descent.

Lets assume that when you die, you leave a surviving spouse. You died without a will. Most people would naturally think that their property would automatically pass to their spouse, but let's look at some examples that get progressively more complicated.

You leave one child and the child belongs to you and your spouse at death. The law says that your one-half of the community share of the assets shall pass to the surviving spouse in an intestate situation if all of the children of the decedent were of the marriage the deceased was in at the time of death.

Now let's assume that you leave two children. One of the children was the product of the current marriage at death and one was by a prior marriage. When the law changed in 1993, it stated that if the deceased spouse is survived by a child or other descendant who is not also a child or descendant of the surviving spouse, one-half of the community estate is retained by the surviving spouse and the other one-half passes to the deceased spouse's children or descendants. In other words, unless all of the children of the decedent are of the marriage the decedent was in at death, then the law says the community property of the decedent passes to the children.

How many estates do you think would be affected by this law? Well, consider the divorce rate which hovers around 50%. If you have children by a prior marriage, you should determine whether you like the result that would occur in the event you died intestate.

You should also realize that it will typically cost more to probate an estate of a person who died intestate. If the decedent had a will, then it would be filed with an application to probate and have one hearing to have the will admitted into probate and have the independent executor appointed. If the decedent died intestate, then there will typically be an application to determine heirs filed along with a separate application for either an independent or a dependent administration, depending on the case. This will require two hearings, although they are typically handled by the court back to back. The first is usually the application to determine heirs. This is because in order to obtain an independent administration, the law requires that the heirs agree to the advisability of having an independent administration thus requiring that the heirs first be determined by the court before the independent application can be considered forward. The heirship determination will also require an ad-litem attorney to be appointed to represent unknown heirs and those suffering under a legal disability.

Depending on the problems that the ad-litem may face, the fees for the attorney may cost several hundred dollars to a few thousand.

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