The Law and You
For Small Estates, Do Nothing or Do It Yourself

The average estate is generally modest. There may only be a home and a few thousand dollars in savings. Or, there may be a home and several hundred thousand dollars. These may be considered as small estates that don't justify expensive estate plans and documents.

When asked if a person needs a will, I answer them, "It depends." This answer is purposely vague, because there are several factors that need to be considered.

First, who would be entitled to the estate if there is no will? If there's no spouse and if the parent wants his or her children to equally receive the entire estate, then perhaps no will is needed.

However, if the parent has a particular child in mind to be in charge of the estate, then a will is needed to nominate that child as the Personal Representative for the estate.

Second, factors should be considered such as (1) if there is a spouse, is there a prenuptial agreement or is this a second marriage with children from each marriage; and (2) how substantial is the size of the estate?

If there is no home or other real property and the total of all assets is less than $100,000, the estate can be administered by using what is known as "small estate affidavits." No probate is required and all assets can be obtained by submitting a small estate affidavit to each institution holding assets of the estate.

However, if there is a home or other real property, then probate is required regardless of the size of the estate.

If a will is required, you can choose to have a professional draft it for you, *i.e.*, an attorney, or you can write it yourself without the formalities generally required by the Probate Code. We call this a holographic will.

The term Holographic Will refers to a handwritten will rather than a typed, printed, or computer generated will. This kind of will is given special treatment under Utah's probate laws.

A will must ordinarily be witnessed by at least two individuals. However, no witnesses are required if the signature and material portions of the will are in the testator's handwriting. You are the "testator" if it is your will.

For example, you can't have your son or daughter or someone else write or print your will for you and then just have you sign it. While such a will could be valid, it would have to also contain the signatures of two witnesses. To avoid witnesses, your will must be in your own handwriting.

It is possible to obtain a "will form" from an office supply business or on the Internet. While such forms allow you to fill-in the blanks, they may or may not be valid as holographic wills. The test is whether or not the "material portions" of the will are in your handwriting.

Although a holographic will is not required to be dated, it is best that it have a date. That makes it clear that your will revokes any and all prior wills, whether or not such prior wills were witnessed or were holographic wills.

A holographic will must also include your signature in a manner that clearly shows that you intended your signature to be for the purpose of approving your will. It is not sufficient if your holographic will simply states in its beginning that "I, John Jones, hereby . . ."

An important point to consider when deciding whether or not to have a will, is that you should have a power of attorney and advance medical and health care directives. These directives are very important for the care and treatment you receive in those final years of life when you may not be able to fully direct the care yourself.

If you need help in deciding what to do, you might consult with an Elder Law Attorney to help you. To locate an Elder Law Attorney, check with the National Academy of Elder Law Attorneys at (520) 881-4005, or your local Yellow Pages.