Introduction To Wills

The material in this handout represents general legal principles. The law is continually changing; although the information in the handout was current as of the date it was drafted, some provisions in this pamphlet may have changed. It is always best to consult an attorney about your legal rights and responsibilities regarding your case.

What Happens if I Die Without a Will?

If you die intestate (without a will), your state's laws of descent and distribution will determine who receives your property by default. These laws vary from state to state, but typically the distribution would be to your spouse and children, or if none, to other family members. A state's plan often reflects the legislature's guess as to how most people would dispose of their estates and builds in protections for certain beneficiaries, particularly minor children. That plan may or may not reflect your actual wishes, and some of the built-in protections may not be necessary in a harmonious family setting. A will allows you to alter the state's default plan to suit your personal preferences. It also permits you to exercise control over a myriad of personal decisions that broad and general state default provisions cannot address.

What Does a Will Do?

A will provides for the distribution of certain property owned by you at the time of your death, and generally you may dispose of such property in any manner you choose. Your right to dispose of property as you choose, however, may be subject to forced heirship laws of most states that prevent you from disinheriting a spouse and, in some cases, children. For example, many states have spousal rights of election laws that permit a spouse to claim a certain interest in your estate regardless of what your will (or other documents addressing the disposition of your property) provides. Your will does not govern the disposition of your property that is controlled by beneficiary designations or by titling and so passes outside your probate estate. Such assets include property titled in joint names with rights of survivorship, payable on death accounts, life insurance, retirement plans and accounts, and employee death benefits. These assets pass automatically at death to another person, and your Will is not applicable to them unless they are payable to your estate by the terms of the beneficiary designations for them. Your probate estate consists only of the assets subject to your will, or to a state's intestacy laws if you have no will, and over which the probate court (in some jurisdictions referred to as surrogate's or orphan's court) may have authority. This is why reviewing beneficiary designations, in addition to preparing a will, is a critical part of the estate planning process. It is important to note that whether property is part of your probate estate has nothing to do with whether property is part of your taxable estate for estate tax purposes.

Wills can be of various degrees of complexity and can be utilized to achieve a wide range of family and tax objectives. If a will provides for the outright distribution of assets, it is sometimes characterized as a simple will. If the will creates one or more trusts upon your death, the will is often called a testamentary trust will. Alternatively, the will may leave probate assets to a preexisting inter vivos trust (created during your lifetime), in which case the will is called a pour over will. Such preexisting inter vivos trusts are often referred to as revocable living trusts. The use of such trusts or those created by a will generally is to ensure continued property management, divorce and creditor protection for the surviving family members, protection of an heir from his or her own irresponsibility, provisions for charities, or minimization of taxes.

Aside from providing for the intended disposition of your property upon your death, a number of other important objectives may be accomplished in your will.

- You may designate a guardian for your minor child or children if you are the surviving parent and thereby minimize court involvement in the care of your child. Also, by the judicious use of a trust and the appointment of a trustee to manage property funding that trust for the support of your children, you may eliminate the need for bonds (money posted to secure a trustee's properly carrying out the trustee's responsibilities) as well as avoid supervision by the court of the minor children's inherited assets.
- You may designate an executor (personal representative) of your estate in your will and eliminate their need for a bond. In some states, the designation of an independent executor, or the waiver of otherwise applicable state statutes, will eliminate the need for court supervision of the settlement of your estate.
- You may choose to provide for persons whom the state's intestacy laws would not otherwise benefit, such as stepchildren, godchildren, friends or charities.
- If you are acting as the custodian of assets of a child or grandchild under the Uniform Gift (or Transfers) to Minors Act (often referred to by their acronyms, UGMA or UTMA), you may designate your successor custodian and avoid the expense of a court appointment.

What Does a Will Not Do?

A will does not govern the transfer of certain types of assets, called non-probate property, which by operation of law (title) or contract (such as a beneficiary designation) pass to someone other than your estate on your death. For example, real estate and other assets owned with rights of survivorship pass automatically to the surviving owner. Likewise, an IRA or insurance policy payable to a named beneficiary passes to that named beneficiary regardless of your will.

Jointly Owned Property

If you own property with another person as joint tenants with right of survivorship, that is, not as tenants in common, the property will pass directly to the remaining joint tenant upon your death and will not be a part of your probate estate governed by your will (or the state's laws of intestacy if you have no will). It is important to note that whether property is part of your probate estate has nothing to do with whether property is part of your taxable estate for estate tax purposes.

Frequently, people (particularly in older age) will title bank accounts or securities in the names of themselves and one or more children or trusted friends as joint tenants with right of survivorship. This is sometimes done as a matter of convenience to give the joint tenant access to accounts to pay bills. It is important to realize that the ownership of property in this fashion often leads to unexpected or unwanted results. Disputes, including litigation, are common between the estate of the original owner and the surviving joint tenant as to whether the survivor's name was added as a matter of convenience or management or whether a gift was intended. The planning built into a well-drawn will may be partially or completely thwarted by an inadvertently created joint tenancy that passes property to a beneficiary by operation of law, rather than under the terms of the will. In some instances, a power of attorney document giving the trusted person the power to act on your behalf as your agent with regard to the account in order to pay bills will achieve your intended goal without disrupting your intended plans regarding to whom the account will ultimately pass.

Many of these problems also are applicable to institutional revocable trusts and "pay on death" forms of ownership of bank, broker, and mutual fund accounts and savings bonds. Effective planning requires knowledge of the consequences of each property interest and technique.

In many instances, consumers prepare wills believing that the will governs who will inherit their assets when in fact, the title (ownership) of various accounts or real property, for example, as joint tenants, or beneficiary designations for IRAs, life insurance and certain other assets control the distribution of most or even all assets. This is why merely addressing your will is rarely sufficient to accomplish your goals.

Trusts

Trusts are legal arrangements that can provide incredible flexibility for the ownership of certain assets, thereby enabling you and your heirs to achieve a number of significant personal goals that cannot be achieved otherwise. The term trust describes the holding of property by a trustee, which may be one or more persons or a corporate trust company or bank, in accordance with the provisions of a contract, the written trust instrument, for the benefit of one or more persons called beneficiaries. The trustee is the legal owner of the trust property, and the beneficiaries are the equitable owners of the trust property. A person may be both a trustee and a beneficiary of the same trust.

If you create a trust, you are described as the trust's grantor or settlor. A trust created by a will is called a testamentary trust, and the trust provisions for such a trust are contained in your will. A trust created during your lifetime is called a living trust or an inter vivos trust, and the trust provisions are contained in the trust agreement or declaration. The provisions of a living trust or inter vivos trust (rather than your will or state law default rules) usually will determine what happens to the property in the trust upon your death.

A trust created during lifetime may be revocable, which means it may be revoked or changed by the settlor, or irrevocable, which means it cannot be revoked or changed by the settlor. Either type of trust may be designed to accomplish the purposes of property management, assistance to the settlor in the event of physical or mental incapacity, and disposition of property after the death of the settlor of the trust with the least involvement possible by the probate (surrogate or orphan’s) court.

Trusts are not only for the wealthy. Many young parents with limited assets choose to create trusts either during life or in their wills for the benefit of their children in case both parents die before all their children have reached an age deemed by the parents to indicate sufficient maturity to handle property (which often is older than the age of majority under state law). Trusts permits the trust assets to be held as a single undivided fund to be used for the support and education of minor children according to their respective needs, with eventual division of the trust among the children when the youngest has reached a specified age. This type of arrangement has an obvious advantage over an inflexible division of property among children of different ages without regard to their level of maturity or individual needs at the time of such distribution.

For More Information, See Planning With Retirement Benefits: General Information for Plan Participants. This is a brochure published by the ABA.

Find the full article:

https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/an_introduction_to_wills/

Updated October 2023