The Importance of Estate Planning: Where There’s a Will, There’s a Way

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As the learned Benjamin Franklin once said “In this world nothing can be said to be certain, except death and taxes.” This is as true today as it was over 200 years ago. To ignore one’s ultimate death, however, can result in a significant increase in taxes and other headaches for the loved ones you leave behind. Like other unpleasant aspects of life, there is a tendency to ignore the inevitable process of our growing older and the implications of that process. Very few individuals wish to focus their limited (and precious) time and energy on the prospect of their aging and ultimate demise. Yet, there are a multitude of reasons why you should focus your energies from time to time on the estate planning process.

When it comes to wealth, you unfortunately can’t take it with you. A report by Wealth-X and NFP projects that high-net-worth individuals alone will transfer $3.9 trillion to the next generation by 2026. No matter what amount of wealth one has, ensuring that wishes are honored after death is important and the best way to do so is through estate planning. Caring.com reports that just over 40 percent of American adults currently have an estate planning document, like a will or living trust, in place. Only 36 percent of parents with children under 18 have taken the steps to secure this document. What’s worse, the top reason cited by survey respondents for not having a will or living trust is simply “delaying getting around to it.” The guide below explains just what a will is, the importance of creating one and why we should in fact “get around to it.”

**WHAT IS A WILL?**

A Last Will and Testament (or “Will” for short) is a legal document that serves a variety of purposes, including the distribution of a decedent’s property and assets, the selection of a personal representative of the estate, and the selection of guardians for minor children amongst other things. To be valid, a Will must be written by a competent individual over the age of 18 and signed by her or him. There are further formalities that can be followed in order to make the probate of the Will easier following death, but those formalities are not required in order to make a legally effective document.

**WHY DO YOU NEED A WILL?**

In the absence of a Will, the intestate succession and other laws of the individual’s state of residence at the time of death will dictate the resolution of a number of matters that can otherwise be handled as that person wishes through a will. Often, the default rules under those state intestate statutes do not reflect the values, goals and intentions of a decedent.

By way of background, it is important to understand that a Will or the intestate statute govern only the disposition of “probate” property. Non-probate property includes other property that is jointly held with another with a right of
survivorship, or property which is subject to a beneficiary designation (such as retirement plans and life insurance). Accordingly, it is important to verify how your property is held in order to develop an effective strategy for passing it properly to loved ones.

Any probate property not effectively disposed of by a Will instead passes pursuant to state intestate laws. This can include both real and personal property. Generally, such property will go to a surviving spouse if there is no issue (children, grandchildren and more remote descendants) or parents who survive a decedent. The share of the intestate estate which does not pass to the surviving spouse (usually, a sum certain plus one-half of the balance of the probate assets) goes first to the decedent’s issue, then to the decedent’s parents. How many married individuals would plan to dispose of their assets in this way? I reckon that it is very few! In the absence of immediate family members, the laws of the state in which you reside outline to which collateral relatives the probate property will pass, dependent on who has survived the decedent. Ultimately, in the absence of any surviving relatives, the state can claim the property.

In addition to headaches and red tape that often come along with intestate succession, disagreements between surviving family members about shares of an estate can lead to legal battles, “bad blood” and unwanted heartache. Even if a person does not have relatives that he/she wishes to inherit assets, charities or other organizations can be named as beneficiaries in a Will, rather than leaving it up to the intestate laws of one’s state of residence.

**REASONS TO AVOID INTESTATE SUCCESSION**

**Spousal Exemptions from Death Taxes**

Another reason to avoid intestate succession is that although a surviving spouse receiving transfers will be exempt from federal estate tax and most states’ death taxes to the extent that one’s state of residence still imposes one, transfers to non-spousal relatives and other individuals may be subject to both taxes.

**Protection of Beneficiaries**

In some cases, potential beneficiaries may not or should not be entitled to receive substantial sums of money upon the death of a loved one. For example, minors, mentally or physically challenged individuals who may be receiving public or private assistance and benefits, and those unable to manage money effectively, can be better protected with applicable provisions in a will, including placing assets in testamentary trusts.

**Maintaining Family Harmony**

It is unfortunate the number of times that we have witnessed otherwise harmonious (or at least cordial) family relationships break down during the administration of a loved one’s estate. More often than not, the genesis of the argument is over largely sentimental items of tangible personal property rather than sizeable assets. These family squabbles can end up costing hundreds, if not thousands, of dollars in unnecessary legal fees if the attorney has to mediate the heirs’ dispute. There is a better alternative! You can provide in your Will for the disposition of these items in additional to your financial assets either by incorporating the bequests in a separate document that is referenced in the Will, or by doing so directly in the document itself. Even if you don’t want to make a laundry list of these items, you can also provide for a method by which your children (or other takers) get to choose the items that they will receive in this
regard.

**Creditor Protection Through Spendthrift Clauses**

Financial assets and other property that is bequeathed to a beneficiary becomes the beneficiary’s property and thus, subject to the claims of his or her creditors. Alternatively, a beneficiary’s share of an estate can be placed into a testamentary trust under the care and management of a trustee, in which the beneficiary is entitled to distributions of principal and income from the trust. Most importantly, the trust can contain appropriate spendthrift provisions. These provisions protect the principal and limit access should the beneficiary attempt to “give away” their trust interest, or in the event that a creditor seeks to lien the beneficiary’s interest in the trust. Spendthrift provisions largely prevent the beneficiary from voluntarily or involuntarily alienating his or her interest in the trust assets for the benefit of creditors.

**Selection of Appropriate Fiduciaries**

In addition to allocating the distribution of property, a Will can allow for the appointment of four types of fiduciaries to serve the estate and manage assets:

- An executor or executrix: in the absence of a Will appointing an executor or executrix, the selection of a personal representative of the estate, called an “administrator,” is left to statute. Most state statutes largely give that right to whoever would take the estate under the applicable intestate statute.
- A trustee: an individual may be given control of assets, with a legal obligation to administer those assets solely for the purposes specified, following the administration of the estate.
- A guardian of a minor and his/her assets: it goes without saying that those with minor children would be keenly interested in identifying appropriate individuals in their Will to care for those children. In the absence of appointment of trustees, guardians and custodians, the applicable state court would be responsible for determining who should care for those children and any property that would pass to them.
- A custodian for assets not held in trust or by a guardian that may nevertheless pass to a minor.

**CONCLUSION**

Anyone over the age of 18 and of sound mind may make a Will. A Will is a fluid document, to which changes may be made at any point should a person reconsider the distribution of his/her assets. The counsel of tax and estate attorneys can be valuable in ensuring a Will is structured in the best interests of the testator and his/her beneficiaries.

For questions, more information, or guidance, please contact Bill Hussey (husseyw@whiteandwilliams.com; 215.864.6257) or another member of our Tax and Estates Group.

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