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Wills, Trusts and Estates

BY CARRON ARMSTRONG Updated April 24, 2018

When you think about wills and estate planning, you might imagine the classic cinematic tableau: The lawyer gathering the assorted (and rapacious) heirs into his office to hear the reading of the will, dramatically learning to whom the wealthy deceased had bestowed good fortune (and which of the spurned would be contesting the will). That piece of drama probably influenced many people to believe that wills and estate planning were just for the rich who wanted to mess with their relatives.

Indeed, for many people, estate planning conjures images of oversolicitous lawyers and bankers discussing million-dollar trusts, avoiding the tax man, and which conditions to place on a bequest to a ne'er-do-well relative.

But that's not the case at all. Most people, even those with modest means, can spare their loved ones serious headaches with a little estate planning. Let's spend a little time discussing various elements of wills, trusts, and estates.

The Estate

Hear the term "estate," and you may imagine mansions with six-car garages, a huge pool, tennis courts, and gardens. But in reality, an estate is simply all of your property and property rights. When you die, your property and your property rights do not likewise die. They still exist and they have to go somewhere. How that property is managed and distributed depends on whether you die *testate* — that is, with a valid will — or *intestate,* without a will.

Is it also more likely that those with higher incomes are more likely to have an estate plan in place? Not necessarily. The US Legal Wills study indicates that people with higher incomes, of $100,000 to $149,000 only had a will about 9.6 percent of the time.

That figure increases to 15 percent for those with an income that exceeds $150,000. These figures are dwarfed by their lower income cousins who make $25,000 to $74,000, who manage to have up-to-date wills about 28 percent of the time. The same study, however, also indicates that people with higher

Will vs. No Will

Not having a will doesn't mean that your loved ones will avoid a court proceeding. Probate refers to the process a court uses to establish the validity of a will. When someone dies without a will, that same court is said to administer the estate. The nature of the assets or the nature of the people who will inherit often compel a court administration.

Untitled Assets

Some assets can pass to an heir just because there is no need to officially pass title to the property. Personal property like furniture and jewelry will usually not have documentation to establish ownership. If your estate consists entirely of untitled property, there may be no need to go to court unless the heirs cannot agree on how to distribute the property among themselves.

Assets that Pass Outside of Probate

Whether or not you have a will, some assets will pass to heirs outside the probate process and without the need for a will. If yours is a community property state, you will take sole ownership of at least your share of the community property. Some assets transfer automatically because they are contractual in nature and require you to designate a beneficiary who will take ownership when you pass on. These will include life insurance proceeds, annuities with death benefits, and many retirement accounts. Bank accounts often have "payable-on-death" provisions that allow you to name a successor. In each case, since you already designated where you want the proceeds to go, there is no need for the intervention of a probate court.

Intestate Administration

Other assets, like vehicles and real estate, require documents to pass title. If the owner is deceased, usually the only way to pass title is through a court proceeding and a court order.

When you die intestate (without a will) your estate will often still have to go through an administration process.

Since there is no will evidencing your wishes, state law regarding succession and inheritance will take over. Every state has a scheme that will dictate the steps, but here is the typical process:

- Someone initiates a case in probate court.
- The court determines that there is no will and appoints an administrator (often a family member or heir).
- The administrator gathers the assets, identifies the heirs and notifies creditors.
- The administrator liquidates the assets, pays debts and taxes and the costs of administration (like attorney's and accountant's fees).
- The administrator distributes the remaining proceeds according to a schedule set out in state statutes.

Difficulties Encountered in an Intestate Administration

An estate administration is often a lengthy, inefficient, and expensive proceeding because the administrator is usually required to seek permission from the court for every action. The administrator will spend much time requesting court orders and attending hearings. An intestate administration will often take two years or longer.

An intestate administration may bear little or no relation to the wishes of the deceased. Even if you tell your daughter that you want her to have your mother's pearl earrings and would like to see that your best friend gets your car, the administrator is under no obligation to adhere to those wishes. In fact, the administrator will likely be compelled by state law to sell those heirlooms and distribute the proceeds to other heirs as designated by statute.

A will does not alter the terms of transfer for those types of property outlined above that will pass outside of administration or probate, like insurance proceeds. Presumably, you will make sure that the beneficiaries and co-signors are kept up to date.

Instead of an administrator appointed by the court, you will designate an executor. The executor serves a function similar to the administrator except that the executor has much more autonomy and is not required to obtain court permission for every action. This will reduce the cost of probate, allow a more

And, of course, you can direct that your property be distributed in any way you choose.

The Role of Trusts in Estate Planning

A trust is an entity or an agreement that allows you, as grantor or donor, to transfer property to someone, known as the *trustee*, for the benefit of a third party, called the *beneficiary*. Trusts are often used in estate planning to take advantage of favorable tax treatment, to place conditions on the use or distribution of the asset, or to allow the heirs to take possession of assets without a probate proceeding. The trustee holds the asset in a fiduciary capacity, meaning that the trustee has a high responsibility to see that the asset is preserved for the beneficiary.

Trusts serve three main purposes:

1. They allow you to tailor your wishes for the use of your assets
2. They can provide significant tax savings
3. They can allow you to avoid probating certain assets

There are many different types of trusts, and state law determines what will be available for you. Trusts are also subject to some federal law, particularly in how they are treated for estate tax purposes. If the property exceeds a certain minimum value, federal estate taxes are assessed.

- A spendthrift trust can be used to provide for income for children until they are old enough to manage their inheritance.
- A special needs trust will ensure that an heir with special needs will have sufficient assets to provide for those needs
- A generation skipping trust will transfer assets to grandchildren
- A life insurance trust contains life insurance on the grantor's life and is often used to avoid estate taxes.
- A QTIP trust provides income for a spouse, then passes the remainder of the assets to other heirs
- You can even set up a pet trust to provide for your beloved non-human companions.

Living Trusts

A living trust is a way for you to preserve and retain control over your assets even if you become incapacitated. It can also alleviate the need for a guardianship or conservatorship if you are unable to make decisions on your own. You can name yourself as the trustee so that you can retain control over the assets during your lifetime, and provide for a successor trustee who will take over upon incapacity or death. In that way, a living trust can also help you to avoid probate.

Living wills can provide a lot of flexibility during your lifetime including the ability to revoke or dissolve the trust as your needs change. You can also make the trust irrevocable, and a revocable trust will generally become irrevocable upon your death. An irrevocable trust cannot be changed once assets have been transferred into it. But, irrevocable trusts generally allow for the best estate tax consequences.

Be Prepared

Wills and trusts can be used to accomplish many goals and are about as flexible as your needs and wishes require. Ensure that those needs and wishes are carried out requires careful planning in choosing the best trusts and provisions for the will. Even if your estate is more modest, having a will can make life much easier for the ones you leave behind.

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