12. WILLS

State Probate Process

A will is governed substantially by state law. State requirements vary, even if the state has adopted a form of the Uniform Probate Code. To determine the applicable law in any state, consult that state's probate code, review the constitution, other statutes, court decisions, and administrative rules. Although the probate code is applicable primarily to the probate process, it must also be consulted to determine how wills will be interpreted and administered.

The execution of a will does not mean that probate will be avoided. A will is of no legal effect until it has been accepted into probate by the probate court to be the decedent's last will.

Legal Requirements

Wills must be in writing unless local law permits otherwise. In jurisdictions where nuncupative (oral) wills are permitted, they may be used in limited circumstances.

The ultimate aim of a will is for the testator to make a distribution of his/her property in a way that provides for the fulfillment of existing obligations at the time of death, and designates gifts to persons and organizations that are important to the individual. A person must have a testamentary intent in order for a will to be valid. The testator/trix (the one signing the will) must also be of age (in most states, at least 18) and of sound mind at the time the will is made. Subsequent lack of mental capacity does not affect a will previously made during a period of mental capacity.

It is important that wills be properly witnessed. All states require either two or three witnesses to legitimize the will. The witnesses must either see the signing or the acknowledgement of the will by the testator. Subsequent incompetency of the witnesses does not destroy the legality of their witness function. If, at the time the will is probated, the witnesses cannot be located, there is a presumption that the will was properly executed and witnessed. Many jurisdictions have adopted statutes that provide for a self-proving affidavit. This usually precludes the necessity of the witnesses appearing in court.

Witnesses should not be heirs of the testator or devisees (beneficiaries) named in the will. In some states, a testamentary gift made to a witness may be void except as to the portion that the witness would have received as an heir if the testator had died intestate (without a will). At the time of probate, even if all the witnesses are available and of full mental capacity, the probate court usually requires that no more than one witness testify to the validity of the signature and the mental competency of the testator.

If the testator is blind, the will should be read to him/her in the presence of the witnesses. The testator/trix should be asked if the document, as read to him/her, is his/her will. If he/she agrees that it is, the testator should then sign the will. The will should indicate that it was read to the

testator, that he/she acknowledged what was read to be his/her will, the name of the person who read the will, and that the witnesses heard it read exactly as it was printed on the will document.

State requirements vary, so qualified local legal counsel should be consulted.

If There Is No Will

In the event that a person chooses not to make a will, or revokes a will, state law provides for distribution of the assets of intestate individuals (those without a valid will). The provisions of these intestacy laws will be implemented at his/her death.

Reasons for a Will

Reasons to create a will include the desire to make distributions according to the perceived needs of the beneficiaries, to make charitable gifts, to make conditional gifts, to nominate guardians for minor children, establish trusts, nominate a personal representative (executor) to oversee the settling of the testator's affairs, and to avoid passing assets to the state in the event that there are no heirs (escheat).

For many young parents, the most important provision of a will is often the nomination of a guardian who would care for their children, should both parents die. Such a nomination will usually prevail unless there is some overriding concern that the probate judge considers paramount.

Holographic Will

Some jurisdictions allow an individual to make a holographic will. Since state requirements vary, legal counsel should review all applicable statutes. Where a holographic will is allowed, it usually does not require witnesses, but it must be dated, the material provisions of the will must be in the handwriting of the testator, and the signature of the testator must be at the end of the will.

Pour-Over Will

A pour-over will allows a testator to pass all assets into a pre-existing trust.

Codicil

A codicil may be used to change or partially amend a will. A codicil is a change in the will which is short of a complete revision, but which must meet the same execution requirements as the original will.

Revocation

A will can be revoked in whole or in part. The revocation can occur by the execution of a subsequent will or codicil that expressly revokes, or contains provisions that are inconsistent

with, the provisions of a prior will. The best way to avoid having several wills involved in the settlement of an estate is to expressly and completely revoke prior wills when preparing a new will. An example of a subsequent partially inconsistent will that revokes a prior will follows:

> *Testator leaves the Ford to Son A, the Buick to Son B, and the Cadillac to Son C.*
>
> *In a subsequent will, he leaves the Buick to Daughter D. He has revoked the provision in the prior will that gave the Buick to Son B, because the subsequent will is inconsistent with the prior will regarding the distribution of the Buick. However, the prior will is still partially valid because the Ford still goes to Son A and the Cadillac still goes to Son C.*

The manners of revocation can vary, but a written revocation is best. Other methods are burning, tearing, obliterating, or otherwise destroying the will with the intent to revoke. There must be the intent to revoke the will and the physical act of revocation. As a matter of law, a divorce or annulment can also revoke spousal provisions contained in a will.

Revocation of a second will does not automatically reinstate a prior will. For instance, if an individual writes a will, subsequently writes a second will, and then revokes the second will in one of the manners described above, such an individual is without a will (*intestate*).

Joint, Mutual, and Contractual Wills

Joint and mutual wills and contracts not to change wills can have many disadvantages andshould not be used without first receiving qualified legal counsel; however, they can also solve some problems. Suppose two individuals desire to make wills providing that upon the death of one, the other may not change the provisions of his or her will. Such provisions need to be made very explicit so there can be no successful challenge of such a contract at the time of probate. A contract not to change the terms of a will can be amended by both parties until the death of one of them. The contract can be contained in the wills themselves, there can be references to the contract in the wills with some outside proof of such a contract, or there can be an outside express written agreement as to the terms of the contract.

Will Preparation

Wills may be prepared by the individual testator or may be prepared by an attorney. A non-lawyer who prepares wills for other individuals is engaged in the unauthorized practice of law.

The Statutory Will

Some states have laws providing for a "statutory will." A statutory will is basically a simplified fill-in-the-blank document which, if properly executed, is a valid will. Most statutory wills make no provision for educational trusts or other types of trusts desired by some testators. Often the use of the statutory will is not adequate for the needs of the testator because it is created without the benefit of legal counsel.

Will Provisions

A will must first identify the testator by name and address. The will may also provide for the payment of the debts of the deceased, although most state laws provide for the payment of debts even in the absence of such a provision.

The primary reason most people make a will is to distribute their assets. This distribution can be made directly through probate (the usual procedure) or it can be made by use of a "pour-over" will that transfers assets to a previously existing trust which then makes distributions to specified beneficiaries. An existing document can be incorporated (by reference) into the will, provided the language of the will manifests the intent of the incorporation and describes the document sufficiently to permit its identification.

The Devise

At common law, a bequest was a transfer of personal property and a devise was a transfer of real property. The Uniform Probate Code has removed this distinction and refers to all transfers, gifts, and conveyances through a will as a "devise." The recipient of a devise is called a "devisee." If a devisee predeceases the decedent, a devise to that person lapses unless the devisee is a lineal descendant of a grandparent of the testator. The Uniform Probate Code also provides that a devisee must survive the testator by a period of time, usually 120 hours, to take a devise under a will. A devise that lapses is treated as not having existed and is distributed pro rata among the other devisees in its class unless a different provision is made in the will. Consideration should be given to an alternate disposition in the event that a devise lapses.

Sometimes an individual, prior to his/her death, transfers property that was devised in a will. This transfer which removes the property from the estate by prior disposition may constitute an "ademption," which results in the devisee not receiving the gift.

Sale of Devised Property to Pay Expenses

Sometimes it is necessary for the personal representative (executor) to sell property to raise cash to pay debts of the estate. When this happens, the devisee (person who would have received the property) is usually entitled to the following proceeds from the devised property:

> Any balance, after debts of the estate have been paid, of the purchase price, including any security owed by a purchaser to the testator at his/her death,
>
> The balance of any amount of a condemnation award for the taking of property,
>
> Any proceeds, not yet paid at death, on fire or casualty insurance on the property, unless the property is restored to its previous condition,
>
> Property owned by the testator at death as a result of foreclosure of a security for a specifically devised obligation or property obtained in lieu of foreclosure.

Specific Bequest of Securities

If a testator devised a specific gift of securities, rather than the equivalent value thereof, the specific devisee is entitled to the following:

> All of the specifically devised securities which are a part of the estate at the time of the testator's death,
>
> Additional or other securities of the same corporation owned by the testator by reason of action initiated by the corporation, excluding any acquired by exercise of purchase options,
>
> Securities of another corporation owned by the testator as a result of a merger, consolidation, reorganization, or other similar action initiated by the first corporation.

Advancement and Abatement

If, during lifetime, a testator gives property to a devisee and in the will provides for a deduction of the lifetime gift, the gift will be treated as a satisfaction of the devise, in whole or in part. The act of giving a devise prior to death is called an "advancement."

Occasionally, the estate is not large enough to make full payment of the legacy contained in the will, in which case the legacy is reduced. This reduction is called "abatement."

Real Property Devise

In devising real property, it is important to have the correct name of the devisee. For instance, a devise to a church entity that is not legally incorporated may result in a transfer of the real property to an organization that has no legal status for purposes of holding or transferring legal title. A subsequent attempt to convey the property would require additional legal expenses, affidavits, or other procedures to clear title. An individual devise should be made with sufficient particularity to enable the personal representative to identify the proposed recipient.

The Residue

One important consideration when distributing property through a will is to determine that all of the property owned by the decedent has been distributed. After the specific devises have been made, there should be a provision for distribution of the "residue." Usually the residue is divided among several devisees. A final review of the will should be made to assure that the percentages of distribution of the residue add up to 100%.

Alternate Distribution Designations

While the testator is free to devise monetary gifts in dollar amounts or in percentages, the use of percentages assures that the relative portions remain the same in spite of diminishing estate assets. For instance, assume a father with $100,000 wanted to leave the bulk of his estate to the

child who took care of him in his final years, and accordingly devised $10,000 to each of his three other children and the entire residue to the child who took care of him. The result would be satisfactory if he died in the same financial circumstances as when the will was executed. However, if, because of hospital bills, nursing home bills, and other expenses, at the time of his death there was only $30,000 in his estate, the first three children would still each receive $10,000, but the child to whom he wanted the bulk of his estate to go would receive nothing. It would be preferable to put all monetary gifts of the same class in percentages to assure the relative position regardless of the testator's economic circumstances at the time of death.

Educational Trust Provisions

Many wills contain a provision that creates an educational trust to provide for the maintenance and education of children until they have completed their education. Assets are held in trust with the income and principal, if necessary, to be used to accomplish the objectives of the trust. At the termination of the trust, a distribution of the remaining trust assets, if any, is made. Normally the association/corporation should not serve as trustee of an educational trust, allowing some other person or organization to be appointed.

Appointment of a Guardian

If there are minor children, the will should also nominate a guardian. Thus, in the event of the death of both parents, the court shall consider the nomination in the will of the last parent to die. An alternate guardian should also be nominated in the event that the primary guardian fails, refuses, or is unable to act. Where two persons are named as guardian, the will should be clear as to whether the child or children should live with only one of the named guardians if one guardian is unable or unwilling to serve.

Spousal Rights

In most jurisdictions, an individual cannot disinherit his/her spouse. When the estate is probated, a spouse must make an election as to whether to take action against the will and receive his/her statutory share, or to abide by the terms of the will. Reference should be made to applicable state statutes regarding spousal rights.

The Rights of Children and Other Heirs

In most jurisdictions, children and other heirs can be disinherited as long as it is clear from the will that the pretermitted (omitted) children and other heirs were not omitted by accident. Reference should be made to the applicable state statutes to define children's rights.

It is not necessary to give a reason when omitting heirs. The more elaborate the statement of reason to pretermit heirs, the more opportunity there is to challenge an allegation of fact or conclusion contained in the excluding language. Therefore, a pretermission should be simple and short and yet be effective under local law.

Personal Representative (Executor or Executrix)

All wills should nominate a personal representative as well as an alternate in the event that the first nominated personal representative fails, refuses, or is unable to act. In choosing a personal representative, the testator should be aware of the qualifications that may be needed by the personal representative in order to settle the estate. These should include his/her availability, general competence, capability, and integrity. Even though the individual named may have little specialized training, such a person can employ professionals to assist in the administration of the estate and thus he/she may prove to be a good choice.

Other Will Provisions

The will should include a statement defining the powers of the personal representative, including a power of sale and a power to operate businesses. A power of sale contained in the will may avoid the necessity of obtaining permission to sell real estate and a confirmation of the sale once consummated, possibly saving the estate substantial costs and fees. The same is true regarding a power to operate a business.

It is preferable to avoid including funeral and burial instructions in the will. Typically the will is not readily available at the time this information is needed.

The will should also request that no bond or surety be posted, or that only a nominal bond be required. This request may save the estate substantial expense.

Safekeeping of the Will

The will, upon execution, should be properly secured. The Planned Giving & Trust Services office of most conferences and unions has fire retardant cabinets in which documents can be stored. In most jurisdictions, a will may be left for safekeeping with the Clerk of the Probate Court. Wills kept at home are at risk of being lost or destroyed by fire. An heir who finds a will in which he/she is not favorably mentioned might destroy such a will. Caution should be exercised when keeping the will in a safety deposit box, since the box may be sealed upon the testator's death and the original will may not be available at the very time it is needed. Photocopies of the executed original will can also be beneficial, since in most jurisdictions a photocopy could be admitted in the event of the loss of the original.

Independent or Informal Probate

Many probate codes include a procedure for independent or informal probate. This allows a personal representative (executor) to file a petition for commencement of proceedings with the probate court, receive letters of authority, and proceed to administer the estate without the intervention of the court. Portions of the estate activities, such as the claims procedure, could be brought under the supervision of the court with the rest of the estate being administered independently. This procedure is described more fully in the probate section of this manual, but, if desired, it should be either expressly approved in the will or at least not excluded from consideration, depending upon the requirements of local law.