Agnew Law Office, P.C.

A Family Estate Planning Law Firm

LAST WILL & TESTAMENT

Background

A Last Will and Testament is perhaps the most commonly known estate planning document. While a Will can be very simple in nature (i.e. a vehicle which directs who your assets are to be distributed to upon your death), it can also address many complex estate planning issues, such as the naming a guardian for minor children, establishing "*testamentary*" trusts to hold money for minors and other beneficiaries, incorporating provisions which will seek to reduce estate tax liability, and establishing trusts or foundations which can benefit individuals and/or charities for generations to come after your death.

Therefore, when considering the provisions for your Last Will and Testament, it is important you have an understanding of what types of terms and conditions can be incorporated into a will so that you can create a document which will address your needs and concerns.

Assets to be Governed by the Will

Perhaps the first step in determining what terms and instructions to include in your will is to fully understand which assets you own will pass through the will and which assets will pass outside the terms of your will.

Assets that Pass Through a Will

All property which is in your name alone and which does not designate a beneficiary will be disposed of by your Last Will and Testament. This is due to the fact that the underlying asset does not indicate a successor owner through joint tenancy, nor does it indicate a beneficiary through a beneficiary designation. For instance, the Deed to your residence may indicate that you are currently the owner of that property, but a Deed typically does not indicate who is to receive that property upon your death. In order to determine that, one would have to look to the terms of your Last Will and Testament.

Therefore, common examples of assets that will typically be distributed pursuant to the terms and provisions of an individual's Last Will and Testament would include bank accounts, CDs, money market funds, stocks, mutual funds, bonds, partnerships, corporations, real estate, automobiles, and similar items held in your name alone. If any of these items are owned with another individual as joint tenants or if they perhaps designate a beneficiary (i.e. a mutual fund or CD may sometimes provide for the naming of a beneficiary), then they will not pass through the owner's will upon his or her death. However, if any of these types of assets are not owned jointly and do not designate a beneficiary, they will then pass through the will of the owner upon his or her death.

Assets That Pass Outside of the Will

As indicated above, certain assets will pass directly to named beneficiaries either through the form of beneficiary designations or joint ownership. Examples of assets that will pass directly to designated beneficiaries despite the presence of a will would include:

- ❏ Property held in joint tenancy with another individual. The "right of survivorship" that accompanies the joint tenancy form of ownership simply passes title directly to the surviving joint tenant (or tenants) upon the death of an individual owner.

- ❏ Life insurance or an annuity payable to named beneficiaries.

- ❏ Pension, retirement or other employee benefit plans payable to named beneficiaries.

- ❏ Property that is held in the name of a Trust Agreement (such as a land trust, living trust or revocable trust).

It is important to understand that not all property will necessarily pass through an individual's will. A common example would be an individual with 3 children that names 1 of her sons as a joint tenant on her checking accounts and certificates of deposit (for "convenience" purposes). Her will might provide that all of her assets are to be distributed equally among her 3 children. However, upon her death, the checking account and the certificates of deposit will all pass directly to the one son. In addition, he will then also be entitled to his 1/3 share of the remaining assets which

pass under the terms of the will. Therefore, it takes careful planning to avoid this type of situation if this is not desired.

Distribution Options

With property which will pass under your will, it is not necessary that you name or describe each item. Your assets can be described by groups, categories or in any other way which adequately delineates your property. It is also possible to leave all of your property or certain categories of it to more than one beneficiary by providing that each beneficiary is to receive a fraction or percentage of all or any category of property.

How Much?

If you would like for a particular beneficiary to receive a specific item of property or a specific amount of money, such a provision should be clearly expressed in your will. If you wish to leave a specific sum of money to a beneficiary, because of the fact that your estate may increase or decrease in size between the time that you execute your will and the time of your death, you may wish to consider distributing a sum of money defined by a *percentage* of your estate. For example, assume your estate is worth $50,000.00 and you wish to leave a beneficiary $500.00. Five Hundred Dollars is 1% of your estate. If your estate should shrink to $25,000.00 by the time of your death, the specific bequest of $500 may end up being more than you would have intended under the circumstances. If, however, your bequest is made in terms of the lesser of $500.00, or 1% of your estate, then the bequest would shrink proportionately with the total estate.

When?

It is also possible to require a trust to be established upon your death (legally referred to as a *testamentary trust*) in order to postpone the distribution of assets to designated beneficiaries. For instance, rather than allowing a child or grandchild to receive his or her share of the estate outright upon your death, you can establish a trust which would hold the assets for the benefit of that child or grandchild, and make distributions to them over a period of time (i.e. 1/3 at age 25, 1/3 at age 30 and 1/3 at age 35). You can also add discretionary authority which would allow the trustee to

make distributions at any time prior to those ages for prudent and desired purposes, such as education, medical needs and living expenses.

You can also establish different provisions for different beneficiaries. You may want one child to receive his or her share at a specified age (or ages) and another child to receive their share at a different age or ages.

Personal And Household Effects:

In dealing with your personal effects and household goods (which includes furniture, appliances, silverware, china, wearing apparel, automobiles, etc.) it is typical to leave all of such property to a surviving spouse and alternatively to children, grandchildren, etc. However, where an individual desires to provide for some specific distribution of personal effects, you can generally do so in one of two ways:

- Set forth the specific bequests directly in your will (i.e. "my jewelry to my daughter and my tools to my son"); or

- You can indicate that you may leave a memorandum which specifies who will receive certain pieces of property.

While the second option (the memorandum) is not legally binding, it is usually persuasive and such a memorandum can be made and changed at any time without going through the formalities of amending your will. Setting forth a specific bequest in the will has the benefit of being legally binding and enforceable, but it is more cumbersome to modify from time to time due to the fact that a formal Codicil must be created to make any change.

Residence:

If you own a residence or other parcels of land subject to a mortgage, unless you provide otherwise in your will, the person to whom you leave your residence or land may be entitled to require your executor to pay off the mortgage. If this is not what you desire, you may wish to provide that the residence or land is left to a beneficiary subject to the mortgage, and this will mean that the executor cannot be required to pay off the mortgage note. Instead, it will become an obligation of the person receiving the property.

Personal Representatives

When contemplating the provisions to be included in your will, you must also decide on from one to three "personal representatives" who are to be named in the will. In general, the potential positions you would have to consider include:

- ❑ Executor
- ❑ Trustee
- ❑ Guardian

Executor:

It will be necessary for you to name an executor for your will. The function of an executor is to collect your assets, pay your debts and distribute the remainder of your property to the beneficiaries named in your will. Many people name their surviving spouses and alternatively, adult children, as executors of their wills. It is possible to name one executor and any number of alternate executors to serve in the event that the prior named executor fails to serve. For example, a surviving spouse can be named as primary executor, the oldest child as first alternate executor and the second oldest child as second alternate executor. An executor must be over the age 18 to serve in Illinois. However, a minor child can be named executor in your will as long as they have reached 18 years of age at the time of your death when your will is probated.

It is also possible to name two or more persons to serve as co-executors and such co-executors will serve concurrently with each other. Alternate executors can be named for any co-executor who does not serve. It may be wise, although it is not necessary, to name a corporate entity (i.e. a bank or brokerage house trust department) as the final alternate executor.

It is not necessary that your executor, if an individual, be a resident of the State of Illinois. However, Illinois law does not permit a bank in another state to serve as the executor of the will of an Illinois resident. An executor is also sometimes referred to as a Personal Representative.

Trustee:

Where you desire to have assets held for the benefit of a beneficiary for a period of time after your death, it will be necessary to name an individual or corporate entity as a "trustee" to hold and administer those assets for the benefit of the named beneficiary.

The trustee will often times have the longest job of the personal representatives due to the fact that a trust established for a beneficiary may last 10 or 15 years beyond your death. The trustee can be an individual, a corporate entity, or any combination thereof.

Guardian:

It is also possible, under Illinois law, to appoint in your will a guardian for your children who may be under the age of 18 and who have no surviving parent. For those individuals with minor children, this is often the most important (and most difficult) decision they must make in putting together the terms of their will.

Common Probate Terms

Understanding some of the common probate terms will help you in developing and understanding your will. Some of the commonly used terms in probate, wills and trust documents are as follows:

Bequest, Bequeath:

A bequest is a gift by will of money or personal property (excluding land). To bequeath means to make such a gift.

Codicil:

A codicil is an amendment to a will which changes the will in some manner. It is usually a separate document and must be executed with the same formalities as a will.

Devise, Devisee:

A devise is a gift by will of land. A devisee is the person to whom land is given by a will.

"In Default Of Issue":

As used in a will, "in default of issue" means dying without leaving any living children, grandchildren, etc.

Issue:

Issue means lawful blood descendants, whether children, grandchildren, great grandchildren, etc. and also includes adopted children, grandchildren, etc.

Lapsed Legacy Or Devise:

When a beneficiary under a will dies before the person making the will, the gift, whether of land or personalty, lapses, which means that it does not pass to the deceased person or his estate.

Per Stirpes:

This is a Latin term which when used in a will means that if a beneficiary of a will dies before the testator (the maker of the will) leaving surviving children, those children will take the deceased beneficiary's bequest under a will.

Residuary Estate:

The residuary estate is that portion of your total estate covered by a residuary clause in your will. The residuary clause of your will disposes of all of your property not disposed of earlier in your will. In other words, after you have made specific gifts, a residuary clause normally provides that you leave "all the rest, residue and remainder" of your estate to one or more beneficiaries.

Testator/Testatrix:

The term for a male/female who is making a will.

Post Execution Information

Once a will has been completed and signed, there still several questions that are commonly asked. Some of those questions are as follows:

Where Shall I Keep My Will?

You should keep your will in a safe, but accessible place. We commonly have clients execute duplicate originals so that we can keep one signed will in your estate planning file in our office. If your signed will is ever lost or destroyed, we can access our signed copy as a back up. If you do not execute duplicate originals, than it will become much more important to make sure that your one and only signed copy does not get lost or destroyed. In that event it is typically recommended that you keep the one signed copy of the will in a safe deposit box in your bank. If you place the one signed original will in a safe deposit box you may want to keep a photocopy of the will at home for reference and annual review.

Whom Should I Tell Where My Original Will Is Located?

You should tell your spouse and your Personal Representative (Executor) where your original will is kept. You may want to tell some other trusted relatives as well.

Who Should Get Copies Of My Will?

It is not necessary for anyone other than you to have copies of your will. If you nonetheless wish to provide copies to other individuals, it then becomes important to remember that if you change your will in the future, the copies of the old wills could potentially be embarrassing to you.

When Should I Review My Will?

We suggest that you review your will every time there is a significant change in your family or financial situation. As a minimum, you should review your will once every three years.

What Are Some Changes That Would Cause Me To Review My Will?

- ✔ Death of a beneficiary
- ✔ Marriage, divorce or remarriage
- ✔ Birth or adoption of a child
- ✔ Death or change of personal representative
- ✔ Death or change of children's guardian
- ✔ If you change your name
- ✔ If you change your mind about the distribution for your assets
- ✔ If there is a significant change in your assets
- ✔ If you retire
- ✔ If you buy, inherit, or receive assets as a gift
- ✔ Finally, any time you feel uneasy about your will make changes so you do feel comfortable with it

How Do I Change My Will?

Do not write on your will. Do not change any terms and "initial" them. That could make that section or perhaps the entire will invalid. Unlike a contract, any changes to a will must be signed and executed with the same formalities as the original will. Changing your will is often done by a Codicil. It is highly recommended that you contact an attorney if you want to make any changes in order to make certain all changes are legally made.

How Do I Revoke My Will?

The best way to revoke a will is to tear up the original. Normally you should not revoke your will unless you have signed a new will. If you revoke your will and die without one, your property will be distributed according to State law, and that may not be the way you want your assets distributed.

This document was prepared by:

AGNEW LAW OFFICE, P.C.
129 South Phelps Avenue
Suite 801
Rockford, Illinois 61108
(815) 399-3522