



SHOULD I USE A WILL OR TRUST: *WHO'S AFRAID OF PROBATE*

Moira S. Laidlaw, Esq.

Shamberg Marwell Hollis Andreycak & Laidlaw, P.C.

Mount Kisco Office
55 Smith Avenue
Mt. Kisco, NY10549

White Plains Office
445 Hamilton Avenue
White Plains, NY 10601

New York Office
1 Grand Central Place
New York, NY 10165

Disclaimer

- This is an overview – not a complete statement of the law and is not to be considered legal advice
- If you have any questions, contact Moira S. Laidlaw, Esq. at (914) 666-5600

IRS Circular 230 Disclosure

- To ensure compliance with requirements imposed by the IRS, I inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

Overview of Presentation

- Define a Last Will and Testament
- Review New York Surrogate's Court Departments
 - Probate
 - Administration
 - Accounting
 - Miscellaneous
- Outline Probate versus Non-Probate Assets
- Define Revocable Trusts
- Discuss the Pros and Cons Between Probate versus Revocable Trusts

Last Will and Testament

- What is a Will?
 - A document that determines how assets owned by the maker of the Will or designated to the person's estate will pass

What happens if there is no will?

- The assets do not go to the State, except in extreme circumstances.
- State law determines who receives the assets.
- A person's spouse and children are the first to inherit if there is no Will.
- Other descendants take next:
 - Parents; if none then
 - Brothers and sisters; if none then
 - Nieces and nephews; if none then
 - Cousins.

Elements of a Simple Will

- Name and domicile of the Testator/Testatrix.
- Revoke all previous wills.
- Provide for payment of funeral expenses, debts and estate taxes.
- Make special bequests.
- Set Beneficiary of residuary estate.
- Name an Executor and alternate Executors.
- Define the powers of your Executor.

Additional Elements of a Simple Will

- Dispose of tangible personal property:
 - Household goods
 - Furniture
 - Clothing
 - Jewelry
 - Vehicles
- Dispose of all the rest of your estate – your “residuary estate.”
- Direct what happens to property going to a minor or a legally incompetent beneficiary

Will Signing Requirements

- Date and signature of Testator/Testatrix.
- Must be witnessed.
- Witnesses:
 - Must watch the Testator sign.
 - Testator must declare document to be a Will and ask witnesses to serve as such.
 - Ideally witnesses sign an affidavit at the same time that makes the Will self-proving.
 - This means witnesses do not need to be located at time of death of the Testator.

Probate

- The process by which a Will is proven to be valid – “admitted to probate”
- If no Will, then no probate – “Administration” proceeding to
 - identify heirs at law
 - appoint administrator of estate: priority of relatives to serve
- If property is located in multiple states, then the estate is probated in state of residence and an ancillary probate proceeding is brought in other states – only one Will is necessary

Probate Assets Defined

- Financial Assets
 - titled only to the decedent or held as tenants-in-common
- Real Property
 - titled only to the decedent or held as tenants-in-common
- Personal Property
- Business Interests
 - though contract terms may dictate valuation and transfer of title

Non-Probate Assets Defined

- IRAs or Qualified Retirement Accounts
- Life Insurance
- Annuities
- Certain Bank Accounts
 - JTWRROS, POD OR TOD
- Real Property
 - Tenancy by the Entirety
 - Joint Tenancy
- Any other assets with a “Designated Beneficiary”

When does a Non-Probate Asset Become a Probate Asset

- When the ESTATE is designated as a beneficiary on a non-probate asset
 - WARNING: Do not do this on any qualified retirement accounts! They need an “ascertainable” beneficiary
- When a Trust created in a Will is named as the beneficiary of a non-probate asset
 - Important for Medicaid Planning

Will Offered for Probate at Death

- Upon Testator's death, Executor submits the Will to the Surrogate's Court to have it declared valid – “Probated.”
- Upon probate, Court will issue “Letters Testamentary” to the Executor.
- Probate time varies depending upon the complexity of the estate.
 - There are many forms that needs to be completed in the probate process, and typically an Executor will hire an attorney to help with probate.

Probate Procedure

- Executor submits probate petition to Surrogate's Court, identifying:
 - Named beneficiaries
 - Nominated Fiduciaries (i.e., executors and trustees and alternates)
 - Heirs at Law (aka "statutory distributees")
- Must note whether any party is under a legal disability; if so a Guardian ad Litem may be appointed
 - Mental Incapacity
 - Minority
 - Missing
 - Unknown heirs at law
 - Incarcerated

Goal of Probate

- To have Court issue a Decree declaring the Will valid
- To obtain Letters Testamentary for Executor
- Receive Letters of Trusteeship for any trusts created in Will

Administering an Estate

- Once a will is probated, the estate then moves into the Accounting Department of the Surrogate's Court
- Estate fiduciary responsible for:
 - marshalling the estate assets
 - paying the administrative expenses and creditors
 - distributing proceeds in accordance with the terms of the Will
- An accounting of all these transactions must be made to the “interested parties” of the Estate

Overall Duties of Executor

- File income and estate tax returns, if necessary.
- Gather estate assets.
- Pay estate expenses.
- Distribute the assets in accordance with the terms of the Will.
- Executor must submit an Inventory of Assets.
- At conclusion, Executor must Account for estate assets either informally with beneficiary consent or through judicial approval

What Is A Trust?

- A **relationship** among:
 - Creator: trustor, grantor or donor
 - Trustee: the fiduciary and manager of all trust assets
 - Beneficiaries/Remaindermen: designated recipients of income and principal

Trust Agreement

- Relationship Governed by Agreement:
 - Creator: sets the terms of the agreement and funds the trust
 - Trustee: agrees to follow the terms of the agreement
- Caution:
 - Please consult a lawyer before making a trust agreement, as the income and estate tax consequences will vary depending upon the trust agreement terms

Kinds of Trusts

Revocable

- Trustor allowed to also serve as Trustee
- Trust can be revoked or amended at any time by Trustor
- For IRS purposes, the Trustor is still the legal owner of the assets for income and estate tax purposes

Irrevocable

- Cannot be changed or altered by Trustor alone
- If certain rights are relinquished to the property, then not includible in the Trustor's taxable estate upon death

Trustee Options

Individuals

- Self, spouse, children, trusted friend
 - Positive: May save on administrative fees
 - Negative: May improperly administer the trust, possible conflict of interest between income beneficiaries and remaindermen

Corporate

- Administrative experience, neutrality
- But may cost more to administer
- Not all trust companies are alike
 - Need Removal Provisions

Why Use a Revocable Trust

- Avoid Probate and Accounting in Surrogate's Court
 - Westchester County Surrogate's Court has lost 1/3 of its staff in the last year with much expertise lost
 - Probate and Accounting proceedings have ground to a halt
 - Probate of Will can now take 6 months in certain counties
 - Except upon emergency, assets will be frozen until probate
- Allow for immediate transfer of assets upon death
 - Power of Attorney no longer valid after death

“Thorny” probate proceedings

- Jurisdiction
 - Heirs at Law Unknown or Missing
 - Expensive Publishing Requirements
 - Expensive Genealogy Reports
- Minor Beneficiaries or Heirs at Law
 - Spouse and minor children
 - No Spouse and predeceased children leaving minor children
- Property in Multiple States
- Charitable Beneficiaries

Interplay between will and living trust

- Still need a Will, even if create a Living Trust
 - Difficult to own nothing at death (i.e., car)
 - Create Will as a back up
- Will can name Living Trust as the beneficiary of all probate assets
 - This technique is commonly referred to as a “Pour Over Will”

Why Proceed in Probate

- Can create a trust in a Will for a spouse that “triggers” into a Supplemental Needs Trust if spouse needs to qualify for Medicaid
 - This is void against public policy in a living trust
- May be a burden to transfer assets during lifetime to trust

Conclusion

- Every situation is unique
- Whether just a Will or a Pour Over Will and Living Trust is an appropriate choice for you or your family will depend upon a number of factors
- Moira Laidlaw offers a free initial consultation to help families make that assessment

Thank you

Moira S. Laidlaw
Shamberg Marwell Hollis Andreycak &
Laidlaw, PC
55 Smith Avenue
Mount Kisco, New York 10549
(914) 666-5600
mlaidlaw@smhal.com