WILLS

Drafting Tips for the "Simple" Estate

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Jessica A. Rogers, Luvaas Cobb

There is a running joke in my house: whenever Robert Shapiro appears on television advertising LegalZoom, I am helpfully reminded that the "robot lawyers" are coming and I should consider a new line of work. While I laugh at the joke, I am quick to point out that such wills can often create work on the probate (and probate litigation) side of things.

Most estate planning or probate attorneys have seen do it yourself or "DIY" wills, including those prepared with the assistance of software like LegalZoom or Rocket Lawyer. Moreover, most of us can probably tell tales of how well (or not) such documents have actually accomplished what the testator intended. The popularity of DIY will drafting is indicative of a larger problem which estate planning attorneys should be prepared to address with prospective clients: many people believe that wills are easy to prepare, are nothing more than forms in which the relevant information is inserted in the blanks, and that an attorney's experience and expertise in drafting is expensive and unnecessary. I have no doubt that the vast majority of you have heard some variation of "I just need a simple will. It shouldn't be very expensive at all."

Of course, some clients' wills *are* quite simple to prepare. But many are not. The thoughtful practitioner knows how to make that determination, and more importantly, will be able to explain to prospective clients the importance of a well-drafted estate plan that adequately addresses each client's unique needs and circumstances.

For purposes of this presentation, a "simple will" is one that either accomplishes what the laws of intestacy would, or that disposes of all of the decedent's assets outright to the named beneficiaries without the need for a continuing trust or conservatorship.

IS A WILL NECESSARY?

Some prospective clients may question the need for a will at all. If a client owns assets of more than nominal value, such as real property, bank accounts, investment accounts, stocks, bonds, and so forth, there needs to be a frank discussion of what will happen to his interest in those assets at his death. Some clients will want to pursue one or more methods of probate avoidance, including joint tenancy or beneficiary designations, and these methods can work very well and accomplish a client's ultimate goals.

These probate avoidance methods should not be used unthinkingly, however. For example, many clients want to add a child as a joint owner of an investment account. If the client has just one child, there are not many downsides to this plan. But what if she has multiple children? What if her plan is to have the beneficiary divide the account among the client's surviving children after the client's death? Suppose she has three children and three investment accounts of roughly equal value. She might think it wise to designate one beneficiary for each account, intending for each child to inherit one-third of her estate. But things are rarely equal in the long run. Setting aside variations in fund performance, suppose one of those children is named as the attorney in fact and must pay for the client's care. What happens if that child pays the client's expenses first from the accounts earmarked for the other children?

There are similar concerns regarding real property. Clients will occasionally inquire about adding a child's name to a real property deed during life (or worse, making an outright transfer of the property to the child without reserving a life estate). This has obvious risks and disadvantages. Although Oregon permits transfer on death deeds for real property, many attorneys express reservations about the wisdom of such deeds, for reasons that go beyond the scope of this presentation. With either option, a client may not fully realize how difficult it would be for his children to jointly own—and manage—

real property. A cost conscious client may conclude that a will is a good idea if he understands how complicated and expensive the alternatives can end up being.

Clients with minor children should have wills for the purpose of nominating guardians and/or conservators for their children, and should understand that any assets a minor child inherits from a probate estate will be distributed outright to that child at the age of 18. More complex estate planning, such as a testamentary trust or revocable living trust, may be advisable under the circumstances. Likewise, clients whose children or other desired beneficiaries are disabled and receiving needs-based public benefits need specialized estate planning – not merely a "simple" will.

Beyond the concerns over the disposition of property there are other good reasons a client should consider a will even if she plans to designate beneficiaries for all of her assets. These include the ability to waive the personal representative's bond required by statute, and selecting a personal representative other than one who is on the list helpfully suggested by the legislature. Even if a client's plan of probate avoidance through joint tenancy or transfer on death designations is reasonable and successful, a will can be a useful safety net in case the client acquires an unexpected property interest.

IS A *NEW* WILL NECESSARY?

People's lives change; they marry, divorce, or are widowed. Children are born, become estranged, or die unexpectedly. Fortunes are made and lost. We should encourage clients to think of their estate plan not as a permanent solution, but rather something fluid that they should revisit from time to time. Accordingly, these are the most common life events for which execution of a new will is recommended.

Marriage. Unless prepared in anticipation of a pending marriage, a will executed prior to marriage will be revoked upon the testator's marriage, *provided that* the spouse survives the testator. ORS 112.305.

Divorce. Divorce revokes all provisions in a will in favor of a former spouse, including the appointment of the former spouse as personal representative, unless a will evidences a different intent. ORS 112.315. A client updating an estate plan following a divorce should also be counseled to change beneficiary designations on life insurance, retirement accounts, investment accounts, and other assets.

Birth/adoption of children. Pursuant to ORS 112.405, children born to or adopted by a testator after the execution of the testator's will may take under the will. Whether an after-born or after-adopted child inherits under the will depends on whether the testator had other children living at the time the will was executed and whether those children are named as devisees. If the testator had no children living at the time the will was executed, then the surviving children will take a share of the estate as though the testator had died intestate. ORS 112.405(4).

Death of devisees. If a devisee has passed away, does the client's current will provide that the devise passes to her issue by right of representation, or to someone else entirely? If the will is silent, then ORS 112.395 will control. If the devisee was related to the testator by blood or adoption, then the devisee's descendants will take the devise by representation. If the devisee is unrelated by blood or adoption, then the devise will become part of the residue of the estate. It is thus important to ask clients who they would want to receive the devise if the named devisee does not survive the testator.

Significant changes in assets. Has a client sold or liquidated specifically devised assets? Is the client's net worth significantly less than it once was, so that specific bequests are now far more generous than the client would want? If the client specifically devises an asset that he sells within six months of the date of his death, does the client want the devisee to get an equivalent amount of cash from the estate?

Desired changes to nominated fiduciaries or devises. It should go without saying that a codicil, if not a new will, should be prepared whenever a client wishes to change the dispositive plan or nominate different personal representatives.

WHEN IS A "SIMPLE" WILL INSUFFICIENT?

Depending on a client's goals, a simple will may be insufficient to adequately protect the client or the client's spouse, children, or other intended beneficiaries. Estate planning does not involve just the post-death planning, but also end-of-life needs as well. Some clients may not understand what will happen in the event of their incapacity and inability to manage assets and property. Powers of attorney can only do so much; even with a power of attorney in place some clients may need a conservatorship unless they have created a trust for their benefit.

A significant percentage of my clients are blended families: couples where one or both spouses have children from a prior relationship, with or without joint children. If the marriage occurred after the children reached adulthood, these couples rarely want the survivor to inherit the entire estate outright. Rather, they typically desire that the surviving spouse is cared for and able to maintain the standard of living to which he or she is accustomed, and that after the survivor's death, the estate will be divided among each spouse's respective children in some manner. This plan is best accomplished through the use of a trust. Similarly, some clients want to delay a child's or grandchild's inheritance until the beneficiary is presumably more mature. If left an inheritance under a will, the beneficiary could receive the full use of the assets outright as early as age 18. Few 18-year-olds are mature enough to handle significant sums of money.

If one of a client's chosen beneficiaries is disabled, inheritance under a will may not be ideal. First, if the disability affects the beneficiary's capacity, the inheritance will require a conservatorship. Second, if the beneficiary receives means tested public benefits, the inheritance could result in a disruption and loss of important benefits. A special needs trust may be a better option.

Clients who own real property in multiple states are probably better served by a trust, thus avoiding probates in multiple states.

The kind of tax planning that can save or eliminate estate taxes is very difficult to do with a will alone. Furthermore, probate proceedings in Oregon are public record and clients may desire to keep their personal financial information private.

DRAFTING THE WILL

Each will should have the following provisions:

Identification of Testator. The testator should identify herself.

Revocation Clause. The will should include a statement revoking all prior wills and codicils.

Identification of family. The testator should state whether he is married, and if so, name his spouse. He should state whether he has any children (and whether they are joint children with his spouse), providing dates of births for minors, or identifying which children have predeceased him and their issue, if any. Stepchildren can be listed here if the testator desires to include them in the class of his children. Conversely, if the testator wishes to disinherit one or more people, that intent can be set forth here as well.

For the occasional client who wishes to disinherit a spouse, with no plans to divorce that spouse, counseling should be given on the elective share and its much greater reach under current Oregon law.

Specific gifts. Clients may want to make cash gifts of a specific amount, or devise specific items of tangible personal property. The will should state whether the gift is contingent on the devisee surviving or will lapse and become part of the residue. Further, in the case of tangible personal property, it might be prudent to consider who pays for the cost of delivering the property to the beneficiaries, and what happens if the beneficiaries cannot agree on the division of the property.

Residuary clause. In my experience, many clients think carefully about the specific gifts (especially of tangible personal property), and less about the residue. But most clients will dispose of their entire estate through the residuary clause. It is thus important

to be sure that there is no failure of the residue – that all percentages add up to 100% and that all contingencies are considered (such as, "What if everyone dies?").

Miscellaneous provisions. Some additional clauses you and your clients may desire or consider:

**Appointment of guardian and/or conservator for minor children.*

**Administrative provisions.* Pay attention to the language regarding debts, taxes, and administrative expenses, including apportionment of estate taxes, as well as which law will govern construction of the will.

**No contest/*In terrorem. Such clauses are valid and enforceable in Oregon, ORS 112.272, but should have some teeth to them. If a client wants to avoid a challenge to the will, he must not make it advantageous for a disappointed beneficiary to do so. Similarly, some clients believe a challenge to a will can be avoided if a beneficiary is left a nominal sum ($1 or $10 or $100) rather than being disinherited completely. The practical difficulties such a bequest will pose to the personal representative should be discussed.

**Exercise of power of appointment*. If your client has a power of appointment, it is imperative to review the document granting that power and the specifics for how it must be exercised.

**Disposition of remains.* Some clients want to make specific instructions regarding disposition of remains or funeral instructions. I generally advise against doing so in the will, simply because a will may not be located or reviewed until after the funeral has taken place. If a client has specific instructions regarding funeral or burial services, I recommend executing the form described in ORS 97.130 instead and providing it to the nominee therein.

CONCLUSION

Many people put off the preparation of a will; the process can be uncomfortable or daunting. However, most agree that it is a relief to have a plan in place and often remark on how glad they are to have taken the time to do so. Furthermore, a well-drafted, thorough will can ease the stress that accompanies a loved one's death. Drafting such a will depends on the attorney's ability to ascertain what a client truly intends. Clients may express a desire for a simple will, but this is often a case of not knowing what they don't know. Most are deeply appreciative of the attorney who takes the time to ensure that the final estate plan, whether simple or complex, is truly in their best interest.