George M. Hiller Companies L.L.C.
INVESTMENT MANAGEMENT, TAX, ESTATE & FINANCIAL COUNSEL

Estate Planning: Why You Must Have A Will!

December 2015

By George M. Hiller
JD, LLM, MBA, CFP®

In the two previous articles we outlined steps that very large estates could take to significantly reduce or eliminate federal estate taxes at death. We mentioned that the foundational document to estate planning is the Last Will and Testament (Will).

If you own property, have any expectation of owning property, or if you have a spouse or children you should have a Will. A Will is a legal document that has your instructions on how your estate is to be administered and how your property is to be distributed at your death.

According to LexisNexis about 55 percent of American adults do not have a will. Among minorities it is estimated that 68 percent of black adults and 74 percent of Hispanic adults do not have a Will (source, "Statistics on Last Wills & Testaments," by A. L. Kennedy).

If you die without a Will you will not be able to decide how to distribute the property you own at death. You have died "intestate" and the state will decide how your property is distributed. Intestate laws of each state determine how property of a decedent without a Will is distributed.

In many if not most cases dying intestate will result in your property being distributed in a way that you would not have wanted. The intestate laws differ somewhat from state to state, but as an example, let's assume you died in Georgia while domiciled in Georgia, without a will, leaving a surviving spouse and two young children. Under Georgia intestate laws, your estate would go one third to your surviving spouse and one third to each of your two young children.

Georgia and other states also have what is known as "Year's Support." This is an amount that is determined to be sufficient to provide for the support of a spouse and children for one year. Chances are great in this intestate scenario that one-third of the estate plus year's support is not going to be a satisfactory disposition of the estate for a surviving spouse.

The property going to the young children may require a court ordered guardian of the property to supervise and manage the property for the benefit of the children until they reach legal age. This type of estate distribution is likely to be costly, cumbersome, and not what the decedent or surviving family would have wanted and could have had if only a proper Will had been prepared and executed.

A proper Will means that you have had a will prepared by an experienced attorney, and that if it is an old will that it has been reviewed to make sure it still meets your wishes and desires and is not outdated given changes in tax law or other changes that may have occurred such as divorce, remarriage, or other significant life events.

The Will must also have been properly executed. This generally means that it is a written document (the will should be a typed document, not an oral will or a handwritten will) and signed by the testator in the presence of witnesses as required by state law.

Although it is possible to execute a valid will that is not prepared by an attorney and there are many will kits or legal forms or Will software programs available in the marketplace, the better practice by far is to pay an attorney to prepare a proper Will for you and to make sure that it is properly executed. Estate planning and drafting a will is complicated and it is easy to make mistakes.

An estate attorney can help make sure you have a Will that is best for you and one that avoids fatal errors and costly missteps. An attorney can make sure that the Will accomplishes your testamentary objectives and that you follow the legal formalities for making and executing a valid will.

Many states have what is known as a self-proving attestation provision. The attestation provision is an extra page where the witnesses attest that they saw you sign the will and that at the time of signing the will you knew what you were signing and appeared of sound mind. A self-proving attestation provision is not required in order to have a valid Will, but it is very helpful in the administration of the estate. It avoids having to locate the witnesses after death to have them sign attestation provisions as part of the probate process.

The Will does more than just distribute your property at death. In a Will you have the right to designate an Executor. The Executor is the person charged with gathering up the assets of the estate, paying off debts, expenses, and taxes of the estate, and carrying out the instructions of the Will regarding the distribution of estate assets to the beneficiaries of the estate.

Typically, a Will is also used to designate a Guardian for any minor children. A Guardian is the person responsible for raising the children and taking care of their property in the event of the death of a parent.

A Will can also be used to establish trusts for a surviving spouse or children. A trust requires a trustee. In a Will you can name who you want to designate to serve as trustee of any trusts you establish in your Will. You may need a testamentary trust to make sure that the support needs of a surviving spouse and children are properly addressed. If you have a special needs child or a child or family member that is unable to manage finances properly then trusts can be used during life or in a Will to address these situations.

It is important to point out that you may own assets that pass under the Will, but you may also own assets that pass outside the Will. Assets that pass under the Will are known as probate assets. Probate assets are comprised of property that you own in your individual name or where the estate is designated as the beneficiary in event of death.

Assets that can pass outside the Will include assets passing under certain contracts such as IRA beneficiary designations, 401(k) beneficiary designations, annuity and life insurance beneficiary designations, and certain forms of property owned as joint tenants with right of survivorship or as tenants in entirety. These types of assets are known as non-probate assets because they pass directly by operation of law to the designated beneficiaries or surviving joint tenants and do not pass under the Will.

Another important distinction that may affect the ownership of property during life and the passing of property at death is that certain states are known as common law states and other states are known as community property states. Generally speaking in community property states the property acquired during marriage is considered as being owned by both spouses. This is one reason why it may make sense to use a local attorney who is familiar with the estate laws of that state in preparing the Will especially if you live in a community property state.

If you own a home in one state, but also own a vacation home, land or other property in another state then you may be subject to what is known as ancillary jurisdiction or ancillary probate. This is a process whereby you may have to submit to probate in both states. Through the use of a Will and trust you may be able to avoid the potential complications and expense of ancillary probate. This is yet another reason why you may need an attorney to help with your Will and estate planning.

For all the reasons discussed above if you do not already have a Will we strongly urge you to correct this deficiency as soon as possible. Contact an estate attorney to assist you with preparing and executing a Will. If you have an old Will that is outdated please have it reviewed soon.

Having a proper Will is an important step in having financial peace of mind, making sure that your estate is distributed according to your wishes with lower estate administration costs, taxes, and burdens, and in making sure that the support needs of your surviving spouse and children are properly addressed.

It is our mission to provide high quality professional and objective financial counsel in the areas of investment management, estate and personal financial planning designed to help our clients improve their financial condition and achieve long-term financial goals.

Sincerely,

George M Hiller Companies, LLC Investment Team

More Resources on our Website

www.georgehiller.com

George M. Hiller Companies, LLC - Financial Newsletter is published periodically by George M. Hiller
Address: 1110 Monarch Plaza, 3414 Peachtree Rd. NE, Atlanta, Georgia 30326
Phone: 1-800-359-0222 or 404-365-0222 Email: ghiller@georgehiller.com Web Site: www.GeorgeHiller.com
Please call or email if you have any questions regarding your receipt of this newsletter.
Comments and inquiries are appreciated.