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New York Estate Planning & Administration: Wills and Revocable Trusts—What You Should Know

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Confusion and misinformation surround both the Last Will & Testament and the Revocable Trust. There is no one estate plan that fits every situation. Your individual circumstances dictate what would be best for you. Thoughtful consideration is needed to determine what is advisable. Key factors to consider include:

FAMILY. Married, single, second marriage, children, no children, young children, older children, child or spouse with special needs, estranged child or other family member, no spouse, no child, no sibling, unknown family tree, non-citizen, non-citizen spouse, and more.

VALUE OF ASSETS. Typically, the higher the net-worth the more complex the estate plan. Estate plans for high net-worth individuals with varied assets are even more intricate. Those who fall in the estate tax realm require estate tax planning to further complicate their plan. However, every individual, no matter the value of their estate, needs to plan so that their assets and belongings are distributed as they want them to be.

TYPE OF ASSETS. Bank accounts, brokerage accounts, CDs, mutual funds, stocks, equities,

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business, real estate, corporation, life insurance, IRA or other retirement accounts, annuity, artwork, and more.

OWNERSHIP OF ASSETS. Joint with your spouse or someone else, in trust, transfer on death, designated beneficiary, individually, tenants in common, joint tenants with rights of survivorship, in an LLC or other corporate entity or business, a combination of all and/or another ownership type.

STAGE IN LIFE. Just starting out, married, divorced, getting married or divorced, nearing retirement, selling a business, in litigation, potential litigation, recent inheritance, and/or somewhere in between; the list goes on.

While there may be similarities, no two estate plans are the same. Most important is to seek advice from a knowledgeable trust and estates attorney that specializes in estate planning. Your relative, neighbor or your bank teller may mean well, but they do not know what they are talking about.

The Last Will & Testament—Probate Proceeding

You may decide to include a Last Will and Testament (Will) in your estate plan. If so, upon your death, the above factors along with New York statutory requirements, such as the Estates Powers and Trusts Law (EPTL), Surrogate's Court Procedure Act (SCPA), and Court Rules specific to each County's Surrogate's Court, result in more aspects to consider that affect how your estate is distributed.

DELAY. The wishes set forth in your Will are not carried out automatically after your death. No matter how simple or complex, rich or poor, your original Will must be located, your Executor must file the Will along with the required Petition and accompanying documents with the court to probate the Will and become the Executor. Depending on your situation (see above factors), and the quality of your Will, this could take months or years. Regardless, in every situation, your Executor is not authorized to act for your estate while the Probate is pending and must wait until he or she receives Letters Testamentary or Preliminary Letters. This means that while grieving your loss, your loved ones must obtain an order (Probate Decree) from the court to follow your wishes in your Will and to secure and manage your probate assets.

NON-BENEFICIARY BLOOD RELATIVES INVOLVED. The Probate Decree will not be issued until all the statutory and court requirements are met. The closest blood relatives, or "distributees," are required to be contacted so that they may either consent to the probate or appear in court to object to the Will. This is so regardless of whether they are named in the Will or not. Any non-distributee named in the Will also must receive notice of the probate by mail. Therefore, if you leave your spouse, child, or child of a predeceased child out of your Will, they get the opportunity to object; if you do not have one of those closest relatives, the next level of relatives get involved.

ONLY ONE ORIGINAL. There is only one original Will, and the original is required to carry out your wishes. There are lost Will proceedings and other court remedies for situations where the original cannot be located, however, probating a copy of a Will is difficult with mixed success.

PUBLIC. The Will is public record. Your Estate and your beneficiaries are not kept private and are available for all to see. Most Surrogate's Courts have online access to same.

THE WILL ONLY CONTROLS ASSETS THAT PASS UNDER IT. Notably, the Will only covers assets that you own individually, in your name alone, and without a designated beneficiary. Therefore, if you have all joint accounts, retirement accounts or life insurance with beneficiary designations, but no assets in your name alone, the terms in your Will do not apply and the Will does not need to be probated. Once the death certificate is obtained, your joint account holder receives the account by operation of law and/or the designated beneficiary makes a claim.

OUT OF STATE ASSETS. When a New Yorker owns real property in another state in their name individually, the executor must petition the surrogate's court in that jurisdiction and file an Ancillary Proceeding for probate in order to administer that out of state asset under the

terms of their Will. This results in doubling the court requirements, having to file both the New York Probate Proceeding and the Ancillary Probate Proceeding in the other state.

GUARDIANS. Even if you have no probate assets, if you have minor children whose other parent is not alive at your death, the Will is a vehicle for you to name a Guardian. If you do not have a Will, you do not have a say in who will be responsible for and taking care of your minor children.

TESTAMENTARY TRUSTS. A will that is a step-up from a "simple will" contains language that sets up a trust under the will for the benefit of a named beneficiary. This type of trust is a testamentary trust. The beneficiary most often is a spouse or child but can be any person or entity. A Will containing a testamentary trust must also include language naming the Trustee(s) of said testamentary trust. While this is a useful tool to set up further protections for your loved ones instead of leaving assets outright, the result is that, like the Will, the testamentary trust is subject to court involvement. At the same time as the Executor petitions the court to become Executor, the Trustee must also seek Letters of Trusteeship. Then, any issue with the testamentary trust in the future must be resolved by petitioning the court. This often happens when a successor Trustee is needed to administer the testamentary trust.

ADMINISTRATION PROCEEDING—WHEN THERE IS NO WILL. If a person dies without a Will, then all assets individually owned and without a designated beneficiary pass pursuant to the laws of intestate administration (NY EPTL 4-1.1). If you do not have a spouse and children, your assets pass down, or up, the line to the nearest blood relative. This can prove costly and time-consuming when the family tree is not known. Even when known, without direction from you, your estate passes pursuant to the intestate laws. Like the Executor in the Probate Proceeding, the Administrator in the Administration Proceeding has no power until all the required documents are filed, all the necessary people appear or are noticed, and the court issues the Decree and the Letters of Administration. Likewise, joint assets and assets with designated beneficiaries are not part of the Estate in an Administration Proceeding.

THE REVOCABLE TRUST

The revocable trust is a trust created by you (the grantor/creator/settlor) for your benefit for your lifetime and sets forth your wishes for the distribution of the assets in the revocable trust upon your death. Typically, you are the sole trustee of your revocable trust. The revocable trust is completely revocable, may be restated and amended, is not a separate entity, uses your social security number and is reported on your personal income tax return while you are alive. The revocable trust turns into an irrevocable trust on your death, becomes a separate entity with its own tax identification number, and its terms cannot be altered. The revocable trust is a viable tool for New Yorkers of all means. There is no one defining factor that calls for the creation of a revocable trust. After considering your situation and factors such as those discussed above and below, you may decide to include a revocable trust in your planning.

NO DELAY. The provisions set forth in your revocable trust may be executed automatically after your death by your co-trustee or successor trustee. There is no court proceeding necessary for a properly drafted revocable trust. Your Trustee is authorized to act and administer your revocable trust estate without any court approval.

ONLY NAMED BENEFICIARIES ARE INVOLVED. Your Trustee will only need to contact the beneficiaries named in your revocable trust. Distributees or other relatives, as discussed above, do not have any involvement and need not be notified of the revocable trust. This factor is important for those individuals with estranged family members.

PRIVATE. There is no public access to your revocable trust as a result of your death.

THE REVOCABLE TRUST ONLY CONTROLS ASSETS THAT PASS UNDER IT. You must re-title your assets into the name of your revocable trust. The revocable trust only covers assets that the revocable trust owns or assets that have your revocable trust named as beneficiary upon your death. The revocable trust does not include assets that you own individually, in your name alone, joint accounts, and retirement, life insurance, or other accounts with beneficiary designations other than the revocable trust.

OUT OF STATE ASSETS. As stated, when a New Yorker owns real property in another state in their name individually, the executor must petition the surrogate's court in that jurisdiction and file an Ancillary Proceeding for Probate in order to administer that out of state asset under the terms of their Will. This results in doubling the probate proceeding requirement, both in NY and in the other state. The solution for individuals with out-of-state property is to create a revocable trust to own their out-of-state property. This is done by individuals that choose Wills and revocable trusts alike.

TRUSTS CREATED UNDER YOUR REVOCABLE TRUST UPON YOUR DEATH. Your revocable trust may contain language that creates a trust under it for the benefit of a named beneficiary upon your death. This is like the testamentary trust discussed above except without court involvement. The beneficiary most often is a spouse or child but can be any person or entity. The revocable trust will also include language naming the Trustee(s) of for any trust created under it.

THE REVOCABLE TRUST AND THE POUR-OVER WILL. A Will is still needed even if you have a revocable trust. This type of Will, often called a "pour over will," has dispositive provisions that leave your estate to your revocable trust. This covers you in the event there is an asset that you never re-titled into your revocable trust and/or for an asset discovered after death. Then, if probate is needed, it is limited to that asset.

Conclusion

This article skims the surface of Estate Planning and Estate Administration and the use of Wills and revocable trusts, and is meant to highlight the items that may not be known by those with little to no experience in this area. When creating your estate plan with your attorney, the factors above, among others, should be discussed and considered to make sure your wishes are met.

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