Can You Execute?

Being the “Personal Representative” or “PR” of an estate – the modern term for executor – is not a task to take lightly. The Personal Representative is responsible for managing the administration of a deceased individual’s estate. Although the time and effort involved will vary with the size of the estate, even if you are the executor of a small estate you will have important duties that must be performed correctly or you may be liable to the estate or the beneficiaries.

How do you become a Personal Representative? The PR is either named in the will or if there is no will, appointed by the court. You do not have to accept the position, even if you are named in the will.

The average estate administration takes six months to one year, although small estates typically can be resolved in a few months. Following are some of the duties you may have to perform as executor:

- **Locate documents**. If there is a will, but you don’t already know where the will is or the will hasn’t already been brought to court, you may need to find it among the deceased’s belongings. If all you have is a copy of the will, you may need to get the original from the lawyer who drafted it. You will also need to get a copy of the death certificate.
- **Hire an attorney**. You are not required to hire an attorney, but mistakes can cost you money. You may be personally liable if something goes wrong with the estate or the payment of taxes. An attorney can help you make sure all the proper steps are taken and deadlines met.
- **Apply for probate**. If there is a will, the court will grant you “letters testamentary” If there is no will, you will receive letters of administration (although in

some states, like Maryland, letters of administration are used in both cases.) This will officially begin your work as the executor.

- **Notify interested parties**. Notify the beneficiaries of the will, if there is a will, as well as any potential heirs (such as children, siblings, or parents who may or may not be named in a will). In addition, you will have to place an advertisement for potential creditors in a newspaper near where the deceased lived.
- **Manage the deceased's property**. You will need to prepare a list of the deceased's assets and liabilities, and you may need to collect any property in the hands of other people. One of the executor's jobs is to protect the property from loss, so you will need to assure the property is kept safe. You will also need to hire an appraiser to find out how much any property is worth. In addition, if the estate includes a business, you may have to make sure the business continues to run.
- **Pay valid claims by creditors**. Once the creditors are determined, you will need to pay the deceased's debts from the estate's funds. The executor is not personally liable for deceased's debts. The estate usually pays any reasonable funeral expenses first. Other debts include probate and administration fees and taxes as well as any valid claims filed by creditors.
- **File tax returns**. You need to make sure the tax forms are filed within the time frame set under the law. Taxes will include estate taxes and income taxes.
- **Distribute the assets to the beneficiaries**. Once the creditors' claims are clear, the executor is responsible for making sure the beneficiaries get what they are entitled to under the will or under the law, if there is no will. You may be required to sell property in order to fulfill legacies in a will. In addition, you may have to set up any trusts required by the will.
- **Keep accurate records**. It is very important to keep accurate records of everything you do. You will need to

create a final accounting, which the beneficiaries must review before the distribution of the estate can be finalized. The accounting should include any distributions and expenses as well as any income earned by the estate since the deceased died.

- **File the final accounting with the court**. Once the final accounting is approved by the beneficiaries and the court, the court will close the estate. File a final report with the court and close the estate.

All this can be a lot of work, but remember that the executor is entitled to compensation, subject to approval by the court. Keep in mind that the compensation is counted as income, so you will need to declare it on your income taxes.

ela:dsmod

Disinheriting A Relative

You may feel that you have given one child more during your life, so he or she should get less in your will. Or you may want to cut out an heir altogether. Whatever the reason, disinheriting a close relative—especially a spouse or a child—can be complicated.

It generally is not possible to completely disinherit a spouse. Even if you don't leave your spouse anything in your will, most states have laws that keep a spouse from losing everything – usually the spouse is entitled to one-half or one-third, depending upon whether you have children. If you live in a "community property" state, your spouse already owns half the community property. Also, the definition of your "estate" varies from state to state; in some states it includes only your probate estate and not trusts, retirement

accounts, life insurance or other assets. In some states, all or part of these “non probate” assets are included in the spouse’s share.

Even if you don’t completely disinherit your spouse, he or she can choose between taking what the will provides or taking what the law in your state says a spouse should receive in any case (the “statutory share,” usually one-third to one-half of the estate). The only solution is to enter into an agreement with your spouse in which you each waive the right to receive anything from the other’s estate.

Disinheriting a child is a different story. You will need to check with an attorney in your state to find out what is required. Louisiana is the only state that does not allow an adult child to be disinherited. While other states do not require that you leave anything to your adult children, there may be laws that protect minor children. For example, in Florida you are required to leave your house to either your spouse or a minor child, if they are living. In addition, there are often laws that protect children born after a will was written. To be safe, even if you are leaving a child nothing, you should specifically mention the child in the will. It may also help to state the reason the child is getting nothing or a reduced amount. If you don’t mention a child at all, the state may conclude that you did not intentionally exclude the child.

Disinheriting a close relative can cause fights among family members. Squabbles over wills can drag on for years and prevent your heirs from receiving their inheritance, so if you are planning on disinheriting someone, it is important to take as many precautions as possible and consult with an elder law or estate planning attorney.

May Someone With Dementia Sign a Will?

Millions of people are affected by dementia, and unfortunately many of them do not have all their estate planning affairs in order before the symptoms start. If you or a loved one has dementia, it may not be too late to sign a will or other documents, but certain criteria must be met to ensure that the signer is mentally competent.

In order for a will to be valid, the person signing must have “testamentary capacity,” which means he or she must understand the implications of what is being signed. Simply because you have a form of mental illness or disease does not mean that you automatically lack the required mental capacity. As long as you have periods of lucidity, you may still be competent to sign a will.

Generally, you are considered mentally competent to sign a will if the following criteria are met:

- You understand the nature and extent of your property, which means you know what you own and how much of it.
- You remember and understand who your relatives and descendants are and are able to articulate who should inherit your property.
- You understand what a will is and how it disposes of property.
- You understand how all these things relate to each other and come together to form a plan.

Family members may contest the will if they are unhappy with the distributions and believe you lacked mental capacity to sign it. If a will is found to be invalid, a prior will may be reinstated or the estate may pass through the state's intestacy laws (as if no will existed). To prevent a will contest, your attorney should help make it as clear as possible that the person signing the will is competent. The attorney may have a series of questions to ask you to assess your competency. In addition, the attorney can have the will signing videotaped or arrange for witnesses to speak to your competency.

For more information about preventing a will contest, click here.

ela

Revocable Trust Myths

Articles constantly appear and seminars proliferate lauding the benefits of "revocable" or "living" trusts and urging all people of sound mind to create them. These articles or seminars **invariably prompt clients to ask me why their estate plan fails to include one of these miraculous devices**. This Memorandum will highlight some of the advantages and disadvantages of Revocable Trusts vis-à-vis Wills in Maryland and the District of Columbia

Revocable (living) trusts are basically plain vanilla revocable trusts established during a person's lifetime. The

person retains the right to income and principal and the right to amend or revoke the trust prior to death. The trust becomes irrevocable when the person dies and the trust assets are disposed of according to the trust instrument. The trust instrument at death acts essentially as a **will substitute**.

The claims made for a revocable trust as a will substitute are that it saves taxes, avoids the expenses associated with probate, and avoids delays in distributing assets after death. There is also the claim that it ensures a greater degree of privacy than probating a will. Let's briefly dispel some myths and then highlight situations when a revocable trust may make sense.

***Estate, inheritance, and income taxes*.** The first myth to be dispelled is that a revocable trust is a tax-savings device. The assets in the trust at death are included in the person's estate and subject to estate tax. **There simply are no inheritance or estate tax savings**.

As far as income tax, an estate offers several advantages over the revocable trust, the most important of which is the ability of the estate to elect a fiscal year. While a trust must report on a calendar year basis, the ability of the estate to choose a fiscal year may enable the beneficiaries to postpone payment of tax for a year on post-death income.

Avoiding probate costs and delays. The other major claim made for revocable trusts is that they save probate costs. This is literally true, except that there are important counterbalancing expenses involving revocable trusts. Probate fees themselves tend to be rather reasonable in Maryland, for example. In fact, revocable trusts can involve probate fees because it is frequently necessary to have a "Pour-over" Will for assets not in the trust, in which case there are probate fees.

Of more importance, however, is the fact that the cost of

preparing the trust agreement and related documents, such as a pour-over will, and the costs of transferring property to the trust, can be significant. Moreover, transferring assets to the trust can be more than a documentary formality. Permission may be necessary to transfer interest in partnerships, closely held businesses, and cooperative apartments. With respect to real estate, deeds must be prepared.

It is true that there is no interruption in trust administration when the person establishing the revocable trust dies, but there are usually only minimal delays in having a will admitted to probate and special procedures are available to expedite the process. As a practical matter, distributions by both trustees and executors are generally delayed until assets are valued, federal and state inheritance taxes are paid, and the appropriate releases secured. The legal fees would be fairly constant whether or not a revocable trust is issued, provided that you retain an attorney who is compensated based upon professional services rendered rather than getting a "cut" or percentage of the size of the probate estate. Although a revocable trust does not have to be filed for probate like a traditional will and has "privacy" advantages, its privacy may be compromised by the requirement of banks and brokerage firms that they review the trust agreement before they will open an account. In addition, the assets in a revocable trust must be reported on an information report in Maryland which needs to be filed.

Avoiding contested wills. Because a "trust" and a "will" are separate legal concepts, a trust is not subject to a will contest. However, trusts are subject to attack on the basis of lack of capacity, undue influence, and fraud. These same grounds can be used to contest a transfer by will.

BUT – there is an additional problem with trusts. When a will is probated, the disposition of the assets come under the supervision of the Court through the Register of Wills, an administrative agency of the court. This includes the

auditing of accounts and distributions by the Register of Wills auditor's office. **Contrary to popular belief, this is a good thing that is – unfortunately – avoided by having a trust.** Recently I spent two years representing – and litigating – a revocable trust set up by a mother for her two adult children. She named only one child as trustee, and unfortunately the two children did not agree on the valuation or method of distribution of the trust. There were considerable legal fees and emotional costs that would have been avoided had the mother simply left the assets in her will, because the executor would have been under the supervision of the court, with prescribed valuation methods and distribution procedures.

Avoiding creditors' claims. During your lifetime, assets in a living trust are subject to the claims of your creditors. After your death, these assets are subject to the claims of your estate's creditors.

Avoiding your spouse's claim to a share of your estate. Most state laws provide that a surviving spouse may claim a share of revocable trust assets.

Avoiding the expense of guardianship. While a living trust may avoid the expense of a guardianship in case of your future incapacity, a durable power of attorney is a simpler and less costly alternative to achieve the same goal.

Avoiding lengthy probate delays. There are rare circumstances where families and others clash for an extended period after a death. Such disputes can cause delays in the administration of either a probate or a living trust (as noted above). In other circumstances, disputes with the Internal Revenue Service can cause more delays. However, in most circumstances the administration of a living trust is no more time efficient that the administration of a will in probate.

The living trust is the only way to avoid probate. If your

goal is to avoid probate, there are several ways to do so. Joint tenancy with rights of survivorship, multiple party accounts with financial institutions, and transfer on death or pay on death (TOD or POD) designations of securities and bank accounts are common and inexpensive methods of avoiding probate.

When revocable trusts work. Let me identify a few specific situations as being particularly suited to revocable trusts:

- Where a person has significant real estate holdings in a number of states. Here a revocable trust could avoid the necessity of a probate filing in each locale.
- For a elderly surviving spouse with an uncomplicated asset structure (e.g., one or two brokerage accounts), the revocable trust may be the appropriate instrument. This is because the costs and aggravation encountered with the transfer of the assets to the trust (e.g., re-titling brokerage accounts) is minimal. In these cases, the assets would pass upon death simply and without delay.
- For what might be called Machiavellian estate planning, there are some states, including Maryland, where the revocable trust – unlike a will – may still be used in certain instances to bar the grantor's surviving spouse from obtaining a statutory share of such trust property.
- A revocable trust may be an excellent tool for the orderly management of the affairs of an elderly person or someone otherwise unable or unwilling to manage his or her property. A similar result can usually be achieved through the use of a Durable General Power of Attorney – a document appointing another individual to manage your affairs. Maryland even permits a "springing" power which would not take effect until the incapacity arises. Nonetheless, the revocable trust may be the proper tool in certain situations. It is certainly preferable to a formal guardianship or conservatorship.

There are other situations where the revocable trust may be beneficial. However, the purported advantages of a revocable trust do not seem to stand up to a close comparison with more traditional estate planning vehicles in many situations. In short, the decision to use a will or a revocable trust needs to be evaluated based upon a client's specific circumstances. In this regard, please feel free to contact us to discuss these issues more closely.

Preventing a Will Contest

Emotions can run high at the death of a family member. If a family member is unhappy with the amount they received (or didn't receive) under a will, he or she may contest the will. Will contests can drag out for years, keeping all the heirs from getting what they are entitled to. It may be impossible to prevent relatives from fighting over your will entirely, but there are steps you can take to try to minimize squabbles and ensure your intentions are carried out.

Your will can be contested if a family member believes you did not have the requisite mental capacity to execute the will, someone exerted undue influence over you, someone committed fraud, or the will was not executed properly.

The following are some steps that may make a will contest less likely to succeed:

- **Make sure your will is properly executed**. The best way to do this is to have an experienced elder law or estate planning attorney assist you in

drafting and executing the will. Wills need to be signed and witnessed, usually by two independent witnesses.

- **Explain your decision**. If family members understand the reasoning behind the decisions in your will, they may be less likely to contest the will. It is a good idea to talk to family members at the time you draft the will and explain why someone is getting left out of the will or getting a reduced share. If you don't discuss it in person, state the reason in the will. You may also want to include a letter with the will.
- **Use a no-contest clause**. One of the most effective ways of preventing a challenge to your will is to include a no-contest clause (also called an "in terrorem clause") in the will. This will only work if you are willing to leave something of value to the potentially disgruntled family member. A no-contest clause provides that if an heir challenges the will and loses, then he or she will get nothing. You must leave the heir enough so that a challenge is not worth the risk of losing the inheritance. Some states, however, either do not honor no-contest clauses or have limitations upon them.
- **Prove competency**. One common way of challenging a will is to argue that the deceased family member was not mentally competent at the time he or she signed the will. You can try to avoid this by making sure the attorney drafting the will tests you for competency. This could involve seeing a doctor or answering a series of questions.
- **Video record the will signing**. A video recording of the will signing allows your family members and the court to see that you are freely signing the will and makes it more difficult to argue that you did not have the requisite mental capacity to agree to the will.
- **Remove the appearance of undue influence**. Another common method of challenging a will is to argue that someone exerted undue influence over the deceased family member. For example, if you are planning on leaving everything to your daughter who is also your primary caregiver, your other children may argue that your daughter took advantage of her position to influence you. To avoid the appearance of undue influence, do not involve any family members who are inheriting under your will in drafting your will. Family members should not be present when you discuss the will with your attorney or when you sign it. To be totally safe, family members shouldn't even drive you to the attorney.

Bear in mind that some of these strategies may not be advisable in certain states. Talk to your attorney about the best strategy for you.

ela