The Pitfalls of Planning with a Simple Will

A simple will, no matter how well-crafted, virtually guarantees a public probate proceeding that incurs executor and attorney fees and causes significant delay of the distribution of your life legacy to your heirs and beneficiaries. Simply stated, probate is the legal process initiated upon your death to pay your taxes and lawful debts, and to pass legal ownership of your property to your heirs or beneficiaries. Probate is a formal court proceeding that can be reduced to five basic steps:

- Your will must be admitted to probate. The court determines whether your will is legally valid and determines any challenges to your will by any disgruntled heirs or beneficiaries.

- The Probate Court must approve the executor/administrator of your will. The executor usually retains an attorney to file the necessary court papers and make court appearances. Usually, your executor has no experience in probate matters and is totally dependent on the lawyer.

- Your probate estate must be inventoried and appraised. This appraisal is necessary in order to determine estate and gift tax liability, the extent to which any creditors will be paid before any distributions are made to your beneficiaries, and the allocation of pro rata shares to beneficiaries.

- All expenses, including executor and attorney fees, creditors and taxes are paid from the estate assets.

- Finally, whatever is left is distributed to your heirs and the probate proceeding is closed.

These five basic steps are a general overview of the probate process. Let's take a look at some of the consequences that result from this process.

First, probate generates executor fees and attorney fees. In California, the Legislature has directed that attorney and executor fees for "ordinary" services be paid based on a percentage of the value of the estate. For example, Probate Code Section 10810(a) provides a schedule of attorney fees based on the value of the decedent's estate as follows:

- 4% of the first $100,000;
- 3% of the next $100,000;
- 2% of the next $800,000;
- 1% of the next $9,000,000; and
- .5% on the next $15,000,000.

In addition, the "appraised value" of the estate is calculated without reference to any encumbrances or liens on the estate property. Thus, if the estate includes a home valued at $450,000 but with a $250,000 mortgage, the full $450,000 value is used in calculating the value of the estate for purposes of determining the amount of fees to be paid.

A similar schedule applies for compensation to the executor/administrator of the estate. Thus, an estate appraised at $500,000 will incur at least $26,000 (or 5.2% of the estate value) in combined attorney and executor/administrator fees. An estate appraised at $1,000,000 will incur at least $46,000 (or 4.6% of the estate value) in combined fees.

These are minimum fees. The attorney and executor may, and often do, petition the court for additional fees based on "extraordinary" services provided to the estate. Typically, the extraordinary fee is based on the attorney's hourly billing rate multiplied by the number of hours involved in performing the extraordinary services. In Los Angeles County Probate Court, it is not unusual to see requests for extraordinary fees billed at an hourly rate in excess of $400 per hour.

Second, the probate process is time consuming. It is not at all unusual for probate proceedings to drag out for eighteen months or more before completion.

Third, multiple probates may be required if you own real property in another state. For example, if you own a vacation condominium in Hawaii or another state, that property will have to be probated in the state in which it is located. Multiple probates create added complexities and costs for loved ones.

Fourth, probate is a public proceeding and the Court filings are open to inspection by anyone who wants to know about your will and personal financial affairs. Both during and after probate, sensitive financial information and personal matters that were well-guarded during life will be readily available to curiosity seekers and those seeking a business advantage.

> Example: Earl and Julie's Pitfall Story:
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> Earl and Julie, the owners of a successful closely held business, were careful to keep their financial affairs private. A few months after Earl's death, a competitor who wanted to purchase Earl's business approached Julie.

Earl's competitor, Sam, was a shrewd businessman. He checked Earl's probate records. From reading the probate records, and with help from his advisers, Sam soon discovered that Julie was in desperate need of cash to pay expenses and taxes. Knowing Julie's situation, Sam offered her a very low price for Earl's business.

Julie and the estate's attorney knew what Sam was doing, but they felt they had little choice but to accept Sam's offer. Time was short, they had no other offers, Julie wasn't qualified to run the business, and the estate's creditors were clamoring to be paid. Reluctantly, Julie accepted the offer.

Fifth, wills offer no planning or direction for you or your family in the event of your incapacity. Insurance statistics tell us that in any given year, a person is six times more likely to become incapacitated than to die. If incapacity occurs without proper planning, the result is commonly referred to as "living probate." A "living probate" is a public conservatorship proceeding in which the court appoints a "conservator" to manage your affairs during the period of incapacity. Conservatorship proceedings are a legal process, generally requiring legal counsel and the appointment of a conservator. It is a process that is often expensive, time-consuming and emotionally draining for family members.

Sixth, unhappy relatives sometimes challenge wills. Wills may be challenged by disgruntled heirs in what attorneys call "will contests."

Example: Mrs. Phelps's Pitfall Story:

Mrs. Phelps was in her late seventies when she passed away. Three adult children survived her. She was not particularly close to her children, but she was close to her favorite grandchild, Sally. Mrs. Phelps had prepared a will that left her entire estate to Sally.

After Mrs. Phelps's death, her children's disappointment quickly turned into an angry lawsuit. The probate proceedings provided the children an opportunity to contest the will. The children hired an attorney and claimed that their mother was not of sound mind when she signed the will and that, even if she was of sound mind, she was forced to sign the will while under Sally's control.

Because her family's allegations were untrue, Sally opted to defend her inheritance. Several months into the controversy, Sally was emotionally drained and frightened. Rather than continue to go through the emotional turmoil and expense that would eventually

lead to a full-fledged trial, she settled. As a result, she received only a portion of what her grandmother wanted her to have.

In summary, simple wills often do a poor job of meeting our criteria for “Lives and Legacies Well Planned.” A simple will, which becomes effective only at death, is incapable of providing any instructions should you become disabled or incapacitated for a period before death. Nor does a will necessarily provide distribution of your property to your intended beneficiaries if you mistakenly leave assets outside the will, such as jointly owned property. A simple will also does not incorporate any safeguards to protect your beneficiaries from creditors and predators in the beneficial use of their inheritance. A simple will virtually guarantees a public, time-consuming and expensive probate proceeding.