Estate Planning Misconceptions: Last Will and Testament

-by Jeffery D. Stinson, CELA*

This article is the first in our series of articles that outlines the risks in preparing one's own estate plan documents. This article will focus on some the common misconceptions with the Last Will and Testament.

Misconception 1-The Will Distributes *All* of the Decedent's Assets

The Last Will and Testament distributes probate assets only. In its simplest definition, probate assets are assets that are in the sole name of the decedent that do not have a beneficiary.

Unfortunately, many individuals mistakenly believe that the Last Will and Testament is single necessary vehicle for distribution of all of their assets. This misconception can often have significant ramifications in the overall estate plan resulting in unintended taxes, unequal distribution of assets among beneficiaries, and family disharmony. As an example consider the following:

Clara has the following assets:

- A checking account with a balance of $10,000 and a savings account with a balance of $30,000 titled as joint tenants with rights of survivorship with her daughter, Sara.
- A home worth $100,000 titled as joint tenants with rights of survivorship with her son, James.
- A life insurance policy with a death benefit of $25,000 listing her son Wilbur as beneficiary.
- An IRA worth $90,000 listing Wilbur, James, and Sara as beneficiaries.

Clara executes a Last Will and Testament dividing her estate into three equal shares, one share each for Wilbur, James, and Sara. This matches Clara's intention that all her children are treated equally and all receive an equal portion of her net worth. Clara mistakenly believes that the Will divides and distributes all her assets-probate and non-probate- into the three equal shares. However, none of Clara's assets are probate assets and the Will will not dictate the distribution of any of her assets. Sara will receive the entire checking account and savings account as surviving joint owner, James will receive the home as surviving joint owner, the life insurance will be paid to Wilbur as beneficiary, and the IRA will be paid to Wilbur, James, and Sara as beneficiaries. Consequently, rather than three equal shares, Clara's children receive the following:

- Sara-$70,000
- James-$130,000
- Wilbur-$55,000

In order for Clara to realize her goal of equal distribution to her children, she must ensure that the beneficiaries of her non-probate assets match the beneficiaries of her probate assets as expressed in the Last Will and Testament.

Misconception 2-The Executor of the Last Will and Testament Can Handle the Individual's Affairs if the Individual is Incapacitated

Another misconception is that the Executor of the individual's Last Will and Testament can handle the individual's affairs if the individual is incapacitated. The authority of the Executor under the Last Will and Testament begins only after the death of the creator of the Will. If the individual who created the Will becomes incapacitated, the Executor has no authority over the affairs of the individual until the individual's death. This misconception creates a huge gap in the person's need for assistance. If the individual becomes incapacitated, no one has the authority to handle the individual's financial affairs or make health care decisions for him or her. In such an instance, a guardianship must be established and a Judge will decide who handles the individual's affairs and how that individual handles such affairs. The individual should have created a Power of Attorney and Health Care Advance Directive along with his or her Last Will and Testament to avoid such a situation.

Misconception 3-Improper or Lack of Formalities in the Execution of a Last Will and Testament

Many online estate planning packages or those found in book stores are created to "fit" the requirements of the laws of many states. However, the requirements of a properly executed Last Will and Testament can differ greatly from state to state. Our firm has seen many documents that were witnessed when they needed to be notarized or were notarized when witnesses were required. Even more common is documents witnessed or notarized by disqualified individuals such as a Will witness who is also the beneficiary of the Will. Often, it is too late to repair the problems with these documents by the time the error is discovered as the creator of the document is incapacitated or has passed. As a result, a guardianship that the individual sought to avoid or a statutory estate plan (intestate plan) is in effect because the individual failed to follow State document execution requirements.

Consumers today have a multitude of options available to meet their need for legal documents. From web-based options to office supply form books, the do-it-yourselfer has multiple resources available to create their own documents. However, only a professional can ensure that the client's intentions and goals behind those documents are met. To avoid the unintentional beneficiary, extra tax, or other unintentional consequence in one's own estate plan, consumers should consider hiring legal counsel for such an important endeavor. To create your estate plan with us, please contact us to schedule an appointment at 317-622-8181.

*Certified as an Elder Law Attorney (CELA) by the National Elder Law Foundation.