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Elder Law: Here's what a will can (and cannot) do for you

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At some point in everyone's life, the time comes to prepare a will. Many people loathe discussing their own demise and put off this topic for as long as possible. Others might be driven to prepare a will because of a life-changing event, such as the birth of a child, the death of a friend or loved one or retirement.

Whatever the reason, preparing a will is a good idea. However, it is important to understand what a will is, what it isn't and its utility in planning one's estate. A will is only part of the documentation necessary for estate planning. Wills have been the mainstay of estate planning documents for years, but there are also alternatives to consider.

Take Mr. Adams, for example. He recently retired after a long corporate career from which he departed with a sizeable 401 (k) plan. He and his wife have also amassed an assortment of assets: IRAs, CDs, annuities, mutual funds and a home. They have three adult children and wish to treat them equally when they are gone. So, Mr. and Mrs. Adams seek guidance from an attorney in preparing their wills to distribute their assets at death. They prepare wills that leave their assets to each other, with the surviving spouse's estate passing to their children equally. This is quite common for a basic will.

While they are both alive, they maintain all of their assets jointly. This is the first point to examine in contrasting the treatment of various assets passing through a will vs. joint title or direct beneficiary designations. For example, many assets can be titled with two or more names as joint owners. If these owners are "survivorship" owners, this means that upon the death of one of the owners, the remaining surviving owners automatically take title to the jointly held asset.

A will does not determine where these jointly held assets go at the death of a joint owner, the titling of the asset does. In fact, for many families, the will of the first spouse to die is never admitted to probate (the formal legal process of administering a will) because, by law, the jointly held assets simply pass to the surviving spouse.

This is also true for assets with beneficiary designations. For example, Mr. Adams has named his wife as the primary beneficiary of his 401(k) along with his children as contingent beneficiaries (planning note: always name contingent beneficiaries).

This means that upon his death, the 401(k) will go to his wife (if she survives him). If she does not survive him, the 401(k) will go to the contingent beneficiaries (his children) who may elect a variety of tax treatment options for this asset. However, once again, as with jointly held property, the will is never used to complete this transaction because the beneficiary designations decide where the asset goes.

This begs the question, "Why do I need a will?" Simply put, a will only acts upon assets that are solely owned by a decedent at death and that don't have a designated beneficiary. A designated beneficiary may be created by contract (such as a 401(k) or IRA account) or through accounts titled as "payable on death" or "in trust for".

So, when preparing a will, the testator (the one who creates and signs the will) must be careful to coordinate the assets that are passing through the will and are subject to its terms, along with those assets passing "outside" the will to joint owners or direct beneficiaries to achieve the overall desired distribution of assets.

Let's revisit the situation of Mr. and Mrs. Adams. A few years after retirement, they had some health problems and became more reliant upon their daughter, Elaine, who lives in the same neighborhood. Their other two children moved out of state years ago. While it was never anticipated that Elaine would take on the responsibility of caring for her parents, she does so because she wants to and is nearby.

Speaking of convenience, after Mr. Adams' death, Mrs. Adams needs more assistance from Elaine and thinks it would be a good idea to add Elaine to her checking account. She also hears from her friends that her local banker can set up her CD's as "in trust for" accounts for her children so that upon her death, the CD's will avoid probate and the money will then easily pass directly to her children. So, after she adds Elaine to her checking and savings accounts, Mrs. Adams adds each of her three children as "in trust for" beneficiaries of three CD's valued at $50,000 each. Mrs. Adams feels that she has been proactive in her plans and feels good about the situation.

Unfortunately, not long afterwards, Mrs. Adams suffers a stroke from which she does not fully recover and requires significant care in her home that costs several thousand dollars each month. Elaine tries to help out where she can, but she has her own job and family to support.

Because Elaine was the closest and most involved of Mrs. Adams' children, she is her agent in her power of attorney. Elaine has faithfully served in this capacity and kept excellent records of her mother's assets and their use for her mother's ongoing needs. As Mrs. Adams' medical costs continue to rise, Elaine realizes that she must start liquidating her mother's CD's in order to pay for her ongoing care. So, using her mother's power of attorney, Elaine goes to the bank and liquidates the first CD that was held in trust for her brother.

Over the course of several months, these funds are exhausted for Mrs. Adams' medical needs, so Elaine liquidates another CD. This time it is the one owned "in trust for" her sister, which Elaine deposits into her mother's checking account in anticipation of paying her medical bills for the next year. Shortly after Elaine deposits the second CD, her mother dies.

At the time of her death, Mrs. Adams still owned her house and her husband's 401(k) (now an IRA) in her name. She also owned one remaining CD titled "in trust for" Elaine and joint checking and savings accounts with Elaine valued at $80,000.

While Mrs. Adams' well-written will divides her estate among her three children equally, Elaine will receive $130,000 more than her siblings simply because the bank accounts were titled jointly with her and because of the order in which CD's were liquidated to pay for her mother's care. While the result is certainly not what Mrs. Adams intended in her will, it is a legal, albeit unequal, distribution of her assets.

Even more disturbing is the treatment of Mrs. Adams' IRA, which she inherited from her husband. She had originally named her three children as equal beneficiaries of the IRA after her husband's death. However, shortly thereafter, her son was going through a messy divorce and requested that Mrs. Adams remove him as a beneficiary of the IRA to "protect" his share from his soon to be ex-spouse until the divorce was completed. Unfortunately, Mrs. Adams never remembered to add her son as a beneficiary to the IRA again once the dust settled on his divorce. Thus, the IRA was paid equally and directly to only Mrs. Adams' daughters.

This example illustrates the importance of coordinating not only the language of one's will, but also the title of accounts and beneficiary designations. In Pennsylvania, there are many ways to bypass the distributive terms of a will. In fact, the Pennsylvania Supreme Court recently decided a case involving the differences between the terms of a will and the title to bank accounts and ruled in favor of the way the assets were titled. And so while the will can be an important document to establish an orderly distribution at death, it's only part of the overall estate planning picture and requires thoughtful, deliberate and coordinated planning.

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