Is a Will Enough?

Regular readers of my column in the North Georgia Star have probably noticed that I frequently write about estate planning subjects such as wills and trusts. A big reason for doing so is the small percentage of people who have wills. The most commonly cited statistic states that one-third of the adult population has prepared a will. But is a will enough? No, there are other essential documents that I believe all people need in addition to a last will and testament.

A will only controls the property that a person owns in his or her own name at the time of death. Any assets that are owned with a right of survivorship or with a beneficiary designation are going to pass "outside of the will." That can result in unintended results. I once had a case where a man told his insurance agent that he had changed the beneficiary designation on his employer-provided life insurance from his mother to his wife of five years. A year or so later I was representing his widow because she had learned that he had not made the change of beneficiary. It went to court and, because she had a weak legal position, she had to settle for a fraction of the death benefit.

The complexity of beneficiary designation issues is a recurrent problem. I frequently encounter young parents who have named minor children as their secondary beneficiaries on their life insurance and their IRA accounts. Such moves are counter-productive when the estate plan calls for a trust to protect all this wealth in the event that there is no surviving parent. In this era of multiple marriages, if the surviving parent is an ex-spouse the problem of protecting the children can be even more dramatic. (A natural parent succeeds to custody of a child upon the death of a custodial parent/ex-spouse).

IRA's often contain a considerable portion of the family wealth. Because they are "beneficiary designation" property and hold tax-deferred money, IRA's should not usually pass through the account holder's will in the event of death. If an estate is the IRA beneficiary, the tax deferral is usually lost because of the five-year rule requiring the account to be liquidated within five years of the account holder's death. If a trust is a beneficiary of an IRA, certain tax regulations must be observed in order to obtain the best income tax treatment for the death benefit. Again, focusing exclusively on the will can result in an incomplete estate plan with unintended (and undesirable) consequences.

Not all estate planning issues are connected with death. In the event of a disabling illness or injury a person may not be able to act on his or her own behalf. If the legal capacity is serious or permanent, then a probate court proceeding to obtain the appointment of a guardian is the traditional solution.

A guardianship petition is notorious for being time consuming, expensive and overly protective of the property of the disabled person. Having an alternative requires planning in advance. A person with substantial financial or real estate investments might use a "living trust." At a minimum a standby general power of attorney is a necessary precaution for every adult. A catastrophic illness or injury can result in an even more dramatic need for a durable power of attorney for health care.

A person does not have the authority to make major medical decisions for a disabled spouse simply because of their status as spouse. The law requires something more, which it provided over fifteen years ago with the Georgia statute authorizing the durable power of attorney for health care. Every adult

should have one, regardless of age or the state of health.

So it should be obvious by now that “all I need is a simple will” may be the wrong approach for a lot of people. Even if someone has the other documents mentioned above, the need to coordinate those documents and the person’s economic affairs won’t go away. I recommend to my clients that they review their estate plans every three to five years, or after any major life event (e.g. birth of a child, retirement, major illness, etc.). That involves more than just reading through the documents. Checking beneficiary designations, running a worksheet tabulation of all assets (including life insurance), and thinking about the continued suitability of candidates for executor, trustee and guardian all go into a successful effort to avoid obsolescence.

“Estate planning” does not require fancy folders and color charts with twenty-year projections of future wealth. It involves creating a set of documents that implement those decisions necessitated by that individual’s circumstances. A simple life will probably result in simple documents, but only after a thorough analysis of all the facts.

Patrick J. Gibbs practices law in Roswell, Georgia with a concentration on Wills, Trusts and Estates. This article is intended to be educational. Legal advice should be obtained as to individual needs before taking any action.