I Just Need a Simple Will...

How many times have I heard it? A person calls and wants to schedule an appointment. All they need is a simple will for a husband and wife. Only on rare occasions do I find that they are correct in their assessment. Since underestimating legal needs is a common problem, I thought that it was worth writing about.

First, what are the alternatives? With the last will and testament, it is either a simple will or a trust will. The “simple” approach calls for the executor of the decedent’s to distribute all of the decedent’s property that remains after payment of debts, taxes, and administration expenses and then close the estate. A trust will requires the executor to make a distribution of some or most of such property to a trustee, who then manages, invests and distributes the property given him or her to designated beneficiaries in accordance with instructions contained in the will.

Another alternative is a hybrid of the first two where the executor is instructed to hand over the net assets of the decedent's estate to a trustee of a trust established by the decedent while living. Such a trust is called an “inter vivos” trust, which is Latin for “between the living,” referring to a living person starting the trust by making a written agreement with another living person. The last will and testament in this situation is called a “pourover will” because it pours over the assets from the decedent's estate to the trust, which then controls their ultimate disposition.

Combining pourover wills with inter vivos trusts, usually those that are revocable (i.e. subject to being amended or revoked by the person establishing it), is less popular in Georgia than in other states, such as Florida, California and New York, because the probate administration of wills is much less cumbersome and expensive in Georgia. Our probate system is user-friendly and minimizes court involvement in the administration unless there is a controversy.

So why would someone need the complexity of a trust will instead of a simple will? The most common reason is to provide for minor children in the event of the death of one or both parents. Many young parents are driven by the desire to designate a guardian to care for their children if both parents have died. They underestimate the need for someone to watch over the family’s assets, including life insurance death benefits, until the children are old enough (and wise enough) to manage it for themselves. Without a trust, all of assets must be held by a guardian of the property for each child and turned over to him or her upon reaching 18 years of age. With a trust it can be invested and managed with greater flexibility. While the child is younger the trustee can use it for his or her benefit and then distribute it outright at much later ages (e.g. one-fourth at 28 and the balance at 32).

The threat of death taxes is the other major reason for a trust will. Due to recent changes in the tax law death taxes are threatening fewer estates. Starting in 2006, the tax kicks in for estates that are $2,000,000 or more. That number changes to $3,500,000 in 2009. With life insurance, retirement accounts and real estate there are still plenty of families in North Georgia who have some exposure to the death tax for the assets passing to the next generation. A trust is used to minimize exposure to the death tax when it holds assets at the “first death” so that some portion of the family wealth bypasses the estate of the surviving spouse estate (thereby avoiding death taxes on as much as $4 to $7 million). After

the death of the surviving spouse trusts from each estate hold all of the family wealth for distribution to the children at designated ages. Since the tax rate starts out at 46%, when it hits it can take quite a bite out of the family wealth.

The last reason the “I just need a simple will” approach can be questionable is that a will only deals with death. A disabling illness or injury creates plenty of legal issues that a will cannot resolve. I find that over 90% of the people I see for wills have not executed powers of attorney. These documents enable a spouse, or any other trusted person, to stand in for a totally disabled person and make necessary health and financial decisions. So even if a trust will is not needed, powers of attorney should be a part of every estate plan.

Making a will is better than doing nothing. But it is not wise to go into the effort with preconceptions of how much needs to be done.

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.