MOSES & SINGER LLP

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Updating Your Will During COVID-19

Pandemic. Social distancing. Friends stricken. This is a difficult time, and many of our clients have decided to review their estate plan, specifically their Will. It is a hard step to take because mortality is no longer a theoretical, philosophical concept. Instead it is an immediate concern.

When reviewing one's Will, the first step in the process is to decide whether it actually needs to be updated. Is the named executor/executrix still the proper person for the job? Are specific bequests of cash still the proper amounts; and if pieces of jewelry or antiques are given, are those bequests still current? If the Will leaves a substantial amount of property outright, have circumstances changed so that a trust is now the better choice? If the Will creates one or more trusts, do the trust terms meet the beneficiary's current needs or are revisions needed?

There are also tax issues to be considered. Congress and States frequently change the amount that can pass free from the estate tax. That amount, coupled with the client's current financial situation, can require that the Will be updated. Specifically, clients should look for a definition of the "Optimum Marital Deduction" – if it provides for the passing of the maximum amount that can pass free of federal estate tax, rather than federal and state estate tax. A change may be required in order to ensure that a minimum of estate tax will be due.

Codicil

If a change is simple, such as the dollar amount of a bequest or appointment of a new Executor, it may suffice to have a Codicil to the Will. As with a Will, a Codicil must be properly signed and witnessed according to State law, and typically the testator asks the attorney to retain the Codicil. If instead the testator retains the Codicil, but misplaces it at home, there is a presumption that he or she destroyed it. This presumption of destruction is quite difficult to overcome and the change in the Codicil may not be allowed.

There is an unfavorable aspect of a Codicil, which may argue for having a new Will instead. When the Will and Codicil are filed for probate, all beneficiaries see the changes made by the Codicil. Often there is disappointment, even anger, when a beneficiary learns that his or her bequest was reduced, or eliminated altogether. And the law gives certain beneficiaries affected by a Codicil the right to object to probate - a situation no testator wants. Given computer software and the ease of drafting a new Will (even for minor changes) clients often forego a Codicil, in favor of having a new Will prepared.

Will

A new Will is needed if the review shows that substantial changes must be made. And a new Will may be needed simply because the existing one does not take full advantage of current Federal or State tax law. In either case, the issues should be discussed with your attorney, whether by telephone or video conference.

New York law (and that of most, if not all, States) requires that the testator sign the Will in the presence of at least two witnesses, who then sign it in the presence of the testator and each other. Thus all of the people see the others sign the Will. The Will must then also be properly "published" by the testator, which is why the Will's execution is usually overseen by the drafting attorney.

The classic method of a Will signing is for the testator, witnesses, and supervising attorney all to be in the same room, so that they can observe the entire ceremony. Then the witnesses sign an affidavit which states what they have observed. That affidavit is notarized, hence a notary public is usually present during the entire ceremony.

This method can be used today if the testator and all others are able to practice social distancing. But this may not be feasible, in which case the law allows for alternative methods. New York law, for example, allows a testator to

sign the Will without witnesses being present. However, the testator must then (1) show the signed Will to the witness and state that the document is the testator's Will which he/she signed and (2) ask the person to sign the Will as a witness. These steps must be taken within 30 days of the Will's execution.

Another newly offered alternative takes advantage of computers and video technology. Again using New York as an example, the testator, witnesses and supervising attorney can all attend the execution ceremony by video conference. On April 7, 2020, the Governor issued Executive Order No. 202.14 which requires the following four items for the video ceremony:

1. If the testator is not personally known by the witnesses, he/she must show them a valid photo ID during the video conference, not merely transmit it before or after the ceremony;

2. The video conference must allow for direct interaction between the testator, witnesses, and supervising attorney (e.g. no prerecorded videos of the person signing);

3. The witnesses must receive a legible copy of the signature pages, which may be transmitted via fax or electronic means, on the same date that the pages are signed by the testator; and

4. The witnesses may sign the transmitted copy of the signature pages and transmit the same back to the testator.

The Executive Order also states that the witnesses may repeat the witnessing of the original signature pages as of the date of execution, provided the witnesses receive such original signature pages together with the electronically witnesses copies within thirty days after the date of execution.

There are also rules permitting remote notarization via video technology.

Obviously, the pandemic and induced isolation have complicated our lives, but essential activities still continue - albeit with modifications. If a Will must be revised and the classic execution ceremony cannot be had, the video work-around will suffice.

Inter Vivos Trust

An inter vivos trust is an alternative to a Will. It disposes of one's property after death, and it avoids the potential drawback that (after death) a Will and/or Codicil must be filed in court together with a petition that the instruments be declared valid (i.e., be probated). This can be a time-consuming and unexpectedly costly process.

Instead, many clients opt to have an inter vivos trust, that is, a trust whose existence begins on the date it is signed. Usually, the Trust is both amendable and revocable, so that it may be modified or terminated at any time before death. Since no Codicil is needed, a beneficiary customarily sees only the latest (amended) document, not the prior one.

Depending on State law, the Trust's creator ("Grantor") may act as the sole trustee. A successor trustee is named to act if the Grantor dies or is otherwise unable to act. After death, there is no need to file the Trust with a court, nor any need for a court decree as to its validity. By its nature, a trust is valid as of the date of execution, assuming it was signed in accordance with State law. Accordingly, there are no court fees.

It may seem obvious, but bears repeating that the trustee and successor trustee can deal with Trust assets only if the trustee has title to the property. Accordingly, after the Trust has been signed the Grantor must formally transfer assets from himself to the trustee. The trustee will then open a new Trust bank account and, if securities are involved, a new brokerage account. Therefore, there will be no delay in investing, selling, or distributing assets immediately after death.

The legal expense of creating a Will or Trust is approximately the same. The work of transferring assets is also approximately the same; the difference being that a Trust requires asset transfers before death, whereas a Will requires transfers afterwards. You should discuss with your attorney the many differences between a Will and Trust, and which is a better choice for your own estate plan – especially now in light of the disruptions occasioned by the pandemic.

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- Blended Family Estate Planning
- Planning for Foreign Persons Purchasing/Owning US Real Property
- What is Asset Protection Planning?
- Reasons To Avoid Probate
- Charitable Giving
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