Life and Death Choices – WILLS and the Probate Process

When an Ohio resident dies owning probate property, a legal proceeding is begun (1) to determine if the person who died (known as a decedent) has a valid Will (2) to determine the nature, extent and value of the decedent's assets, (3) to establish the valid debts of the decedent and (4) to establish the method of distribution of the assets to the heirs or beneficiaries of the decedent after payment of applicable debts, taxes and expenses. This proceeding is known as probate

When planning for the distribution of your property (your estate) after your death, it is important to understand the difference between probate and non-probate assets. Probate is the process through which a court determines how to distribute your property after you die. Some or all of your assets (probate assets) may be distributed to heirs by the rules in the Probate Court located in the county in which you die or own property and some assets (non-probate assets) may bypass the court process and go directly to your beneficiaries. **Probate Assets** are those assets that at your death remain in your individual name without some type of beneficiary designation. **Non-probate assets** are those that contain a beneficiary designation. A **testate estate** is one in which a Will is used to distribute the probate assets and an **intestate estate** is one in which no Will exists and probate assets are distributed according to the rules of the statute of descent and distribution. A Will or lack of a Will does not determine the distribution of a non-probate asset. A Trust does not replace a Will; in fact a Pour-over Will (where probate assets are distributed to a Trust) is often used with a Trust for estate planning. Property that is held in trust prior to death is considered a non-probate asset and is not controlled by the Will. The use of a Trust is an important consideration in estate planning and one that should be discussed with an attorney.

Estate administration includes distributing both probate assets and non-probate assets. That is why one of the first and vital steps of the estate administration process is to determine which assets will need administration under probate court supervision and which ones will be distributed though trusts and designations

If you are like most people, you probably have a number of different types of assets. You may own a home, vehicle, and personal belongings, and also have checking or savings accounts, a 401(k) or IRA, stocks, mutual funds, and life insurance policies. While all of these types of assets make up your net worth during your life, they must each be handled differently upon your death. Assets such as a joint checking account, for example, simply pass to the surviving joint account holder after death by operation of law. By contrast, assets with a named beneficiary – such as a retirement account or life insurance policy – pass according to the terms of the contracts that govern them. These differences are vitally important when you consider how best to plan for your loved ones after your death – ignoring them can lead to unintended and sometimes undesirable consequences.

How an asset is titled determines whether it is a probate asset. For example a house can be a probate asset or a non-probate asset. If someone owns a house and the deed is in one person’s

name only and no transfer on death affidavit has been filed then when that person dies the house will be considered a probate asset. If that person had filed a transfer on death affidavit then the house is a non-probate asset. If a husband and wife own a house as joint tenants and one dies then half the house is considered a probate asset. If that same husband and wife own a house as joint tenants with rights of survivorship then the house is a non-probate asset.

Probate assets can include the following:

- Real property that is titled solely in the decedent's name or held as a tenant in common
- Personal property, such as jewelry, furniture, automobiles, motorcycles, and boats
- Bank accounts that are solely in the decedent's name
- An interest in a partnership, corporation, or limited liability company
- Stocks, Bonds, Mutual Funds or brokerage account that do not list a beneficiary or lists either the decedent or the estate as the beneficiary

***Non-probate assets** can include the following:

- Property(such as your home) that is held in joint tenancy with rights of survivorship
- Property that has a transfer on death (TOD) affidavit **recorded**
- Bank or brokerage accounts held in joint tenancy or with payable on death (POD) or transfer on death (TOD) beneficiaries
- Property held in a trust
- Life insurance
- Retirement or Mutual Fund brokerage accounts that designates a beneficiary

*However, if all of the designated beneficiaries of any of these types of assets predecease the account owner, then the asset become probate assets and will need to go through the probate court administration.

Why is the distinction between probate and non-probate assets so important? Understanding the difference is crucial to ensuring that your wishes are carried out, and your assets are managed and distributed in the way that you have planned. For example, assume you wish to make specific monetary gifts to certain beneficiaries after your death, such as a gift of cash to each of your grandchildren. With that wish in mind, you ensure that your will lays out all the specific details of the gifts to your grandchildren. Now assume that, upon your death, all of your assets are non-probate assets, such as: a jointly-owned home, joint bank accounts, and retirement accounts that name individuals other than your grandchildren as beneficiaries. As a result, despite your carefully-drafted will, your grandchildren would receive no monetary gifts from you. A will – no matter how well written – can only govern your probate assets. Non-probate assets will pass by either the operation of law (such as joint ownership) or the provisions of a contract (such as named beneficiaries in an IRA). For this reason, it is crucial to understand the differences in probate and non-probate assets when planning for the management of your assets after your death.

Why do I need a will – Probate Court administers the distribution of probate assets – determining who the asset will be given to and how the asset will be transferred. The probate process includes filing a will and appointing an executor or administrator, collecting assets, paying bills, filing taxes, distributing property to heirs, and filing a final account. A will should designate an executor and the powers an executor has during estate administration. Wills usually indicate a bond is not necessary for estate administration by the named executor. A Will may also contain a reference to a written memorandum for the distribution of personal property or it may contain specific bequests or both. The Will should contain a request to allow the executor to serve without a bond and provisions for all actions an executor can take, such as paying taxes, cashing in bonds, and selling property. If a person has minor children or children they believe are too young to manage property or investments then a Will can create a testamentary trust naming a trustee and distribution directions such as money being used for education expenses and or distribution at age 25 instead of 18. Also with minor children a person should name a guardian. A guardian and a trustee do not need to be the same person.

If a person dies without a Will, this is called an intestate estate and an administrator is named instead of an Executor. The administrator will need to post bond and the administrator will need to ask the Court's permission to complete many functions of settling an estate such as selling personal property or any real estate. Without a will anyone can apply to be the executor but that executor will have to post a bond (usually double the probate asset valuation) and each action (such as selling a car or home) will need probate court approval (requiring more time and expense). The Administrator will need to follow the Ohio Revised Code's section called the statute of descent and distribution. This dictates who will receive the decedent's assets

2105.06 Statute of descent and distribution.

When a person dies intestate having title or right to any personal property, or to any real property or inheritance, in this state, the personal property shall be distributed, and the real property or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:

(A) If there is no surviving spouse, to the children of the intestate or their lineal descendants, per stirpes;

(B) If there is a spouse and one or more children of the decedent or their lineal descendants surviving, and all of the decedent's children who survive or have lineal descendants surviving also are children of the surviving spouse, then the whole to the surviving spouse;

(C) If there is a spouse and one child of the decedent or the child's lineal descendants surviving and the surviving spouse is not the natural or adoptive parent of the decedent's child, the first twenty thousand dollars plus one-half of the balance of the intestate estate to the spouse and the remainder to the child or the child's lineal descendants, per stirpes;

(D) If there is a spouse and more than one child or their lineal descendants surviving, the first sixty thousand dollars if the spouse is the natural or adoptive parent of one, but not all, of the children, or the first twenty thousand dollars if the spouse is the natural or adoptive parent of none of the children, plus one-third of the balance of the intestate estate to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes;

(E) If there are no children or their lineal descendants, then the whole to the surviving spouse;

(F) Except as provided in section 2105.062 of the Revised Code, if there is no spouse and no children or their lineal descendants, to the parents of the intestate equally, or to the surviving parent;

(G) Except as provided in section 2105.062 of the Revised Code, if there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes;

(H) Except as provided in section 2105.062 of the Revised Code, if there are no brothers or sisters or their lineal descendants, one-half to the paternal grandparents of the intestate equally, or to the survivor of them, and one-half to the maternal grandparents of the intestate equally, or to the survivor of them;

(I) Except as provided in section 2105.062 of the Revised Code, if there is no paternal grandparent or no maternal grandparent, one-half to the lineal descendants of the deceased grandparents, per stirpes; if there are no such lineal descendants, then to the surviving grandparents or their lineal descendants, per stirpes; if there are no surviving grandparents or their lineal descendants, then to the next of kin of the intestate, provided there shall be no representation among the next of kin;

(J) If there are no next of kin, to stepchildren or their lineal descendants, per stirpes;

(K) If there are no stepchildren or their lineal descendants, escheat to the state

So I strongly recommend everyone have a Will – what are the legal requirements for a valid Will in Ohio ?

The testator (person making the will) must be over eighteen years of age. The will must be in writing and signed at the end by the testator. It must be signed in the presence of at least two competent witnesses who must not be beneficiaries under the will and must also sign in the presence of each other. The testator must, in the presence of the witnesses, declare the instrument to be his or her last will and testament.

Your will should be reviewed periodically, as children are born and grow up, as you desire to change beneficiaries, or as your property situation changes. A testator may change or revoke their will as often as they desire unless they become of unsound mind or are under undue influence. The will may be rewritten, or an amendment called a codicil may be attached at the end of a will. Today, with attorneys commonly storing wills on a computer, it is often easier to

re-execute an entirely new will than to make changes by codicil. If a codicil is used, it must be executed with the same formalities as the will. The witnesses do not have to be the same persons who witnessed the previously drawn will. Every will should state at the outset that it is the last will of the testator. Never mark up a will; you may invalidate it.

May Persons Will Their Property Any Way They Wish?

The law protects the legal share of the surviving spouse. If the will leaves the surviving spouse less than the share of the property to which he or she would have been entitled had there been no will, he or she has the privilege of choosing whether to accept the will's provisions or to take the share allotted by law. This is called electing to take against the Will. This is important to remember when estate planning and considering second marriages. You may have a Will that names your children from a first marriage as your beneficiaries (and you may have named your spouse on your 401 K) but after your death your spouse can elect to take against the will, and get a share greater than you intended. Electing to take against the will entitle the spouse to one half of the decedent's net estate unless there are two or more of the decedent's children or their lineal descendants surviving, in which case the election will entitle the surviving spouse to one third of the net estate. No such protection is accorded to children even if disinherited in the will.

Why a Will is Not Enough - Good estate planning means not only having a Will but also checking on the beneficiary designation of non-probate assets, it also means considering minimizing probate assets by converting probate assets into non probate assets through the use of transfer on death affidavits, payable on death accounts (POD's), transfer on death designations (TOD's) and Joint and Survivorship deeds. A good estate planning attorney will talk with you about all assets and how they are titled and what your wishes are in respect to each asset you own.