Estate Planning and Probate Matters

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What happens if you do not have a Will?

- Distribution of Assets If There is No Will:
  - Married with No Descendants. If a decedent is married with no children, the decedent's spouse receives all of the estate. As used here, the term "estate" means only the probate estate - see below for a description of what constitutes probate and nonprobate property.
  - Married with Descendants. If a decedent is married with children, the spouse and each child receive an equal share of the estate, but in no event will the spouse receive less than 1/3 of the estate. The descendants of a deceased child will receive the deceased child's share of the assets on a per stirpes basis. The term "per stirpes" means that the descendants of a beneficiary who predeceases the decedent will take the decedent's share of the estate by right of representation.
  - Unmarried with No Descendants. If a decedent is not married and has no descendants, the estate will pass to the decedent's parents, if they are living, and if they are not living, the estate will pass to the decedent's siblings on a per stirpes basis. If the decedent has no siblings, the estate will pass to the decedent's more distant relatives.

What happens if you do not have a Will?

- Potential Problems With Administration of Estate if there is no Will:
  - No Control Over Personal Representative. If a decedent dies without a Will, the probate court will appoint an Administrator to represent the estate. This will normally be the decedent's spouse or a child, but the decedent will have no control over who is appointed.
  - Requirement for Bond, Inventories, and Returns. The Administrator is required to post bond and file inventories and annual accounting returns with the court unless all of the heirs agree to waive these requirements (and the creditors do not object). This can be quite costly and can place a significant administrative burden on the Administrator. An Executor of a testate estate (*i.e.*, where the decedent died with a Will) is generally not required to post bond, and in most cases the Will waives the requirement that the Executor file inventories and returns with the probate court.
  - Inability to Sell Property Without Court Order. The Administrator must obtain a court order to sell estate property unless the heirs consent to granting additional powers to the Administrator. Again, this places a significant burden on the Administrator if property of the estate will need to be sold. A Will typically grants to the Executor the power to sell property without obtaining an order of the probate court, making the administration of the estate easier if the decedent dies with a Will.

Considerations for Wills

- What assets are and are not controlled by a Will?
  - Assets that are controlled by the Will (*i.e.*, "probate" assets).
    - Tangible personal property, such as clothes, tools, jewelry, cars, etc.
    - Bank accounts and brokerage accounts.
    - Stocks and bonds.
    - Real estate.

  Note that these assets may be nonprobate assets if they are held as joint tenants or in a payable on death designation, as described below.

Considerations for Wills

- What assets are and are not controlled by a Will?
  - Assets that are not controlled by the Will (*i.e.*, "nonprobate" assets).
    - *Joint Tenancy Property*.
      - This may include assets that would be probate property if not owned in joint tenancy with right of survivorship (*i.e.*, real estate owned by a husband and wife as joint tenants or joint bank accounts).
      - Contrast ownership as a joint tenant with right of survivorship with tenancy in common ownership, in which the decedent's interest in the property does not pass to the survivor automatically, but rather passes through the estate of the decedent.
    - *IRA, 401(k), and other retirement plan assets.*
      - These assets pass pursuant to the terms of the beneficiary designation filed by the participant.

Considerations for Wills

- Assets that are not controlled by the Will (*i.e.*, "nonprobate" assets) (continued).
  - *Life insurance proceeds*
    - Life insurance proceeds are paid to the beneficiary designated by the owner of the policy.
  - *Assets held in trusts*
    - These assets pass pursuant to the terms of the trust agreement. This is why revocable trusts are sometimes used to avoid probate (more often in states other than Georgia, where probate is relatively inexpensive and simple).
  - *Payable on death accounts*
    - Assets that are held with a "payable on death" designation, such as certain CDs and bank accounts, are not probate assets. Payable on death accounts are also sometimes referred to as "transfer on death" accounts.

Considerations for Wills

- <u>What is required for a Will to be valid?</u>
  - Written.
    - In Georgia, a Will must be written (handwritten is ok, as long as the Will is witnessed as described below). Oral Wills are not recognized in Georgia.
  - Signed by Testator.
    - The Will must be signed by the Testator (the person making the Will).
  - Witnessed.
    - The Testator's signature must be witnessed by two individuals, who should sign the Will in the presence of the Testator. The individuals should not be someone who is a beneficiary of the Will, or they will lose their right to take under the Will.

Considerations for Wills

- <u>What is NOT required for a Will to be valid?</u>
  - Notarized.
    - In many cases a Will contains a "self proving affidavit" that is signed by the Testator and the witnesses in the presence of a notary. The benefit of doing this is to avoid having to obtain interrogatories from a witness in order to probate the Will. However, a Will does not have to be notarized.
  - Prepared by an Attorney.
    - It is not necessary that the Will be prepared by an attorney, although it may help avoid problems with execution of the Will. Software may work for simple Wills, although software is generally a "one size fits all" solution that may not take into account Georgia-specific issues.

Considerations for Wills

- What terms are important to cover in Wills?
  - Distribution of Assets. The Will should set forth in detail how the assets are to pass to the beneficiaries of the Will. The assets may pass outright to the beneficiaries or a trust may be established for their benefit. A trust is always a good idea where the beneficiaries are young or for some other reason should not receive the assets outright.
    - If any of the beneficiaries of the estate suffer from a disability, it may make sense to create a "special needs trust" (an "SNT") for the benefit of the disabled beneficiary. An SNT contains special provisions that are intended to allow the beneficiary to benefit from the assets in the SNT without losing the right to receive government benefits (such as SSI and Medicaid). If the trust does not contain these special provisions, the fact that the trust assets could be used for the beneficiary's support could cause the beneficiary to lose the right to receive government benefits.

Considerations for Wills

- What terms are important to cover in Wills? (continued)
  - Executors. The Executor is the person who will pay the decedent's debts and distribute the decedent's assets pursuant to the terms of the Will.
    - Typically this is the spouse or another family member, although it can make sense to use a bank or trust company as Executor, particularly in "mixed" family situations.
    - If individual Executors are used, it is a good idea to appoint one or more successors who can serve in the event that the first Executor predeceases the decedent or cannot serve for any reason.
    - Unless otherwise stated in the Will, the Executor is entitled to receive 2.5% of the sums of money received and 2.5% of sums of money disbursed (3% of the value of property distributed in kind) for the services he or she provides as Executor.

Considerations for Wills

- What terms are important to cover in Wills? (continued)
  - Trustees. If a trust will be established under the Will, a Trustee should also be appointed. Similar considerations as those with respect to Executors apply with respect to Trustees.
  - Guardians. If minor children are involved, the Will should appoint one or more guardians for the minor children. Be aware that this provision will only be effective if the other parent predeceases the decedent.
  - Family Members. If there is a possibility that additional children may be born or adopted, the Will should contemplate this possibility expressly.
    - Georgia law provides that a Will is revoked upon the birth or adoption of a child unless the Will contemplates this possibility (but such revocation is only effective to the extent that the after-born or after-adopted child receives no less than his or her intestate share of the estate).

Considerations for Wills

- What terms are important to cover in Wills? (continued)
  - Waivers and Incorporation of Powers. The Will should waive the posting of a bond and the filing of an inventory and returns to court unless there is a good reason not to do so. The Will should grant to the Executor the power to sell estate assets without obtaining an order of the probate court. Also, it generally makes sense to incorporate the Georgia statutory fiduciary powers to give the Executors and Trustees the broadest possible powers to act on behalf of the estate or trust.
  - Contingent Asset Distribution. The Will should contemplate where the assets are to pass in the event that all of the beneficiaries named in the Will predecease the decedent. Typically this will be charities or more remote family members.

Considerations for Wills

- When to review the terms of the Will
  - Marriage or Divorce.
    - Unless the Will is made expressly in contemplation of marriage, a Will is revoked upon marriage to the extent that the new spouse will receive no less than his or her intestate share of the assets.
    - A Will is not revoked upon divorce, but the spouse is treated as having predeceased for all purposes of the Will.
    - In the event of divorce, all IRA, 401(k), and life insurance beneficiary designation forms should be revised, as Georgia law does not automatically exclude a former spouse from receiving these assets.

Considerations for Wills

- When to review the terms of the Will (continued)
  - Death of a Beneficiary. The terms of a Will should be reviewed if one of the beneficiaries predeceases the decedent. It may be appropriate for the assets that were to pass to the deceased beneficiary to now pass in trust to his or her descendants.
  - Change in Circumstances. The terms of a Will should be reviewed if the testator's assets increase or decrease significantly, or if the testator moves to a new state.
  - Passage of Time. It is a good idea for Wills to be reviewed every five years or so in all cases.

Trusts

- What is a trust?
  - A trust is simply a legal relationship where a person (the "Grantor") transfers property to someone (the "Trustee") who holds the property for the benefit of one or more other persons (the "Beneficiaries") for a specified period of time or until a specified event occurs.
  - Note that it is possible for a person to serve in multiple roles. For example, a Grantor could transfer property to herself as Trustee to hold the property in trust for the benefit of herself and her children for a period of ten years.
  - Note that a trust does not require any particular type of property. A trust can be created with any type of asset, including stocks, bonds, real estate, and personal property.

Trusts

- Types of trusts. Trusts can be broadly divided into several different types:
  - Living Trusts vs. Testamentary Trusts. A living trust is a trust that is created during the lifetime of the grantor, while a testamentary trust is created by a decedent's Will.
  - Revocable Trusts vs. Irrevocable Trusts. Trusts can also be classified as revocable or irrevocable. Georgia law provides that a trust is irrevocable unless the trust document provides otherwise.

Trusts

- Uses of trusts.
  - Trusts are often used for estate planning purposes to protect beneficiaries from themselves. For instance, it may make sense to leave assets in trust for a beneficiary who is too young to receive the assets directly, or where the beneficiary has problems managing money.
  - Trusts are also used to ensure that assets end up where the grantor wants them to end up -- for example, a trust that is created for the benefit of a second spouse so that the assets of the trust will pass to the children from the first marriage upon the death of the second spouse.
  - Trusts are also sometimes used as substitutes for Wills, as assets that are held in a trust do not pass through the probate process.

Trusts

- Revocable Living Trusts for Probate Avoidance.
  - Revocable living trusts are often used for probate avoidance. Since the decedent's assets are owned by a trust rather than by the decedent individually, there is no need to probate the decedent's Will to transfer the assets in the trust following the decedent's death.
    - Because the probate process is relatively simple in Georgia, revocable living trusts are not used as often here as they are in other states (notably Florida).
  - Because a revocable living trust may be revoked by the grantor at any time, the revocable living trust is disregarded as being a separate taxable entity and all income and gain of the revocable living trust is taxed on the grantor's income tax return. Following the grantor's death, however, the revocable living trust become irrevocable and will be required to file its own tax return.

Trusts

- Irrevocable Life Insurance Trusts. Irrevocable life insurance trusts ("ILITs") are often used to hold life insurance in order to keep the policy death benefits out of the insured's estate.
  - The insured applies for the policy and is the grantor of the ILIT, but should not serve as the trustee of the ILIT or be a beneficiary of the ILIT.
  - The ILIT is the owner and beneficiary of the life insurance policy.
  - The insured contributes cash to the ILIT to allow the ILIT to pay the premiums on the life insurance policy owned by the ILIT.
  - The beneficiaries of the ILIT are given a right to withdraw the cash contributions to the ILIT in order to qualify the contributions for the gift tax annual exclusion (discussed below).
  - The beneficiaries must be given notice of their right to withdraw a portion of the contribution (called a "Crummey" notice after a famous case in this area of the law).
  - If the beneficiaries do not withdraw the contributions within a specified time period, the trustee uses the contributions to pay the premiums on the insurance policy.
  - Because the grantor is not the trustee or a beneficiary of the trust, the life insurance death benefits should not be included in the grantor's estate at death.

Other Important Estate Planning Documents

- Power of Attorney.
  - A Power of Attorney allows an agent to act on behalf of another person (the "principal") with respect to financial matters.
  - A Power of Attorney should be "durable" which means that it continues to be valid in the event that the principal become incompetent.
  - A Power of Attorney also generally should be drafted to be effective immediately, rather than only springing into existence upon the incapacity of the principal.
  - Georgia recently adopted a statutory form of Power of Attorney which contains a mechanism to force a third party to accept the Power of Attorney. Other forms of Powers of Attorney still work, however.

Other Important Estate Planning Documents

- Advance Directive for Health Care.
  - An Advance Directive for Health Care sets forth an individual's wishes with respect to life-sustaining or death-delaying medical treatment and appoints an agent to make decisions on behalf of the individual if he or she cannot make them.
  - The Advance Directive for Health Care also allows the nomination of a guardian if one is needed.
  - The Advance Directive for Health Care replaced the Living Will and Durable Power of Attorney for Health Care.

Tax Considerations

- Estate Tax.
  - Meaning of Estate for Tax Purposes.
    - All assets owned by the decedent are included in the decedent's "estate" for purposes of the estate tax, regardless of if they are probate or nonprobate assets.
    - This means that life insurance death benefits are included in the computation of the estate tax, unless the policy is held in an ILIT.

Tax Considerations

- Estate Tax (continued)
  - Marital Deduction. A deduction is allowed in the computation of the estate tax for 100% of the value of assets passing to a surviving spouse (this means that in most cases no estate tax will be due until the death of the second spouse to die if all assets are left to the survivor).
    - Generally, transfers to a surviving spouse must be made outright to qualify for the marital deduction, although transfers in trust may qualify for the marital deduction if the trust is a "qualified terminable interest property" trust (QTIP), or if the surviving spouse has a general power of appointment over the trust at death.
    - QTIP Trust requirements:
      - The surviving spouse must receive all of the net income for life, with distributions to be made at least annually.
      - No distributions can be made during the surviving spouse's lifetime to anyone other than the surviving spouse.
      - The executor must make a special election on the estate tax return.

Tax Considerations

- Estate Tax (continued)
  - Charitable Deduction. A 100% estate tax deduction is also available for assets passing to charity. This is a great opportunity to leave assets to a church or a favorite charitable organization if the decedent is charitably inclined.
  - Applicable Exclusion Amount. Each person has an "applicable exclusion amount" (previously referred to as the unified credit amount) which exempts from estate taxation a portion of their estate that passes to persons other than a surviving spouse or charity. The applicable exclusion amount has changed greatly in the last decade, but currently it stands at $11,400,000 per person, and is indexed for inflation.
    - After 2025, the applicable exclusion amount will revert to $5,000,000 per person, indexed for inflation off a 2010 base year.

Tax Considerations

- Estate Tax (continued)
  - Carryover of Deceased Spousal Unused Exclusion Amount.
    - Historically, the applicable exclusion amount of the first spouse to die was wasted if all of his or her assets were left directly to the surviving spouse. The only way to shelter the applicable exclusion amount of the first spouse to die was to create a "credit shelter trust" for the benefit of the surviving spouse.
    - The new tax law provides for a carryover of the Deceased Spousal Unused Exclusion Amount ("DSUEA") to the surviving spouse if an estate tax return is filed for the estate of the first spouse to die. Thus, it is no longer necessary to create a credit shelter trust to preserve the applicable exclusion amount of the first spouse to die.
    - Note that a carryover of the DSUEA amount to the surviving spouse does not carry over the deceased spouse's unused generation skipping tax exemption (discussed below), and that the surviving spouse only receives a carryover of the exemption from the last deceased spouse if the surviving spouse remarries.

Tax Considerations

- Estate Tax (continued)
  - Rate of Tax.
    - The estate tax rate is imposed at a rate of 40% of the taxable estate, after taking into account the applicable exclusion amount.

Tax Considerations

- Gift Tax.
  - The U.S. imposes a gift tax on all lifetime gifts that exceed the decedent's applicable exclusion amount. Any taxable gifts that do not exceed the applicable exclusion amount (in the aggregate) will not cause a gift tax to be imposed, but will be added back to the donor's estate at the time of his or her death, thus effectively reducing the amount that can be left estate-tax free at death.
  - However, a donor can give up to $15,000 per year (indexed for inflation) to any person without reducing his or her applicable exclusion amount. This "freebie" is referred to as the gift tax annual exclusion.
  - A donor may give up to $30,000 per year to any person if the donor's spouse consents to joining in on the gift.
  - The gift tax incorporates the same marital and charitable deductions as the estate tax.
  - Transfers that are made directly to educational institutions or health care providers do not constitute gifts to the benefited individual.

Tax Considerations

- Generation-Skipping Tax.
  - An additional generation-skipping transfer tax ("GST tax") is imposed on certain transfers to grandchildren or more remote descendants (or trusts for their benefit) that exceed the GST tax exemption amount.
  - The GST tax exemption amount is currently $11,400,000, which is the same as the applicable exclusion amount.
  - The GST tax is imposed at the same rate as the regular estate tax, and is intended to approximate the regular estate tax that would have been due if the assets had been subject to estate tax in the estate of the intervening generation (which would have owned the assets at death had the generation skipping transfer not occurred).

Tax Considerations

- Income Tax.
  - A beneficiary of assets from an estate typically will not recognize income tax on the assets received from the estate.
  - The assets owned by the decedent will receive a "step-up" in basis to the value of the assets as of the date of the decedent's death. The step-up in basis means that a beneficiary of assets from an estate will only recognize income tax when he or she sells the assets on the post-death appreciation.
  - An exception to this general rule are assets that constitute "income in respect of a decedent," such as IRAs and other retirement plan assets. No basis step-up occurs on these assets, and recipients of these assets will be subject to income tax when they make withdrawals from the plan.

Probate

- What is probate?
  - The term probate simply means the process of proving that a Will is valid. Once a Will has been probated, it is possible to transfer the estate assets pursuant to the terms of the Will.
  - Recall from the prior discussion that many assets are not controlled by the Will, such as IRAs, life insurance benefits, joint tenancy accounts, etc. Consequently, it is not necessary that the Will be probated in order to transfer these assets.
  - If the decedent died without a Will, the process is referred to as an "administration" rather than probate. The process is similar to the probate of a Will, however.

Probate

- What needs to be done to probate a Will?
  - In order to probate a Will, it is necessary for a probate petition to be filed with the probate court of the county in which the decedent lived.
  - The original Will must also be filed with the probate petition, and most probate courts request a copy of the death certificate as well.
  - The probate petition must list the name, address, and date of death of the decedent, as well as the names and addresses of all of the decedent's heirs.
  - The heirs of a decedent are the people who would receive the decedent's assets if there were no Will. Typically the heirs are the spouse, children, and descendants of deceased children. These are not necessarily the same persons who are beneficiaries of the Will.
  - Each of the heirs must consent in writing to the probate of the Will, or it will be necessary for the sheriff to serve the heirs, and in this case a hearing may need to be held in court.

Probate

- What happens after a Will is probated?
  - Assuming none of the heirs object to the petition, the probate court will issue "Letters Testamentary" which indicate that the Executor has the power to act on behalf of the estate. If there is no Will, the Administrator receives Letters of Administration
  - The Executor uses the Letters Testamentary to transfer assets of the estate, such as bank accounts, stocks, bonds, and real estate.
  - If there is a Will, the requirement to make inventories, returns, and reports to the probate court is typically waived. If there is no Will, however, in most cases the administrator will be required to make reports to the probate court (this can be avoided if the heirs agree to waive this requirement, however).
  - In most cases, a Will allows an Executor to sell property of the estate without obtaining an order from the probate court. If there is no Will, or if the Will does not permit the Executor to sell property without a court order, the personal representative will have to obtain a court order to sell property.

Probate

- Should you try to avoid probate?
  - As previously indicated, in some states the probate process is quite onerous and expensive, so residents of these states (notably Florida, in the Southeast) attempt to avoid probate by transferring their assets into a revocable trust during their lifetimes or using joint accounts or payable on death accounts.
  - Because the probate process in Georgia is relatively simple and inexpensive, most people in Georgia do not go to great lengths to avoid probate.
  - However, in some cases it makes sense to try to avoid probate, especially if there may be a likelihood of an objection to the probate of a Will or if the decedent owns real property in a state where probate is a more difficult process than in Georgia.

Year’s Support

- <u>What is Year's Support?</u>
  - Year's support is a priority claim that a surviving spouse and minor children can make against a decedent's estate for an amount necessary to support them for a period of one year following the decedent's death.
  - The reasoning behind year's support is to ensure that a surviving spouse and minor children have enough funds for their support, even if they are disinherited by a Will.
  - A claim for year's support trumps the claims of the beneficiaries and most creditors of the estate, including property taxes on the home owned by the decedent.

Year’s Support

- What is Year's Support? (continued)
  - The year's support law directs the probate court to give the amount requested in the year's support petition to the petitioner unless an objection is filed by a beneficiary or creditor of the estate. Thus, the amount requested does not have to be the exact amount needed for support, as long as no objection is filed to the petition.
  - If an objection to a year's support petition is filed, the court can look at other assets received by the surviving spouse and minor children outside of probate, as well as what amount is actually needed to support them for a period of one year.
  - A year's support claim can be a good way to "fix" the failure to have a Will, which otherwise might result in assets passing to persons other than the surviving spouse, such as adult children of the decedent.