Estate Planning Newsletter

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WILLS AND TRUSTS

By Samire K. Elhouty, Esq.

Despite their many differences, the terms "will" and "trust" are often wrongly used interchangeably. The confusion of terms comes from a misunderstanding of how a will or trust functions and what the differences between the two are. The two are not interchangeable and there are several important features that those thinking about creating an estate plan should know.

The key to understanding the differences between a will and a trust is to understand the function of each type of instrument. A properly prepared will is a legally enforceable document that does not become effective until the death of the testator (the person who the will belongs to). In comparison, a properly prepared trust becomes effective by signing and notarizing the trust instrument. Put simply, in general, a will is not effective until the testator's death, but a trust is effective immediately. Once effective, a will can be used to direct an executor on how the now deceased testator's estate must be distributed. An effective trust, on the other hand, immediately creates a fiduciary relationship where the trustee must maintain or distribute the trust estate according to the terms of the trust instrument.

Since a will becomes effective after the death of the testator, a probate is still required for estates with over $150,000 in probatable assets. The probate process involves proving the authenticity of the will, appointing an executor, and managing and distributing the estate's assets under court supervision. A will, alone, is not sufficient to bypass probate unless the estate is very small.

Upon execution of a trust instrument, assets can be transferred into the name of the trustee. Assuming that the creator of the trust (the settlor) transferred all of their assets into the trust, there is nothing to probate when they die because the assets are legally owned by the trustee. Once the first trustee dies, a successor trustee, usually a person named in the trust, becomes the new trustee and will manage the trust's assets according to the terms of the trust. A trust can survive the death of the settlor for many years or, depending on what the trust actually says, all of the trust's assets may be distributed immediately after the death of the last settlor.

Typically, a will is used along with a trust as a backup to ensure that assets accidentally omitted from the trust are still distributed according to the settlor's final wishes. Together, a will and a trust are vital elements of an estate plan, which should also include an advance health care directive and durable power of attorney.

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Each element of an estate plan plays a distinct and important role. Although a trust is not always necessary, when it is, it should never been confused with a will. Counsel skilled in this area of law can help review an existing estate plan, or prepare a new one, and explain these important differences in greater detail.

ETHICAL WILLS: A LEGACY OF VALUES

By Samire K. Elhouty, Esq.

Many never get around to preparing their estate plan; even fewer leave an ethical will behind for their loved ones. People routinely leave instructions on how their assets will be distributed, for their end of life care, and some may even leave instructions on who should take care of their kids or pets, but often times the most important things are left out of the estate plan and forgotten. The values, life lessons and hopes for future generations can be just as valuable, if not more so, than the family home or the retirement accounts. A large inheritance could become a curse instead of a blessing to an unfit loved one.

An ethical will, also called a legacy letter, is a document used to pass ethical values from one generation to the next. The author of the ethical will might recount life lessons, mistakes to be avoided, values to remember, cherished memories, and ways he or she would like to be remembered. An ethical will can also be used to provide clarification on why certain end of life choices were followed that may have troubled surviving loved ones.

Ethical wills have been used throughout history and among various cultures. We know that the ancient Hebrews and early Christians used them as referenced in Genesis 49:1-33. In modern times, President Obama published his legacy letter to his daughters, and Randy Pausch, a computer science professor, published his ethical will "The Last Lecture," which became a best-selling book.

Although "wills" are typically thought of as a type of legally enforceable document, ethical wills are not. A son cannot be legally liable for not loving his siblings or caring for his mother. However, putting those wishes into writing and having them read upon death can be a powerfully persuasive tool to change behavior that may be more effective to some than threats to disinherit. Ethical wills can also reduce conflict among family members in the wake of a death by explaining why certain decisions were made and by attempting to foster communication and understanding between surviving loved ones.

Technology can be used to enhance the message and effect of an ethical will, too. Although many ethical wills tend to be in written form, there's nothing preventing an individual from creating an ethical will in video form. Using video allows a departing loved one to recite poetry or favorite quotes, play or sing their favorite songs, and generally provide a warmer message to family and friends.

Imparting life lessons and values to younger loved ones is a lifelong duty, but those lessons and values can be underscored or emphasized at the end of one's life in an ethical will. When preparing an estate plan,

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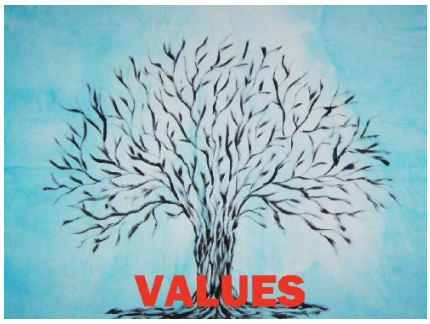

be sure that the material needs of your family are taken care of to the greatest extent possible, but also don't forget that it is often the values that one passes on to the next generation that is truly responsible for their success and well-being. The timing and circumstances of revealing an ethical will to loved ones can make an incredibly powerful impression on even the most stubborn of hearts and may prevent or reduce the conflict that often accompanies the loss of a loved one.

"INTENTIONAL INTERFERENCE WITH INHERITANCE" CLAIMS MAY GIVE DISAPPOINTED BENEFICIARIES NEW OPTIONS

By Samire K. Elhouty, Esq.

Intentional Interference with Inheritance (IIEI) is a relatively new cause of action, which was recognized by a California court for the first time in May of 2012. It has been recognized by at least two dozen states as well as the United States Supreme Court. IIEI has been recognized by various courts in order to provide disappointed beneficiaries adequate recourse where none existed previously through more traditional estate litigation.

IIEI was recognized by the California 4th Appellate District in *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, where the decedent, Marc MacGinnis, died intestate unintentionally leaving his longtime partner, Brent Beckwith, with nothing as a result of actions taken by the decedent's estranged sister, Susan Dahl. MacGinnis had prepared an unsigned will, which he showed Beckwith. Just prior to undergoing a dangerous surgery, MacGinnis asked Beckwith to print his will and bring it to the hospital to be signed. Dahl advised Beckwith not to bring the will, because she would have an attorney friend prepare a trust, which she claimed would be a better alternative. She promised to have the trust prepared within a couple of days. Beckwith was never informed of the details or risks of MacGinnis's surgery, but Dahl was informed since she was a relative. MacGinnis died soon after the surgery without having signed his will and Dahl never had a trust prepared. Since MacGinnis died intestate, Dahl, as the sole family member, inherited the entirety of his estate, which exceeded $1 million. The will that MacGinnis wanted to sign at the hospital would have distributed his estate 50% to his partner, Beckwith, and 50% to his sister, Dahl.

Beckwith alleged a cause of action for IIEI in civil court, because he lacked standing to bring an opposition to Dahl in probate. The Appellate court laid out several elements required to properly plead an IIEI cause of action: 1) an expectation of receiving an inheritance 2) intentional interference with that expectancy by a third party 3) the intentional interference was independently wrongful or tortious 4) there was a reasonable certainty that, but for the interference, the plaintiff would have received the inheritance 5) damages. In addition to the five elements discussed by the *Beckwith* court, IIEI must be limited to situations where the plaintiff has no adequate recourse at probate.

Although courts have tried to limit IIEI to where a disappointed beneficiary

would have no other alternative, some commentators have argued that there is almost always an alternative cause of action. For example, where a will contest is not available to a disappointed beneficiary (as it was not available to Beckwith), then restitution by way of constructive trust could be used as a fallback. A constructive trust is implied when a court finds that a wrongdoer holds assets of the estate as constructive trustee for the rightful owner and must return that property to its rightful owner upon court order. Arguably, restitution might be a wider ranging remedy in that it could be used to impose a constructive trust on an innocent party that benefited from another's wrong doing. An obvious pitfall, however, is that there can be no restitution if the estate assets have already been spent during the pendency of the litigation.

From a procedural perspective, a disappointed beneficiary who happens to have the option of choosing between IIEI or a more traditional probate contest may find it more advantageous to pursue an IIEI claim. Unlike a probate contest, an IIEI claim brought in civil court would entitle the disappointed beneficiary to a jury trial; the initial complaint would not need to be verified as it would need to be in a probate contest; federal jurisdiction may be available; and most importantly, a lower burden of proof is required in civil actions versus probate contests. Typically, will contests require clear and convincing evidence for a plaintiff to prevail whereas the normal standard in civil actions involving a tort such as IIEI is a preponderance of the evidence standard- a much lower standard of evidence. Finally, an IIEI claim may allow for both compensatory and punitive damages where as a will contest would only provide the benefits of the valid will to the successful contestant.

Civil actions claiming IIEI can be a potentially powerful option for a disappointed beneficiary. However, since IIEI claims are a relatively recent development in California law, many questions remain as to the scope of conduct which may trigger a valid IIEI claim and the appropriate statute of limitations for such claims. Individuals finding themselves in the midst of an estate dispute should consult counsel skilled in this area of law to fully explore their options.