Buying a Will in a Box

Be careful. Generic software programs often overlook state requirements.

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More likely than not, you have seen ads for do-it-yourself estate-planning forms or software on the Internet or noticed the CDs for sale at local bookshops or business supply stores. The promoters of these products tout their ease of use and their ability to address a wide variety of issues regarding your estate plan, all for a low price of $49.95 or less.

If this sounds a little too good to be true, it probably is. When I reviewed a variety of such forms and programs, I found cause for concern. Although these products provide much accurate information and can be useful in some circumstances, they also have some critical gaps. Consumers relying upon them run the risk that their estate-planning goals will not be met.

What Your Estate Plan Needs

Before analyzing the deficiencies of these types of programs, it is essential to have a general understanding of estate planning. At a minimum, estate planning should seek to ensure that at the time of an individual's death, such individual's assets pass to their selected beneficiaries. This is typically addressed by the use of wills and revocable trusts.

A will becomes operative only once it has been admitted to probate. The only assets that will be part of the probate estate and subject to the will's terms are those assets that were titled in the individual's name at the time of his or her death and that were not subject to a beneficiary designation (unless such designation names the decedent's estate).

The decedent's probate estate will also include the decedent's interest in any property that he or she held with another individual as a tenant in common. Assets that are titled as joint tenants with rights of survivorship or, in the case of married couples, as tenants by the entirety will pass automatically to the surviving joint owner by operation of law. This passage will occur outside the terms of any will.

Similarly, assets that are subject to beneficiary designations, such as life insurance or retirement plans, will pass to the designated beneficiaries outside the terms of the will.

In addition to wills, individuals commonly pass on assets to their heirs through a revocable trust. An individual creates and, ideally, funds the trust during his or her lifetime. At the time of the individual's death, the trust becomes irrevocable, and those assets that were transferred to it during the donor's lifetime will not be subject to probate.

Nonetheless, the donor also should have a "pour-over" will to ensure that any assets titled in the individual's name at the time of his death that are not subject to a beneficiary designation, or any interests in property that the decedent held as a tenant in common, are transferred to the trust.

Another key component of estate planning is disability and incapacity planning. Three methods help deal with the problem of incapacity.

By establishing and properly funding a revocable trust, the donor can avoid the appointment of a guardian of the donor's property if the donor becomes disabled or incapacitated.

Similarly, an individual can execute a general durable power of attorney to name a trusted person to act on his or her behalf in a variety of matters. That person (called an attorney in fact) need not be a lawyer.

An individual can obtain similar benefits in the area of health care matters by executing a health care power of attorney to name someone to make medical decisions if the principal is incapacitated.

What the Generics Miss

With the foregoing concepts in mind, consider the following issues that may not be addressed adequately by generic estate planning products.

First among these issues are those involving estate taxes. Many individuals wish to reduce the bite that federal and state taxes will take out of their estate. Currently, assets that pass to a surviving spouse who is a U.S. citizen will pass free of federal estate tax because of the unlimited "marital deduction." Each U.S. taxpayer is also currently afforded a $1.5 million "applicable exclusion amount." The applicable exclusion amount is scheduled to increase incrementally to $3.5 million by 2009, with a total repeal of the federal estate tax scheduled to occur in 2010.

Under current federal law, however, the estate tax will be reinstated in 2011, with the marital deduction and an applicable exclusion amount of $1 million.

Some states (including Maryland, Virginia, and the District of Columbia) have also "decoupled" their estate taxes from the federal provisions. In doing so, these jurisdictions may provide a lower applicable exclusion amount for state estate tax purposes and may not recognize the corresponding reduction in the state death-tax credit under federal law.

Many of the generic software programs routinely directed the individual to adopt an "AB Trust" plan. In this plan, the will creates a trust funded with the maximum value of assets that will pass free of federal estate tax under the decedent's applicable exclusion amount (typically the "A" Trust). It then gives the balance of the estate to the surviving spouse, either outright or in trust (the "B" share), thereby avoiding federal estate tax by way of the marital deduction.

The problem encountered with the vast majority of the programs was twofold.

First, many programs did not consider that the decedent had no assets with which to fund the A Trust because such assets were either owned jointly with rights of survivorship or were controlled by beneficiary designations. Given that houses and retirement accounts typically would be excluded, many people would have few remaining assets left for the trust.

Furthermore, most programs failed to incorporate post-mortem planning whereby the surviving spouse could use a qualified disclaimer to disclaim those assets passing to him or her by survivorship or beneficiary designation and thereby use such assets to fund the A Trust. By incorporating this type of planning, the surviving spouse can be able to disclaim, in whole or in part, assets that otherwise would have passed outright to the surviving spouse and, instead, use such disclaimed property to fund the A Trust. The benefit in doing so would be to preserve the applicable exclusion amount and thus potentially avoid estate taxes.

Second, many of the programs did not adequately address the issue of a state's decoupling from the federal estate tax law. Accordingly, many programs funded the A Trust with the applicable exclusion amount for federal estate taxes. By doing so, the program was causing the individual to incur estate taxes at the state level to the extent the A Trust was funded with assets having a value in excess of the respective state's applicable exclusion amount. The result is money needlessly lost to the government, and that amount usually would be far more than the cost of a good estate plan.

State-Specific Requirements

While the vast majority of these programs claimed to address state-specific issues, many did not. These oversights included the following:

• In those jurisdictions where a personal representative's powers must be expressly referred to in the will, many programs failed to invoke the specific state statute. If the will fails expressly to invoke the statutory powers, the personal representative may be forced to file otherwise unnecessary petitions with the probate court requesting that he or she be granted such powers.

• Many programs created testamentary trusts that failed to state expressly that the trustees of such trusts were excused from filing inventories and accounts with the probate court. Absent such language, the trustee may be required to report the nature and value of the assets under the trustee's control and to account for all receipts, disbursements, and distributions made from the trust. Obviously, this type of oversight in the will could lead to otherwise unnecessary and expensive filings with the probate court.

• Some failed to address the specific requirements for the execution of a will and the prescribed form of self-proving affidavit in those states, such as Florida and Virginia, that have such a requirement. A self-proving affidavit is an affidavit that is signed by the witnesses and the testator in the presence of a notary public and attests to the execution of the will. In states that require the use of such an affidavit, the failure to include one typically requires the witnesses to appear in person at the probate court to prove the proper execution of the will.

Although the failure to use the appropriate self-proving affidavit may merely delay the admission of the will to probate, the failure to have the individual execute the will in accordance with the provisions of local law will have the effect of denying the will admission to probate. In the unfortunate event that the will is denied admission to probate, the decedent's probate property will be distributed in accordance with the state's intestacy laws.

• The programs frequently do address grants of general durable powers of attorney, which authorize another individual to act on someone's behalf. The most glaring deficiency in the generic programs regarding general durable powers of attorney involved powers given to the attorney in fact. Frequently these programs gave the attorney in fact absolute authority to make gifts of the principal's property without regard to any standards or limitations such as annual exclusion gifts or the principal's past patterns of giving.

While a gift-giving power can be very useful in certain cases, such power should be qualified to avoid the potential dissipation of the principal's estate by either an unscrupulous or unwitting attorney in fact who gives the principal's property away during the principal's lifetime and essentially bypasses the directives in the will.

• Finally, the majority of health care powers of attorney failed to incorporate powers for the agent in conformance with the new regulations under the Health Insurance Portability and Accountability Act. In short, these federal regulations create privacy rules that permit individuals to control certain uses and disclosures of their health care information. The failure to include them could prove detrimental to both the principal and the agent by delaying or denying the release of the principal's medical records to the agent. At a time when the family members may need to make rapid medical decisions, the legal oversight will create needless bureaucratic frustration.

Beware the Will in a Box

The failure of many do-it-yourself estate planning programs to address these issues properly can lead to the unnecessary payment of estate taxes, may lead to a delay in the administration of the decedent's estate, and, in the worst case, may provide the individual with estate planning documents that are not valid under local law.

Perhaps more so than in other areas of the law, in estate planning, the devil truly is in the details. Many fine products can safely come off the shelf in boxes; your estate plan is not one of them.

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