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THE WILL IN ESTATE PLANNING

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Since other papers published in this series deal with the important and complicated problems of tax minimization and the creation of trusts (including testamentary trusts), we shall confine this paper to the comparatively simple problems of will-drafting in general. Even though the matters discussed will probably be familiar to all attorneys, a summary of common pitfalls with some reference to Colorado law should be of value. Mistakes in the preparation of wills are more apt to be due to oversight than to a lack of knowledge of the law. Every attorney should build up a check list of points to be considered in drafting wills and should from time to time refresh his memory by reading or rereading a good book on estate planning.[1]

NECESSITY FOR A WILL

A will is usually desirable. In many cases it is important for a man to disinherit children and leave all his property to his widow. Even if a client desires his property to go to his heirs at law, a will is usually desirable. Where minors are involved, a will can obviate the expense of a guardianship by the creation of a simple trust to handle the minors' property until the age of 21 years. Even if there is no possibility of minor heirs, a will usually produces a better, cheaper result than an intestate administration. The will can assure a qualified executor, the elimination of the expense of a bond, savings by distribution in kind, and a more expeditious and efficient disposition of assets through sales without court order.

Of course all administration and administration expense may be avoided if a man arranges his affairs so that he dies with no property worth over $500, except insurance policies payable to named beneficiaries, property owned in joint tenancy, a joint bank account, U.S. bonds issued in two names and property held in an intervivos trust.[2] Under some circumstances this plan will be preferable to a will, but it has its dangers. It precludes the flexibility usually desirable in an estate of substantial size. Even in a small estate it frequently is unsuccessful because some asset requiring administration has been overlooked.

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[1] See check list of Hubert D. Henry, 27 DICTA 273 (1950).
The following books are very helpful:
Harold Schwarzberg and Jules E. Stocker, *Drawing Wills.* (Practising Law Institute, 1946.)
Harrison Tweed and William Parsons, *Lifetime and Testamentary Estate Planning.* (American Law Institute, 1951.)
Joseph Trachtman, *Estate Planning.* (Practising Law Institute, 1949.)
Mayo Adams Shattuck, *An Estate Planner's Handbook.* (Little, Brown & Co., 1948.)

[2] See, Merrill A. Knight, *Simple Devices for the Transfer of Assets Without Administration,* 27 DICTA 277 (1950).

In many situations a joint tenancy is undesirable because the parties may have friction or a divorce, the financial or personal factors may change, and if the property increases in value, the survivor will have a greater capital gains tax on the sale of the property than if it were received by inheritance or by will.

There is some danger in a joint bank account. In a recent Colorado case,[3] the decedent had put money in a joint bank account in the names of the decedent and friend A, with an agreement that A was to withdraw the money only after decedent's death and then was to distribute it to certain of decedent's relatives. The court held that the device was a testamentary plan and invalid and that the bank account passed as intestate property. Apparently, a joint bank account will pass the property to the survivor in the ordinary situation where both parties draw on the account and the survivor is under no obligation to dispose of the proceeds to other persons. This case at least casts doubt on the effectiveness in Colorado of the so-called "Totten trusts," e.g., where decedent deposits money in a savings bank "in trust for" some other person.

Will or no will, some money in a joint account or some insurance proceeds may be desirable to provide ready cash for living expenses during the period of administration.

GENERAL PROBLEMS OF WILL-DRAFTING

A testator often thinks he knows just how he wants his will drawn, but more often than not his preconceived ideas will not carry out his real desires and purposes. The attorney's function is not to tell the client what to do with his money, but to advise the client how to do what the client wants to do with it. To do this the attorney must know all the facts—facts regarding the client's family, the amount and nature of all the client's assets, in whose name or names title is held, the client's probable debts, the financial situation of intended beneficiaries, and what property is to be received by beneficiaries outside of the provisions of the will (such as joint-tenancy property, life insurance proceeds, U.S. bonds in two names and trust funds). The attorney must also be informed of any substantial gifts made or trusts created by the client which might be subject to estate or inheritance or gift taxes. The client should be advised as to the probable shrinkage in his estate due to taxes and administration expenses, and should be informed of the advisability of having sufficient life insurance proceeds or other liquid assets available to the executor to pay all taxes, expenses and debts, and of having ready cash available to the family for living expenses.

If the attorney knows all the facts, it is comparatively simple to draw a will which will carry out the testator's desires if the testator dies immediately. But the testator may not die for many years, during which time his financial and family situation may

[3] Urbancich v. Jersin, 123 Colo. 88, 226 P. 2d 316 (1950); noted in 23 ROCKY MT. L. REV. 349 (1951).

change very materially. Most testators fail to appreciate all of the contingencies which may arise before death or during the period of administration. Many testators are unconcerned by the problem of changed circumstances, because they are sure that they will make new wills whenever necessary. Experience shows that all too frequently a testator neglects to make a new will even when it is essential. It is possible that the testator may be prevented from making a new will by mental incapacity. For these reasons the attorney should consider all likely contingencies (such as the testator's divorce, an increase or decrease in assets or debts, a change of the form of assets owned, a change in the purchasing power of money, a change in the family situation, the birth or adoption of children, the possible marriage or divorce or death of a beneficiary), and should draw a will which will probably carry out the desires of the testator under whatever circumstances may exist at the date of death. This is a difficult task; of course it is impossible to draw a will which will be the most desirable will under every conceivable set of circumstances which may arise. Flexibility to meet changed conditions can best be obtained by a testamentary trust with broad discretionary powers in the trustee, but even when a trust is not desired, the problem must be tackled. Probably most testators would be surprised to learn that a divorce does not revoke a will and that a will leaving "all my property to my wife Helen" would be effective even if Helen were divorced from the testator at the time of his death,[4] but that if they had been divorced and were remarried at the time of his death, the will would be invalid.[5]

If the testator makes a will in Colorado and dies domiciled in another state, the law of that state will probably apply as to the validity and construction of the will and the administration of the estate as to personal property wherever located; as to real property the law of the state where the property is situated will apply. A will can and should be drawn so that it will probably be effective under the law of any state. As to execution, a will executed according to Colorado law with the usual attestation clause if witnessed by *three* witnesses should be valid in any state and in most foreign countries.

It is important to provide for flexibility in the administration of the estate. In most cases it is advisable to give the executor power to sell real or personal property without order of court, power to retain an asset of the estate even if retention will result in lack of adequate diversification, and power to distribute in kind. If there is a likelihood of the testator's owning a business at his death, the will should provide under what circumstances and for how long the executor may continue the business and what funds may be used for this purpose. Our present Colorado law gives broad investment powers, but if the law of some other state may apply, investment powers should be set out in the will.

[4] *Semble*, Moore v. Handley, 97 Colo. 258, 48 P. 2d 808 (1935).
[5] In Re Estate of Matteote, 59 Colo. 566, 151 P. 448 (1915).

Under a given set of circumstances probably no two attorneys would give identical advice, and probably no two testators would want exactly the same will. The will must be "tailor-made" to fit the circumstances and desires of the particular testator. A very short, simple will may be the solution, but the result should be reached only after consideration by the testator and the attorney of all the factors involved. The promiscuous use of stock forms should always be avoided. In advising a client as to a will, the attorney is not merely solving legal problems, but is helping the client solve problems regarding the care and welfare of human beings and should never overlook the personal factors involved.

GENERAL LEGACIES

Unless the testator is sure that he will die very shortly, it is dangerous to leave general legacies of substantial sums of money. For example, a testator with $1,000,000 makes a will leaving $100,000 to X University and the residue of his estate to his family. If he meets financial reverses and dies with only $100,000, his family will receive nothing. A safeguard against such a contingency is to leave $100,000 to X University, provided that if this sum exceeds 10% of the net estate, the gift is to be cut down to 10% of the net estate. On the other hand the testator may wish X University to receive more than $100,000 if his estate is larger than $1,000,000. In that event he can leave 10% of his net estate to X University.

Here lurks a great danger. Assume that a testator wishes to treat his two sons equally and leaves Blackacre to his farm-minded son A and an equal value of specific corporate stock to son B. If oil is struck on Blackacre and the stock depreciates in value, the testator's main object is defeated. Furthermore there is the danger of ademption; if the testator sells Blackacre or trades it for Whiteacre or if it is taken on condemnation proceedings, A gets nothing. Similarly B's gift may be defeated if the testator sells the stock or if it is exchanged in a reorganization or merger for new stock which the court feels is a change in substance rather than in mere form. Even a stock dividend may cut down the value of B's gift. A gift of "10 shares of X stock" will be treated as general and not subject to ademption, whereas a gift of "*my* 10 shares of X stock" is a specific gift subject to ademption.[6] It is much safer to give the principal beneficiaries fractional shares of the estate or of the residue than to leave them specific gifts of the major assets.

While specific gifts of major assets are to be avoided, property having primarily a sentimental rather than monetary value (such as heirlooms, furniture, jewelry and personal effects) is usually specifically bequeathed. Such property should not be allowed to pass into a trust fund, nor should it go into the residue as it may then have to be sold. If such property is given to several persons in equal shares, family squabbles may be avoided by giving the executor broad authority as to the method of division. Frequently

[6] Bond v. Evans, 92 Colo. 1, 17 P. 2d 311 (1932).

a testator wishes to have his effects divided among friends or relatives in accordance with directions which the testator will give after the will is executed and which may be changed from time to time. This is clearly illegal, and there is no safe way to accomplish this result unless the testator is willing to leave the property outright (with no strings attached and no desires or wishes expressed) to some person who the testator trusts will carry out the moral obligation. Such person might be legally bound as a constructive trustee, but this involves uncertainty as to proof. Such a device should not be used if the property is of sufficient value to be subject to gift taxes.

Frequently the testator will wish to make a specific gift of the family residence rather than have it pass into the residue. If he leaves "my residence at No. 100 Main St." and later sells it and purchases another residence, nothing will pass. The will should clearly state that any residence owned at the time of death is to pass; but in wording the will, consideration should be given to the possibility of the testator having more than one residence, such as a winter home and a summer home. If a residence or any other property is given specifically and there is the possibility that it will be encumbered, it should be stated whether it is to pass subject to the lien or whether the executor is to pay off the lien from other assets of the estate.

PRIORITY OF LEGACIES

If there are insufficient assets to pay all of the legacies, some will be abated. The testator can provide the order of abatement. For example, if the will leaves an automobile to A, $10,000 to B and $10,000 to C, it may also provide that if the assets are insufficient to satisfy all three gifts, the gift to A shall abate first, then the gift to B. This will give C the first preference and will generally be much more satisfactory than an attempt to prefer C by the clumsy and uncertain device of a demonstrative legacy, e.g., "$10,000 to C, payable out of my savings bank account."

The law is not entirely clear as to how gifts will be abated if the surviving spouse elects to take the statutory share instead of taking under the will. The will should make it clear how the balance of the estate is to be disposed of in this event.

LIFE ESTATES AND REMAINDERS

Where property is not to be given outright, a trust is usually advisable. If a legal life estate and a legal remainder are created, the will should state whether or not the life tenant is to post a bond and is to be liable for repairs and waste. The will should also state who is to take in the event the remaindermen all die before the life tenant. If a remainder (either legal or equitable) is created for a class, extreme care should be exercised in defining the class and the time at which the class is to be determined. For example, a gift "to A for life and then to A's children" is ambiguous. Are children born to A after the testator's death to take?

Do the children take a vested remainder, or is their interest contingent on surviving A? What happens if A has a child who dies before A, leaving issue who survive A?

CHILDREN, AFTER-BORN CHILDREN AND ADOPTED CHILDREN

Does a gift to "children" or "issue" or "descendants" include adopted children? The Colorado Supreme Court has held that a gift to the testator's children includes adopted children, but a gift to the children of any other person does not include adopted children.[7] The will should clearly specify whether or not adopted children are to be included. Certainly most testators intend to include their own adopted children. Suppose a testator leaves property in trust for his child A for life with a remainder to A's children. Probably most testators would wish children adopted by A *bona fide* to take whether adopted before or after the date of the will or the date of death. But the fact that an adult may be adopted, would put A in the position of being able to make an advantageous deal to adopt a friend and thus defeat a gift over to other relatives of the testator.

Frequently a testator wishes his widow to take all of his property to the exclusion of any children. In most states (including Colorado), children born after the will is executed will take their intestate share unless expressly disinherited, and in many states (not including Colorado), children alive when the will is made will take unless expressly excluded. Every will should name all existing children (natural or adopted) and should state whether these children and any children born to, or adopted by, the testator after the will is made are to take or are to be disinherited. A Colorado case[8] dramatically illustrates the necessity for such a provision. The testator, who had a child A, made a will leaving all his property to his wife with no mention of children. Child B was later born to the testator who later died, survived by A, B and his widow. The court held that A was disinherited and took nothing, B took his intestate share of one-quarter and the widow took three-quarters of the estate.

Whenever any person or persons under 21 years of age may be entitled to property under a will, it is important to consider the advisability of avoiding the expense and red-tape of a guardianship of the property. This can be accomplished by a trust, or, in the case of tangible property of no investment value, by directing the delivery of the property to the person having custody of the minor. If a minor is given an interest in a trust fund, the trustee can be authorized to expend the money for the minor without a guardian being appointed.

Ordinarily a gift to children will not include illegitimate children. In this day of Mexican and Reno divorces of doubtful validity, the legitimacy of children born of a subsequent marriage

[7] Brunton v. International Trust Co., 114 Colo. 298, 164 P. 2d 472 (1945).
[8] Lowery v. Harlow, 22 Colo. App. 73, 123 P. 143 (1912).

may be questionable. In rare cases it may be advisable to insert a provision to insure that such children will take regardless of the jurisdictional infirmity of the prior divorce.[9]

LAPSE

Since the anti-lapse statutes vary from state to state, it is a wise precaution to insert the condition "if he survives me" in connection with each gift. If the lapsed legacy is not to pass into the residue, the will should provide specifically who is to take in case the legatee predeceases the testator.

RESIDUARY CLAUSE

Unless the will expressly applies to all of the testator's property, there should be a residuary clause so as to make sure that there will be no intestate property. Powers of appointment are more commonly used since the Revenue Act of 1948, so it is now always advisable to determine whether the testator is the donee of a power or is likely to become the donee of a power. The will should expressly state whether it is, or is not, to operate as an exercise of the power. A general residuary clause may be construed as the exercise of a power. This may have unexpected tax consequences. Also if the will creates trusts, they may violate the Rule Against Perpetuities as to the appointed property, since the period starts to run from the date of creation of the power rather than from the date of the death of the donee of the power.

It is important to make sure that there will be no failure of legatees under any contingency. If the will leaves the residue "to A, B and C in equal shares" and A dies before the testator, B and C will take only two-thirds of the residue and one-third will be intestate property.[10] Even if the will provided that A, B and C or such of them as survived the testator should take the whole residue, there would be no disposition of the property if all three of them predeceased the testator. There should be a catch-all provision stating who is to take in the event all legatees or contingent legatees predecease the testator or all remaindermen predecease a life tenant. The property may be left to a charity sure to be in existence, or to the persons who would be the testator's heirs if the testator had died at the time of the failure of the gift.

PAYMENT OF TAXES

Regardless of all questions of tax minimization, every will should specify how the burden of the federal estate tax and state inheritance taxes is to be borne by the different legatees. If a testator leaves $1,000 to A and a diamond necklace to B, he will usually want the taxes paid out of the residue so that A and B will receive their gifts tax-free. Consideration must be given to the taxes on property which does not pass under the will, such as life insurance, joint-tenancy property and inter-vivos gifts taxed

[9] Shattuck, *op. cit.* note 1 at pp. 364, 365.

[10] Feeney v. Mahoney, 121 Colo. 599, 221 P. 2d 357 (1950).
Feeney v. Mahoney, 123 Colo. 448, 231 P. 2d 465 (1951).

as in contemplation of death. No general rule can be laid down as to the best tax apportionment provision for all situations.[11]

ADVANCEMENTS

Advancements made prior to the execution of a will are not taken into account unless the will so provides. Payments made to a legatee after the making of a will may or may not be considered as made in satisfaction or partial satisfaction of the legacy, depending on the circumstances. In some cases where property is left to children in equal shares, the testator may want a provision that any sum paid to any child is to be taken into account by way of hotchpot.

INCORPORATION BY REFERENCE

If possible, an attorney should avoid uncertainty by putting all provisions in the will itself. Often a testator wishes to have part of his estate added to an existing intervivos trust, and incorporates the terms of the trust by reference. If the trust is revocable or amendable, the gift will probably be invalid unless the will makes it clear that the property is to be held according to the terms of the trust as it existed at the date of execution of the will regardless of future amendments. Gifts to charitable trusts whose papers are filed with the Secretary of State may be made by reference even if the trust is amendable and is amended after the will is made.[12]

COMMON DISASTER CLAUSES

The Colorado Simultaenous Death Act does not apply to a situation where there is any substantial evidence that one of the parties survived the other by even a few seconds.[13] To meet this situation, some attorneys insert a provision in the will that the legatee shall not take if he dies as the result of a common disaster with the testator. This provision is subject to the objections that the cause of death is sometimes uncertain and that the survivor may linger for an indefinite period. A provision that the legatee shall take only if living thirty days (or any other period not exceeding six months) after the date of death of the testator would appear to be more certain and effective. Such a clause should not be used regarding a spouse if it is more important to get the benefit of the marital deduction for estate tax purposes than to prevent the property passing to the spouse's estate. It is probably wiser to omit any provision on the subject, except in cases where the spouses have no children and survivorship will determine whether the property goes to the husband's relatives or the wife's relatives.[14]

[11] Trachtman, *op. cit.* note 1 at pp. 48-55; Tweed and Parsons, *op. cit.* note 1 at p. 68.

[12] COLO. STAT. ANN., C. 4, §§184-186 (1935).

[13] Sauers v. Stolz, 121 Colo. 456, 218 P. 2d 741 (1950).

[14] Trachtman, *op. cit.* note 1 at pp. 56-63.

MUTUAL WILLS

If two persons contract orally or in writing to make wills in which each leaves all of his property to the other, or in which each leaves a life estate to the other with the remainder to a specified person, the wills are irrevocable and the contracts are enforceable in equity. It has been held in Colorado that the simultaneous execution of mutual wills creates a presumption of such a contract.[15] Obviously such contracts should not be entered into in most instances. Many husbands and wives simultaneously make mutual wills with no intent that either party shall be under obligation not to change his will. In such case it is essential to have some evidence that there was no contract between the parties. A statement to this effect in each of the wills should be sufficient, if the wills are executed in duplicate and an executed copy of each will is retained by the attorney. This will not be satisfactory to those attorneys who object to the execution of wills in duplicate. If the wills are not to be executed in duplicate, or if it seems inadvisable to put such a provision in the wills, it is a simple matter to have a statement of the facts signed by both parties and witnessed by the attesting witnesses to the wills. If such statement is executed in triplicate and one copy kept by each party and one copy kept by the attorney, there should be no difficulty in rebutting this rather artificial presumption.

PAYMENT OF DEBTS

It would seem to be immaterial whether a will is silent as to payments of debts, or directs the executor *not* to pay any debts, or directs that all just debts be paid. In any event the statutes provide for the payment of debts. A direction to pay debts should not protect an executor who pays an invalid claim or pays a debt barred by a Statute of Limitations or non-claim.[16] The insertion of such a clause might open the door for the argument that the testator intended to make the executor a trustee to pay all creditors whether their claims were barred or not and whether filed or not. If the testator wishes specific barred claims or unfiled claims paid, he can specifically give the creditor a right as a legatee but not as a creditor. A general direction to pay debts appears to be futile at best and might create an uncertainty.

CONCLUSION

This paper has pointed out a few important problems which might be overlooked, with no attempt at complete coverage or complete discussion. I hope that the discussion has been sufficient to illustrate the necessity for an estate plan in every case and for the careful search for unexpected contingencies which may arise. The exact wording of a will is also a matter requiring great care.

[15] Trindle v. Zimmerman, 115 Colo. 323, 172 P. 2d 676 (1946).
Hoff v. Armbruster, ... Colo. ....., 242 P. 2d 604 (1952).
[16] Crowley v. Farmers Bank, 109 Colo. 146, 123 P. 2d 407 (1942).

Former Judge Kettering of the Denver County Court once remarked that the most common weakness in will-drafting was the inability of the will draftsman to use the English language clearly and precisely. No will of any complexity should be signed until at least two attorneys have checked it—every one of us occasionally has an intellectual or linguistic blind spot. Finally, the attorney's job is not complete unless he periodically checks the wills he has drawn in the light of any changed conditions and reviews the situation with his client whenever a new will may be advisable.

TRANSFERS TAKING EFFECT AT OR UPON DEATH

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When we talk about transfers taking effect at or upon death we are generally talking about rich man's law. Generally we are talking about the Law of Trusts and the Law of Future Interests and their impeding effect on the imposition of death taxes and income taxes. A short translation of the terms "transfers taking effect at or upon death" is a *string* between the donor and the donee. Unfortunately, it is this string upon which has been played the sad note of tax victories for the Government.

Any study of transfers taking effect at or upon death is also a study of the law of the Philadelphia property lawyer. The first inheritance tax law in the United States was passed in Pennsylvania in 1862. This law anticipated the desire of Philadelphia property lawyers to avoid the imposition of the inheritance tax which applied to property passing at death. Accordingly, the law imposes the inheritance tax on transfers intended to take effect in possession or enjoyment at or upon death. The techniques developed by the Philadelphia property lawyers were brought into the Federal tax area with the passage of the Federal Estate Tax Law in 1916. From the passage of the federal law on September 8, 1916 and down to 1935, well drafted property law trusts involving future interests, were successful in insulating large estates from the federal estate tax. Some of the celebrated taxpayer victories well known to us are: *Shukert v. Allen*,[1] *Reinecke v. Northern Trust Company*,[2] *May v. Heiner*,[3] and *Helvering v. St. Louis Union Trust Company*.[4] Each of these decisions, with the exception possibly of *Shukert v. Allen*, has been expressly overruled either by the United States Supreme Court or by Congress. The tide began to run against the taxpayers in 1940. You all recall the celebrated case of *Helvering v. Hallock* [5] which reversed *Helvering v. St. Louis Union Trust Company* and held that whenever

[1] 273 U. S. 545 (1927).
[2] 278 U. S. 339 (1929).
[3] 281 U. S. 238 (1930).
[4] 296 U. S. 39 (1935).
[5] 309 U. S. 106 (1940).