

The Write Stuff

Where There's a Will, There's a Right Way to Approach the Document

Gina Barry and Hyman Darling weigh in below.

By GEORGE O'BRIEN

Despite a mountain of evidence pointing to the need for a will, and some due diligence in crafting one, individuals across several generations haven't heeded that message. Estate-planning specialists say that while the basic tenets of will-writing haven't changed over the years, some societal changes — including a spiraling divorce rate and a preponderance of second marriages and second sets of children — as well as new financial planning products and legislative issues, make the drafting of a will anything but a do-it-yourself project.

Gina Barry calls them “\$50 wills.” The dollar amount actually varies, she explained, but the basic point she's making gets across — she hopes. That \$50 is about what some legal general practitioners might charge to draft a simple will — although there's really no such thing, said Barry, an estate-planning specialist with the Springfield-based firm Bacon & Wilson — and it's actually more than people will often pay for a so-called will ‘kit’ or a form they can find and download off the Internet.

But people will inevitably get

what they pay for, she said, adding that such wills and kits will probably (that's probably) spell out correctly to whom and how a will signer's assets will be passed down. But that doesn't mean they'll necessarily get there.

Barry, like others who spoke with *BusinessWest* on wills and their role in the broad subject of estate planning, understands that when she utters such comments, they invariably sound self-serving. But they are sincere, she says,

“Anybody can draft a will that says, ‘I want to leave everything to my kids,’ but whether it's actually going to carry out that person's wishes is another story. An estate-planning attorney or a specialist knows that there's more to this than taking what the person says they want and putting it into a document.”

As one simple example, Barry references a woman who wishes that the deposits in a CD be split evenly among three children. But if that CD is a joint account, with one of the children's names on it (for whatever reason), that child is under no real obligation to share what's in that account with the others.

“Anybody can draft a will that says, ‘I want to leave everything to my kids,’ but whether it's actually going to carry out that person's wishes is another story,” she said, adding that some general practitioners and most all kits would not dig deep enough to inquire about joint accounts. “An estate-planning attorney or a specialist knows that there's more to this than taking what the person says they want and putting it into a document; you have to look at the asset listing and determine how those assets would flow if the person were to pass away, given joint ownership, given beneficiary designation, and other matters.”

and intended to drive home a point — actually, several of them.

First, that it's important for everyone to have a will — although many still don't, believing that the government, a relative, or gravity will take assets to their intended places. And second, that this will must be well-thought-out, updated regularly, or at least at life-changing times in one's life — divorce, marriage, the arrival of a child — and that it be crafted to avoid those will contests that can cause hard feelings and sometimes tear a family apart.

Gary Shannon, an estate-planning specialist with the Springfield-based firm Doherty Wallace Pillsbury & Murphy, has handled many such will contests — some with more merit than others — and says some of them come about because the will-writer failed to eliminate all or most ambiguity from the document, which is the very essence of effective will-writing.

Shannon, who has been writing and updating wills for nearly 30 years, says the basic issues involved with these documents haven't changed in that time. But some societal and financial-planning trends, as well as seemingly constant changes to estate tax laws and exemptions spelled out within them, are making wills — and proper due diligence when it comes to crafting them — more important than ever.

The divorce rate has never been higher, which has led to large numbers of second marriages and often two sets of children and stepchildren to be considered, he explained. There's also the growing prevalence of retirement accounts, which can be left to many different constituencies, and in many ways.

And then, there's the estimated \$41 trillion expected to be passed down from the World War II generation to Baby Boomers and Gen X members, as well as a host of charities and other beneficiaries.

In this issue, *BusinessWest* examines the broad subject of wills, and what people of all ages need to be thinking about as they consider these documents to avoid problems and legal squabbles down the road.

Tests of Wills

Attorney Hyman Darling posts regularly for an estate-planning blog on the Bacon & Wilson Web site. The titles are sometimes clever — “Be wise on your demise: an estate planning check-up” (he credits his wife for that one) is an example — but always direct. “Prearrangements and funeral instructions: preventing misunderstandings and respecting your wishes”; “Beware giving

your money away as ‘joint accounts’; and “What is an ethical will and what does it do?” are three other offerings from earlier this year.

“If you die, the co-depositor, as a joint owner, will have your funds accessible without the need to pass them through your will or the probate process,” writes Darling in the joint accounts posting. “These funds may not have been intended to pass to that surviving joint owner, but rather, merely to be available to that joint owner in the unfortunate event that you become incapacitated ... open the account in your name alone and establish a durable power of attorney that will allow another person to attend to deposits and withdrawals in the event of your incapacitation.”

Collectively, Darling’s postings drive home the message that there are many issues to be considered when drafting a will or other estate-planning documents — from how one wants the funeral to be handled (this should also be spelled out in a health care proxy, because sometimes the will isn’t read until the funeral is over) to which assets go to whom — and how.

Thus, he strongly recommends that people, and especially those with families and assets, approach wills as they would medical check-ups: “they should be updated regularly and thoroughly,” he explained, adding that people should resist the many ways they can handle a will themselves. “People always think they can do their taxes and their will on their own. And they can — they just usually end up doing something wrong or leaving out something that can’t be left out.”

Jeffrey Roberts, managing partner of the Springfield-based firm Robinson Donovan and an estate-planning specialist, agreed. He told *BusinessWest* that there are some relatively simple wills to be written, especially those involving a married couple with all assets in both names. “When one dies, it all

goes to the other,” he explained. “You write that will once, it lasts longer than a set of tires, and it costs less.”

But these are certainly becoming the exception, not the rule, he said, and besides, no one knows who’s going to die first and what the circumstances of that passing will be.

Canadian forests have been cleared to provide the newsprint for all the articles — like this one — detailing why wills are important and why they should be done

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professionally, but, to the amazement of Roberts and others we spoke with, some still haven’t gotten the message.

Many members of the World War II and so-called ‘Silent’ generations that will pass down that \$41 trillion simply don’t want to talk about wills and other estate-planning matters until it’s often too late, said Roberts, adding that, while Boomers are generally more talkative, some haven’t backed up the talk with action.

And they need to, he explained, because there are tax implications and other considerations for most all types of assets that can be passed on via a will or outside it (retirement plans and life-insurance policies), and people need to understand all these issues before putting things down on paper.

“There is a difference between the estate-plan focus which says ‘this is what I own, and this is where I want it to go when I die,’” he explained, “and ‘these are the income-tax consequences of your intentions, and these are the federal estate-tax consequences, and these are the state estate-tax consequences.’”

“Depending on the amount of the asset, you can have all of those implications,” he contin-

ued, “and once the client understands them all, the estate-planning specialist will recommend a direction to go in — the one that brings the best tax results.”

Often, said Shannon, one of the most difficult issues for couples and individuals to deal with is the reality of two sets of children — and sometimes stepchildren — when deciding the division of assets.

“You have to get both spouses to decide how they’re going to treat those people,” he explained.

“Are they going to treat all those people equally? Maybe one spouse has considerably more assets than the other; would that individual want to treat stepchildren the same as natural child? That’s not the usual inclination.

“The other spouse might expect everyone to be treated equally, though,” he continued, “and that’s why this is very often a source of friction for couples, and that’s why a number of second marriages would benefit from a prenuptial agreement.”

By All Accounts

Shannon told *BusinessWest* that many of the problems he has seen stemming from wills arise when an individual tries the do-it-yourself route, with a kit that uses language that may or may not be appropriate in all 50 states.

Barry agreed, noting, for example, that the kits and \$50 wills often forget something called a Residuary Clause, which, as the name implies, concerns the ‘residue’ of one’s estate.

“Normally, a will says, ‘I leave my diamond ring to my daughter, my car to my son, and the property in Florida to my son and daughter together, and I leave the remainder of my estate to...’” she explained, noting that often, that

last ‘and’ is missing from the equation. “You end up having some assets addressed in the will, and the rest passing by intestacy, which, if you’re trying to make a will, is exactly what you didn’t want to have happen.”

Omissions of this nature often lead to a decedent’s wishes not being fully carried out, she continued. “Even though they think they’ve covered everything, they haven’t, and that defeats the purpose of having a will.”

Shannon told *BusinessWest* that while the words ‘fair’ and ‘equal’ are in the dictionary, they have no real place in will contests, because will-writers don’t have to be fair (in the eyes of the survivors) with regard to their assets, nor do they have to distribute everything equally.

But, in the interest of fairness, and perhaps to stem off a will contest, the will-writer should spell out why assets are not being awarded evenly, said Shannon, or even tell the individuals in question why before they die.

“Everyone who comes in to see me that wants to contest a will assumes that because they’ve been omitted or not treated equally, that is the basis to oppose a will,” he said. “So I have to spend a lot of time with them and explain that this is simply not the case. Absent some statutory requirements about not omitting a spouse, people can leave their estate to whomever they want, and in whatever amounts they want.”

Individuals can omit their children, he continued, but only if they make it clear in the will that it’s intentional and not the result of a mistake.

Legally, in Massachusetts, there are only four bases for contesting a will, Shannon explained. The first is what’s known as a ‘lack of testamentary capacity,’ meaning the will-writer (also known as a testator or testatrix) was mentally incompetent (not of sound mind and body) when crafting a will. This is expensive and very difficult to prove.

And it’s only slightly less diffi-

cult to prove the second basis for a contest — what's known as 'undue influence,' said Barry. This can be established only when it can be proven that the person who wrote the will was susceptible to undue influence, that the person who exerted this undue influence had the opportunity to do so, and that the person exerting the influence had enough control over the will-signer to cause the will to be drafted in accordance with provisions that were not intended. Proving all this is usually a tough assignment, she said.

The final two grounds — which Shannon says he's never

seen in his 30 years of practicing law — are 'fraud,' in which a signature on a will was obtained improperly, for example, and something called 'improper execution,' perhaps having one witness instead of the required two.

There will always be will contests, again because of that misconception that because something isn't fair it isn't legal, said Shannon, but some can be avoided with due diligence up front on the part of the will-writer.

Barry has another bit of advice for will-signers — don't change the document too often.

"People are entitled to do whatever they want," she

explained, "but I advise against changing a will frequently. I explain to them that if they continue to do that, it may call into question their competency, because they obviously can't make a decision about what's appropriate with regard to their estate."

Passing Thoughts

As she talked about wills and will contests, Barry stated an obvious truth — that greed is a powerful force in the universe.

"I hear it from people all the time ... they'll say, 'I don't want my mother's and father's money,'" she said. "But when

push comes to shove, it's all about money."

And because it's all about money — and often lots of it, given what members of several generations have been able to accumulate in their lifetimes — individuals have to make sure their wishes are carried out properly and that their assets go where and how they intend them to.

And that's usually a tall order for a \$50 will.❖

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