Wills, Trusts and Planned Property Ownership in Contemplation of Death

Earl C. Crockett
(mid-1970s)

What a dismal, depressing topic!

I want to make two preliminary general statements:

1. I am no authority on this subject. To be an authority one should be an attorney specialized in the field with considerable training and experience, also an investment authority, a tax expert, and an accountant.

2. My excuse however for making this report:

    - My background in economics including investments, finance and taxation.
    - My recent interest in personal finance revising Della's and my wills and creating living trusts for each of us.
    - Conflict between two attorneys.
        i. Joint ownership
        ii. Separate ownership

The subject of wills, death taxes and probating can be very depressing – did you all bring plenty of handkerchiefs or Kleenex for wiping away tears?

Perhaps one or two tall tales or puns on the dismal subject would be appropriate in order to ease into the subject gradually.

For example there was a classified ad in a New England newspaper as follows:
"For sale: handsome second hand tombstone, as good as new, outstanding bargain for any family named Perkins."

And does this come close to home?
"I set out in life" reminisced the old man sadly "to find the pot of gold at the end of the rainbow. Now I'm seventy and all I've found is the pot – pot belly."

Here is another:
"There was a man playing golf who interrupted a match deciding putt on the 18th hole to stand respectfully, hat in hand, while a funeral procession rumbled by on the road behind him. Then he sank his putt. "Congratulations," said his opponent grudgingly. It took iron nerve not to let that funeral procession fluster you into missing your putt." "It wasn't easy" admitted the man. "On Saturday we would have been married 25 years!"

Or how is this one?
The patient shook his head gingerly and slowly regained consciousness. "Well

Doc" he said weakly to the face bending over him "was the operation a success?" "Sorry son" was the gentle answer, but I'm St. Peter."

Seriously now:

After careful reflection need it be sadness to make a will to decide distribution of all our earthly precious possessions that we have struggled to get and to save?

To give to our children, grandchildren, brothers or sisters, other loved ones, and even B.Y.U. should give much satisfaction and pleasure.

From Who Will Get Your Money by John Barnes, 1972

Everyone should have a will. If you do not have one, the law will dictate who gets your assets. No one really wants the state in which he is domiciled to determine who are his heirs and in what percentage they inherit, for this is what happens when you die "intestate" or without a legal will. Most people prefer to leave their estates to relatives and friends of their own choosing. Why then do people die intestate? [ECC notes that one survey indicated about 45% of adults in middle class have no wills. Too often, especially wives don't have wills.]

There are several reasons, but the main one seems to be inertia; they don't intend to die without having drawn a will, they just never get around to it. Most people do not like to make an important decision, particularly one that can easily be put off because there is no apparent reason for doing it now. No one plans on dying. Young people under thirty think they are immortal; older people know they are going to die someday and have philosophically learned to accept this fact, but this unhappy event is always at least ten years away, so there is plenty of time. As Bernard Baruch the famous financier and adviser to presidents, once said; "Old people are those who are fifteen years older than I am." And this was true with him even in his eighties. This makes for a healthy mental attitude toward the golden years, but it is not conductive to the drawing of a will. Another reason people die intestate is because they are superstitious. They feel that, if they have a will drawn, they will die soon afterward. Mr. Marks felt this way, and as a consequence he left no will. He died in Minnesota, and in that state, when there is no will, the widow receives one third and the children two thirds. As a result, his two sons could have claimed two thirds of the estate and left their mother in difficult financial circumstances. Instead Mr. Marks' two sons signed over everything to their mother, because they knew that was the way their father had wanted it.

Still another reason for not leaving a will is the argument by husband and wife that they have all of their assets in joint tenancy, and therefore the survivor of the two will automatically inherit from the other. This is true. When the first spouse dies, no will is necessary; but what is going to happen when the second spouse dies? Theoretically, after the first death the survivor can then draw a will. But if a

married couple didn't bother when they were both alive, the survivor isn't liable to get around to drawing a will later. It is much better if a couple makes the decision on the eventual distribution of their estate while they are both living and have the advantage of joint decision, rather than have the remaining spouse make the decision alone. [ECC notes that their Boulder friends, the Alexanders, died together.]

Everyone, therefore, should have a will. And it should be drawn by a competent attorney, for then it will hold up in probate court and be declared legal.
Once the attorney has drawn your will and sent you a copy, you should read it very carefully before you sign it, to be sure that there has been a complete meeting of the minds between you and your lawyer. Does he understand exactly what you are attempting to accomplish by this testamentary disposition of your living estate to your heirs? With a small estate and a simple will this should be no problem. A two-page document that says that you leave everything to your beloved spouse, both real and personal, and wherever situated; and if she should predecease you, then you leave your estate to your children share-and-share alike, certainly should not be misinterpreted between you and your attorney. In larger estates, however, particularly those involving trust, the legal terminology can be quite technical, and therefore clear understanding as to what is being accomplished by this document is essential.

Just a few specifics regarding wills:

- Should the children be named? Yes, special problems when adoptions, remarriages, etc.
- Executor must be named or administrator will be selected by court.
- Relative – discussion of advantages and disadvantages.
- The Attorney? Probably not, unless he is also a relative or close friend.

Usually the attorney who drew the will is chosen as the executor's legal representative. As a matter of fact it is almost automatic in most cases because the attorney has retained the original copy of the will (which is the only copy that is valid), and he has called the meeting of the heirs and the executor in his law office. The average executor, a family member, feels that there is no alternative but to appoint the lawyer who drew the will. On the contrary, the executor is in complete charge of the estate and may choose any attorney whom he sees fit.

A six-month clause should be included – should wife survive me but die within 6 months after I die it is presumed that she preceded me and avoids double taxation.

If you leave uneven share to your children (your brothers and sisters) have a clause in the will explaining why – avoid ill feelings.

Personal belongings in the home – jewelry, dishes, furniture, clothing, books, antiques, etc. should be handled in the good old fashioned method:

1. Give away before death
2. Write names on underside of each item

To extent possible have all investments and property located in your state.

Will should provide for some liquidity – immediate use of funds by executor to pay

1. Funeral expenses
2. Doctor and hospital bills
3. Administration costs
4. Cash bequests in will, if any
5. Federal taxes
6. State inheritance taxes
7. Debts falling due

Every day in this vast country of ours a great deal of property and future family security are sacrificed when property owners die. Certainly after a lifetime of saving and self-denial this was not their intention. What then causes this to happen? These unhappy results take place because those who have built a living estate know nothing, or very little, of the complex problems that are created when they transfer their property to their heirs. The property owner mistakenly feels that his heirs will simply take over where he has left off, and that somehow his assets will be left to them intact. Nothing could be further from the truth!

When serious inroads are made into the living estate, and the heirs are bewildered by what is happening to them they do not have access to what they rightfully feel is theirs for a period of many months or several years, whose fault is it? Usually it is no one's fault, and certainly it was not he fault of the property owner. He had been careful and had made the right decisions during his lifetime, but he had never been through probate and he had never paid his own inheritance taxes. Therefore he was not aware of the problems created by death and of the advance decisions that should have been made if he were to reduce to a minimum the delay, the frustration, the taxes, and the cost involved. And too often, because of this, the Internal Revenue Service is too big an heir at the conference table when the will is read; too often years elapse before the estate can be enjoyed by its rightful owners, its legal heirs; too often a lifetime of bitterness is the legacy, or it is riches to rags in a few short years. The way to avoid all of this is for the property owner to learn about the problems beforehand and make the decision that will pass his death estate on to his heirs with the least trouble and expense.

Probate is the legal and bureaucratic process that takes place after a man dies, enabling him to pass on his property to his legal heirs.
The delay during probate occurs because your assets come under the jurisdiction of the probate court. Your will has to be found and read, to determine who is your executor and who you named as your heirs. But as we have said,

they do not immediately inherit. How does anyone know who are your legal heirs? "But I named them in my will!" you protest. But the law states that no one but a judge can say who are your heirs, that you didn't leave someone out, and that all your just debts have been paid and your creditors satisfied. And above all that your taxes have been paid. And here we are not talking about income taxes, although you may still owe some of those, but about death taxes – the federal estate tax and inheritance tax that most states impose.
Who then manages the assets? Up to the time of death the estate builder was managing his own affairs. He was in legal possession of his property, received the gross income, paid the bills and the taxes, and tended to the myriad details necessary to the proper administration of his living estate. Now who does? The executor named in his will takes over, and if no will has been left, the court names an administrator. It is the executor's job to choose the probate attorney, take an inventory of all the assets, pay all just claims, establish a separate trustee account to receive all the income and pay all the expenses, hire an accountant to keep track of all this, arrange for the estate to be appraised, file and pay the federal estate tax and the state inheritance tax, make a final accounting of his stewardship to the heirs, get a final decree of distribution from the court, a release from the heirs of their distributive share, and change the ownership from the deceased to the new owners.

Even a small estate, as little as $10,000, can benefit from knowing the principles of estate planning. The great majority of the people are not upset by the cost of probate so much as they are upset by the long delay. There is a feeling of utter frustration by the heirs, and there is nothing they can do about it. It is sometimes nobody's fault that probate takes so long, though admittedly many executors and probate attorneys are exasperatingly slow. The reasons are as follows:

1. Court calendars are crowded.
2. Bureaucrats are busy and tied down by red tape.
3. Appraisal of the estate and review of death tax returns take time.
4. The attorney has many clients to consider.
5. In larger estates the executor has to wait for the auditor to prepare the final accounting.
6. In many states the executor is personally liable for any premature distribution to the heirs.
7. If securities are involved, change of ownership cannot take place until the judge orders a final decree of distribution.

Disadvantages of Probate:

- Cost – minimum in most states is 2% to lawyer and 2% to executor
- Sometimes amounts to 1/3 or ½ of estate – reasons include property in different state or country, part of property a business and dispute among heirs or alleged heirs.
- Various claims from creditors.
- Poor record keeping by donor.
- Questionable titles to property – land.

- Disputes regarding taxes – gift taxes, inheritance taxes, estate taxes.
- Planned delays by unscrupulous lawyers.
- No sale or purchase or change of investments without court permission or distribution to heirs.
- Anyone can get information – terms of will and listing of property value of estate, etc.

(My daughter-in-law, Ann, received a modest inheritance to be given to her when she became 30 years of age. Due to probate, part of the property in a business, dispute between the children and a step-mother, the banks and the executor, the inheritance instead of growing through the years was gone before she was thirty.)

So how does one avoid probate?

1. Joint ownership – providing both don't go together
2. Give property away before death
3. Living Trust

Trusts

In a trust title passes to a trustee who then administers the property (land or other real estate, stocks, bonds, other investments, even businesses) according to the terms of the trust for the benefit of someone else – perhaps former owners as well as heirs.

Living Trust

Duties of trustee:

1. Protect the property
2. Carry out the terms of the trust
3. Make fair and impartial decisions for the income beneficiaries and heirs

Possible reasons for creating Living Trusts

1. To save taxes especially if total value exceeds $120,000 or $60,000 if both go at once.
2. To protect beneficiaries, i.e., wife or children not experienced in running a business, making investments.
3. Avoid having fraudulent investment speculators camping on the doorstep urging the buying of worthless land or get rich quick schemes that fail.
4. To retain a business interest or a valuable piece of real estate intact.
5. To avoid probate
6. To provide personal security to the grantor.

7. Assures privacy in distribution of assets.
8. Can be modified or cancelled at any time by grantor.

When properly arranged probate can be avoided and taxes reduced. Much has been said over the years regarding Joint Ownership vs. Separate Ownership. Present thinking is a Living Trust for all perperty.

Make a Property inventory and keep up to date

List assets and liabilities

Property – location, cost
Stocks and Bonds
Other investments
Personal property
Savings Accounts
Life insurance
Debts – installment payments

<u>Cheaper to Live</u>
A live man pays $1.00 for a shave – dead one pays $10.00
A woolen overcoat cost $100 – a wooden one costs $1000
A taxi to the theatre is $2.00 – to the cemetery is $20.00
Stay alive and save your money.

I was the executor of my parents trust and everything was spelled out. Mom and Dad never made much money – schoolteachers never have been blessed with much monetary return and BYU was especially light on financial enrichment. Yet, the estate at the time Mom died was twenty times their highest annual salary. (How many of us will be able to realize that?) The estate was divided evenly between the 3 children and Bob's heirs. It paid for a substantial amount of the education of the grandchildren. They would be most pleased with the investment and the accomplishment of you all!

Mom and Dad not only followed the above advice exactly they refined it further in compensating for children and grandchildren that didn't live near by. The estate paid for all transportation of possessions that were distributed. Most everything was marked and great thought had gone into who should receive each item, e.g., who would want and use a grand piano, the furniture, the silver, etc.

The house took awhile to sell and the housing market collapsed right after the sale and I was concerned that the buyer would just walk from her commitment – she did miss some payments, but eventually made them up. Bob in his pre-law days became concerned that I was perhaps an unfit executor and freely gave advice. All in all the settling of the estate was painless and most of the property was distributed immediately due to good preplanning by Dad and Mom.

Not included in the talk, perhaps Mom and Dad worked it out afterwards, was their "living will." They had "Do Not Resuscitate" orders and outlined to the children exactly what they wanted regarding patient care. Dad died in his sleep at home. Mom died, also at home, after requesting to be released from the hospital, after a long and trying illness.

To the end both put the needs of their heirs first. We were more fortunate than most heirs!

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Bruce Brereton got me started on the project of finding interesting items or letters from his Grandfather, Earl C. Crockett, to be including in a book he plans to write about him. Bruce has started cataloging Dad's folders and boxes at BYU and ask Meg and me to suggest an outline. I am ducking the outline for now, but thought you might find this item interesting. Dad gave this as a talk to a monthly dinner and discussion group in Provo in the mid 70's. Della and Earl were invited shortly after arriving in Provo from Boulder to join a group of couples from the town and university that had been meeting for 25 years. They were the first and only "outsiders" to ever be invited to join. The group had about 20 couples. I believe there is only one living member now.

I think you will find this article interesting on several counts:

- Dad didn't have the best stories, but he told them so well
- He was early in the use of Living Trusts
- The message of preparation is still valid – the lawyers in the group perhaps will find the changes that have taken place since then interesting
- The mid-70s still used only the male pronoun
- Dad followed his own advice – I will report more on that at the end

-EDC