Death and Probate

Although death is a ***certainty*** and not a ***possibility***, it is important to plan for the contingency of a premature death. If you are like most people, death's certainty does not spur you quickly into making plans for its occurrence. Despite the unpleasantness of its inescapable reality, everyone needs to provide for the transfer of his or her property upon death. People who support families need to plan for the replacement or continuation of such support.

As stated in the early paragraphs above, a decedent's *individually owned* property (called the Estate) is distributed to persons named in a Last Will and Testament (the "Will"); or, if there is no Will, then to related persons according to the "statute of descent and distribution." A Will is a set of instructions to a person called the "**Executor**" of the estate, who is nominated in the Will and is responsible for paying the debts of the estate and distributing the property that was once owned by the decedent to those beneficiaries named in the Will.

If there is no Will, the person responsible for paying debts and making distributions is called the "**Administrator**" of the estate, who is appointed by the court to pay the debts of the estate and distribute the estate's property to the heirs identified in the statute of descent and distribution. Although the court generally prefers a "next-of-kin" as administrator, any "interested party" is eligible to serve, including creditors of the estate. After the debts of the estate are satisfied, the remaining property is distributed, according to statute, first to the surviving spouse if the decedent had children by a prior marriage. If the decedent had children by a prior marriage, then his current surviving spouse would receive one-third of his estate, with two-thirds to the decedent's children. The statute provides for distribution to others in the event that there is no spouse and no children. A person dying without a Will has no say in the distribution of his or her property. It is distributed by default to the classes of beneficiaries as provided by statute.

In most cases, a Will is the foundation of a good estate plan. The Will is a very important document and care should be taken to ensure that it is both properly written and executed with all the formality required by law. Wills are too often drafted by lawyers who use primarily "boilerplate" language, or who give little consideration to the legal effects of the language used. A poorly drafted Will may, on the one hand, leave out provisions that ultimately cost the beneficiaries thousands of dollars in needless expenses. On the other hand, the drafting attorney may be too wordy, or use language not decipherable to the layman, or include provisions that needlessly expose a majority of the decedent's assets to probate and the consequential costs of probate; or worse, expose the Will to lawsuits to determine its validity or interpretation.

In some states, probate is expensive and overly cumbersome, even for moderate or small estates. While Virginia's system of probate is not overly expensive, it remains yet another bureaucratic labyrinth which, if not properly planned for, can be exceedingly and unnecessarily burdensome – but it may actually be avoided altogether (which is preferred). The probate process begins with the Executor presenting the Will for probate to the Clerk of the Circuit Court in the city or county in which the decedent owned real estate, or where the decedent resided if he did not own real estate. The Executor "qualifies" as the fiduciary of the estate and the Will is examined and recorded as a public record. The Executor is required to give bond to the extent of up to twice the value of the estate. Surety (an insurance policy) on the Executor's bond is required unless waived by the Will or unless one of the limited statutory exceptions applies. The Executor is required, as well, to provide a preliminary listing of the assets of the estate and a list of heirs-at-law, who have to be notified that the Will is being probated. Within four months of qualification, the Executor will have to file an Inventory of the Estate to the Court's Commissioner of Accounts, who oversees the distribution of the estate, and will thereafter have to account for the decedent's assets and the distribution and disbursement of such assets. Once the debts of the estate have been paid and the assets distributed, the administration of the estate is finalized and closed, a process that may take years depending on the complications that arise.

Probate is overly cumbersome due to the myriad of required filings, and it is fully public in that the Will, the inventory and all the accountings become a matter of public record and will be available to anyone who cares to visit the Court's records room to view these documents. Probate is absolutely *required* if the decedent has property left in his name that cannot be transferred by any other means. The Administrator or Executor, as the case may be, is empowered to take possession and assume control over such property to sell or distribute it as the law requires.

Avoiding probate is possible through the effective use of a **Living Trust**, which is a relationship between at least three parties, occurring when a **grantor** gives property to a **trustee** for the benefit of a **beneficiary** or beneficiaries. The grantor, trustee and beneficiary may be the same individual. When property is transferred to the trustee to hold in trust, it is no longer the property of the grantor, thereby eliminating the need for probate. When the grantor dies or becomes incapacitated, the directions to the trustee in the trust instrument provides for the continuation of the management of the trust property. If the grantor is serving as trustee, a substitute trustee steps into his shoes to manage the property so that the trust continues unhindered by the death or disability of the grantor. So long as **all** property is owned by the trust, or is subject to survivorship beneficiary designation, there is no need for probate.