

Lynne N. Clark, P.C.

A Virginia Professional Corporation
Attorney and Counselor at Law

7003 Backlick Court, #100
Springfield, VA 22151
Admitted in Virginia and D.C.

Tel 703-256-7900
FAX 703-256-7902
email: lynne@lynnenclark.com

REPORT OF COUNSEL JULY 2014

CAN I MANAGE MY ESTATE WITH A WILL SUBSTITUTE ALONE?

When asked whether someone needs a will or a trust, or if their estate can be handled with appropriate beneficiary designations or pay-on-death designations, my reply is “maybe.” This type of estate plan is called a Will Substitute Estate Plan because the decedent’s property is distributed by beneficiary designation or by transfer-on-death designation instead of a will or trust document. It appeals to the person who thinks that he/she has a very modest estate and no need for a will or trust. This month we will look at situations in which this type of estate plan does not cover all the decedent’s assets and the potential for unintended results.

Forgotten Assets, Recently Acquired Assets, Expired Beneficiary Designations and Cascading Estates

Even though you designate beneficiaries on your retirement accounts and life insurance policies or, name persons to take your assets by a transfer-on-death designation, you can still find that some of your estate is subject to the intestate succession statute in Virginia. How could this come to pass you ask? The most common ways in which this occurs are forgotten assets, recently acquired assets, expired beneficiary designations and cascading estates.

It is fairly common for people to forget or overlook an asset they own. If an asset is forgotten or overlooked, it is likely that the owner also failed to name a beneficiary or designate a person or charity to take the asset with a transfer-on-death designation. The result

is the asset passes by the decedent’s written estate plan or the intestate succession statute.

The same result can occur when one acquires an asset and there is not enough time between the acquisition of the asset and death for the owner to name a beneficiary or transfer-on-death designation. Perhaps you’re the winner of the next Mega Millions Jackpot or Publisher’s Clearing House arrives on your door step with balloons and a big check. As the big winner, you are thinking about spending your millions and not about naming transfer-on-death beneficiaries. The failure to include a recently acquired asset in your Will Substitute Estate Plan presents another opportunity for an unintended result.

With an estate plan built on beneficiary designations and transfer-on-death designations, a third way for the plan to fail is for the beneficiary of the asset to predecease the owner of the asset. When the owner of the asset is too old or too sick to name a new beneficiary this presents another opportunity for an unintended distribution of the asset.

A fourth way in a Will Substitute Estate Plan can fail is through the process of a cascading estate. In this scenario, you are the beneficiary of the estate of another person. You live long enough to inherit, but you unfortunately die before the first estate can distribute assets to you. Now what? The assets that cascade from another person’s estate into your estate will be governed either by your estate planning

documents or by the Virginia intestate succession statute if you have no plan.

The Uncertainty of Intestacy

When a Will Substitute Estate Plan fails to transfer all of a decedent's assets, and the decedent has no valid will or trust, the Commonwealth of Virginia will distribute these assets through the intestate succession statute set out in the Virginia Code at § 64.2-200.

It is usually easy to tell whether a decedent had a spouse and who the other family members are. The greatest opportunity for an unintended result is in the determination of the decedent's children. The Virginia Code and case law help to define who is a child of the decedent for the purpose of applying the intestate succession statute and the distribution of the decedent's assets.

Your Child Defined by Case Law and the Code of in Virginia

The Virginia Code and case law both help define "child" for the purpose of inheritance and intestate succession.

Children are presumed legitimate when born into a marriage [*Gibson v Gibson*, 207 Va. 821 at 192 (1967)]

Children born out of wedlock are legitimated by the marriage of their parents [VA Code §64.2-1023(a)]

An adopted child is the child of the adopting parent(s) and not the biological parents, except that adoption of a child by the spouse of a biological parent [i.e., step-parent adoption] does not affect the child's relationship with the remaining biological parent.

A child born out of wedlock is a child of the mother. [VA Code §20-49.1(A), 64.2-102(3)]

A child conceived before the death of a parent but born after the parent's death or a child born

after a parent's death as a result of assisted conception pursuant to §20-156 *et seq.* is a child of the parent for purposes of Title 64.2.

A child born out of wedlock is also the child of the father if paternity is established by clear and convincing evidence, including scientifically reliable genetic testing, as set forth in § 64.2-103. However, paternity established in this manner is ineffective to qualify the father or his kindred from inheriting from or through the child unless the father has openly treated the child as his and has not refused to support the child.

No claim of succession based upon the relationship between a child born out of wedlock and a deceased parent of such children shall be recognized unless, within one year of the date of death of such parent, an affidavit by such children or someone acting for the child alleging such parenthood has been filed in the clerk's office of the circuit court of the jurisdiction where property affected by such claim is located and an action seeking adjudication of parenthood is filed in an appropriate circuit court.

The Benefits of a Well-Drafted Will or Revocable Living Trust

A well-drafted will or trust that is also properly signed provides peace of mind. In your document, you can name all of your children including any illegitimate children of which you are aware. You have the opportunity to decide which of your children - legitimate and illegitimate - will inherit from you.

If you have put off planning your estate because you are uncertain how to proceed, please call to schedule an appointment. I'd be pleased to speak with you.