WILLS AND TRUSTS

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I. INTRODUCTION

The purpose of this paper is twofold. The first purpose is to give a very basic overview of the roles of wills and trusts in estate planning. The second purpose is to explain the value an estate planning lawyer brings over the Internet. First, though, there are a number of common misconceptions in estate planning. Dispelling those misconceptions is a necessity for both the person providing estate planning advice and the client receiving estate planning advice.

The first misconception is that probate is bad and must be avoided at all costs. In the twenty (20) states that have adopted some version of the Uniform Probate Code ("UPC"), probate is not necessarily a long, drawn out process that eats up the estate's assets. [See the Website for the Uniform Law Commission for the list of the states that have adopted the Uniform Probate Code]. For instance, in New Mexico, a state that has adopted the UPC, if a decedent's estate will not be subject to estate taxes (i.e., if the value of the decedent's estate is less than $5,000,000 in 2011 or 2012), and if there are sufficient assets to pay the decedent's outstanding bills and if all the claims for payment that are filed against the estate are valid and allowed, it is possible for the estate to be open and administered, assets distributed to the heirs or beneficiaries, and closed in under six (6) months. Probate, however, can be a long costly process if the beneficiaries or the heirs of the estate contest all or a part of a decedent's estate plan. Proper understanding, planning, and drafting, however, can go a long way to preventing such fights.

The second misconception is that if you have a will your estate is not subject to probate. As a general rule, a will governs the disposition of one's assets that are not otherwise effectively disposed of by operation of law, such as property held with another as a joint tenant with rights of survivorship, or pursuant to a beneficiary designation, such as life insurance proceeds. Thus, the property that is actually disposed of pursuant to the terms of a will is subject to probate.

The third misconception is that if a person has a revocable trust that person does not need to have a will. While property that is properly titled in the name of a trust should be distributed in accordance with the provisions of the trust agreement, the fact that the grantor of a trust has established a trust does not necessarily mean that all property in which the grantor has an interest has been transferred to the grantor's trust. If a grantor has a trust but no will, the effect is that any property in which the grantor has an interest but which has not been transferred to the trust during the grantor's lifetime or that is not to be transferred to the grantor's trust by way of beneficiary designation following the grantor's death will pass by the laws of intestacy following the grantor's death. The passing of property by the laws of testacy may not provide the same result as the disposition provided under the grantor's trust. Thus, as a practical matter, whenever a grantor establishes a trust, the grantor should also execute a will that provides that any property in which the grantor has an interest at the time of death and which has not otherwise been conveyed to the trust, or will not otherwise pass by operation of law, shall be poured over to the grantor's revocable trust.

A fourth misconception is that if a person has a revocable trust that person's estate will be subject to less estate taxes than if the person did not have a revocable trust. A revocable trust does not result in a reduction in estate taxes. In fact, § 2038 of the Internal Revenue Code ("IRC") provides that property that a decedent owned in a revocable trust is included in the decedent's gross estate for purposes of calculating the decedent's estate tax liability.

II. PRINCIPLES IN WILL DRAFTING

A. Why the Internet May Not Provide the Best Option for Will Forms

As mentioned above, the Internet offers the consumer the ability to draft his or her own will for low or no cost. Two initial thoughts on this, though, are: (i) you get what you pay for; and (ii) would you consider performing a medical operation on yourself because you were able to read the how to instructions on the Internet.

In preparing this paper, I went to the Internet and typed in "will forms free." The first two results listed in response to my inquiry were (i) Legal Last Will Forms –

www.lawdepot.com...Online legal form creates Last Will and Testament quickly and easily; and (ii) Sample Will Forms Online www.legalzoom.com Create a Last Will in 3 Easy Steps.

As to lawdepot.com, the webpage provided that I could complete my Last Will in 3 easy steps: Step One – answer questions; Step Two – preview and print your completed document; and Step Three – sign and execute your document. After completing the questions, I printed the preview of the will and all I received was a review of my answers. So, I printed my answers which included a printout of "Additional Help." After reading the additional help, I discovered that I had to purchase a license in order to get the will document. With that being said, in just answering the questions and reviewing the additional help, I noticed the following key items or information that was missing: (i) no explanation that the will would only dispose of items that do not pass by operation of law or beneficiary designation; (ii) no option to create a trust for someone other than my minor children; (iii) no option for co-trustees; (iv) no option to name a conservator in addition to a guardian for my children; (v) no option concerning the apportionment of estate taxes; (vi) no option for the disposition of tangible personal property by creating a list referenced in the will; (vii) no option for a survivorship requirement; and (viii) no estate tax planning options.

Next, I went to legalzoom.com. The sign in page for creating a will on legalzoom.com provided as follows: "Finish your Last Will and Testament in less than 15 minutes." The webpage then stated that most people could complete the questionnaire in less than 15 minutes. However, I would have to pay to actually receive the will generated from my answers. I did not review the questions on this website, however, I am dubious that in 15 minutes I would be provided with information concerning any of the following: (i) apportionment of estate taxes; (ii) whether my estate would be subject to estate taxes; (iii) that my will would only govern the disposition of assets not disposed of by operation of law or beneficiary designation; or (iv) the opportunity to create trusts that provided for different distributions if my beneficiaries had different needs or different circumstances, to name just a few.

With that being said, fill in the blank forms may be appropriate in quite a number of circumstances. However, the only case I probated with a fill in the blank form would provide yet another example of why do it yourself wills are not necessarily a good idea. The testator had seven (7) children. The testator's intent was that his seven (7) children should share equally in his estate. The particular will form, however, only provided lines for the names of six (6) beneficiaries. The testator listed the names of his children by age. As there was no seventh (7^{th}) line, the youngest child was not named as a beneficiary of his father's estate. Luckily, for the youngest child's sake, the six (6) oldest children agreed that dad wanted all the children to share equally but that if you only gave dad six (6) lines to complete that would be all that he would complete. All seven (7) children entered into a settlement agreement to divide the estate seven (7) ways. However, what the dad may have saved on the front end could have cost the beneficiaries on the back end.

B. Pertinent Will Clauses and Discussion Topics

1. <u>What Property Will Be Distributed Pursuant to A Will</u>?

As mentioned above, a will may not govern the disposition of all a testator's assets. A will only governs the disposition of assets that do not pass by operation of law or by beneficiary designation. For instance, property held as joint tenants with rights of survivorship or property that has a beneficiary designation will pass by operation of law to the surviving joint owner or pursuant to the beneficiary designation. This is an important concept for estate planning clients to understand. For instance, assume a client only has two assets: her home which is titled in her name alone that has a fair market value of $200,000; and a joint bank with full rights of survivorship that is in her name and the name of her oldest child and has a balance of $200,000. The client's social security checks are deposited into her joint bank account and the client's social security covers all her expenses. The client's desire is that her estate be divided equally among her four (4) children following her death. In the client's mind that means that each child will receive cash and an interest in her home, and each child's inheritance then would be $100,000. With this in mind the client thinks that if her will says I leave all my property in equal shares to my children each child will receive cash and property equal to $100,000. If the will is drafted the way the client intends, the effect will be that the oldest child, who is the surviving joint owner of the bank account, will receive $200,000 plus a ¼ interest in the house. Thus, the oldest child's inheritance will be $250,000. Each of the other children will receive a ¼ interest in the house, and so, the other children will each have an inheritance of $50,000. In other words, the oldest child will receive 62.5% of the client's estate and each of the remaining children will receive 12.5% of the client's estate.

Thus, if the client wants each child to receive an equal share of her assets, the client would have to remove the oldest child from the joint bank account. In a vast majority of instances, clients will add a joint owner to a bank account so that there will be someone to pay the client's bills in the event the client is incapacitated. The client's goal of providing for bill paying during incapacity and leaving an estate in equal shares to all the client's children can be accomplished by the client executing a power of attorney that appoints an agent to act on the client's behalf. In the above example, if the client named the oldest child as the client's agent and not as joint owner of the bank account, the effect would be that the oldest child could pay the client's bills in the event the client became incapacitated. However, in the event of death, the bank account would pass under the terms of the will. In this case, each child would receive cash and property totaling $100,000. In other words, the client's intent would be accomplished. Each child would receive twenty-five percent (25%) of the client's estate.

2. <u>The Minimum Will Clauses</u>

As the purpose of a will is to dispose of the testator's assets following the testator's death, the will at an absolute minimum must satisfy three requirements: (i) it must satisfy the minimum requirements under state law; (ii) it must state the testator's name; and (iii) it must provide directions as to who is to receive the testator's property.

a. <u>Minimum Requirements of State Law</u>

As mentioned above, New Mexico is one of twenty (20) states that has adopted the UPC. All citations to the Probate Code will be to the New Mexico Uniform Probate Code. NMSA 1978, § 45-2-502 provides as follows:

> Except as provided in Sections 45-2-506 and 45-2-513 NMSA 1978, a will must be:
>
> A. in writing;
>
> B. signed by the testator or the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and
>
> C. signed by at least two individuals, each of whom signed in the presence of the testator and of each other after each witnessed the signing of the will as described in Subsection B of this section.

Understanding NMSA 1978, § 45-2-502 is critical. If the will is not properly executed, the will is not valid. The effect of an invalid will is generally that the decedent's estate will be administered as if the decedent did not have a will. Furthermore, if a disgruntled heir wants to challenge the validity of a will, the easiest way to do so is to challenge the execution. Again, as a practical matter, what an estate planning attorney offers over the Internet is the ability to oversee the proper execution of the will and insure that the will will be admitted to probate by the court. As a practical matter, whenever I am contacted about representing an heir who wants to challenge a will, my first question is who were the witnesses. If one of the witnesses was a reputable attorney, the chances of succeeding in a will contest are going to be harder.

In conjunction with having the will executed in accordance with NMSA 1978 § 45-2-502, the will should also be executed as a self-proved will. The advantage of a self-proved will is that a self proved will is presumed to have been properly executed. Thus, a person contesting the validity of a self proved will has the burden of proving that there was fraud or forgery. [See NMSA 1978 § 45-3-406 B]. A will is executed as a self-proved will if, in addition to complying with the requirements of NMSA 1978 § 45-2-502, the will is signed by the testator and two witnesses in the presence of an officer authorized to administer oaths, generally a notary public, and the will contains the following attestations:

"I, ____________, the testator, sign my name to this instrument this _____day of _______, 20__, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind and under no constraint or undue influence.

____
Testator

We,____________________, ____________________, the witnesses, sign our names to this instrument, and being first duly sworn, do hereby declare to the undersigned authority that the testator signs and executes this instrument as his will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence of the testator, and in the presence of each other hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind and under no constraint or undue influence.

____
Witness

____
Witness

State of________________________)
)ss.
County of______________________)

Subscribed, sworn to and acknowledged before me by ______________, the testator, and subscribed and sworn to before me by _______________and_______________, witnesses, this __________ day of _____________________, 20__.

(Seal)

____
(Official capacity of officer)".

[NMSA 1978 § 45-2-504].

b. Distribution Provisions

As the primary goal for executing a will is generally to provide for the distribution of the testator's assets, at a minimum, a will must contain a provision that provides direction as to the distribution of the testator's assets. Thus, if the testator wants her entire estate to be distributed in equal shares to her two (2) children, the will could contain a provision that provides as follows: "I direct that my entire estate be divided equally between my two children, A and B." However, for both state law and tax law purposes it is advisable to at least distinguish between the distribution of "tangible personal property" and everything else. Tangible personal property is personal property, as distinguished from real property, but does not include cash or intangible property such as stocks, bonds, or other securities.

One state law reason for distinguishing between tangible personal property and everything else is that as to tangible personal property it is possible for the testator to constantly update her desires as to the distribution of these assets without having to incur the cost of doing a codicil or a new will. In order to take advantage of the easy update provision for tangible personal property, the testator's will must contain a provision that refers to a written statement or list to dispose of items of tangible personal property. To be effective as to the disposition of tangible personal property, though, the list must be in writing, signed by the testator, and must describe the items and the names of the person(s) to receive the specific items. [NMSA 1978 § 45-2-513].

The tax law reason for including a provision that disposes of the tangible personal property is that if during the administration of an estate a distribution of an item of tangible personal property is made to a beneficiary (i.e., a flat screen television), and during the same tax year of the estate the estate receives income that is subject to income taxes, the receipt of the flat screen television could result in taxable income to the beneficiary. [See § 662 of the IRC]. However, if a will or trust specifically provides for the distribution of a specific sum of money or specific property, then the receipt of that sum of money or property will not result in income to the beneficiary. [See IRC § 663(a)].

After the testator has provided for the distribution of the tangible personal property, the testator may want to make other specific bequests of cash, intangible personal property, and real estate. Finally, and in any event, every will should always provide a provision for distributing the remainder or the residue of the estate. The remainder or the residue is what is left after all the expenses and costs of administration, the creditors, the taxes, and all the specific bequests discussed above have been paid.

Another issue with distribution provisions is that people do not always die in chronological order. Thus, it is possible for parents to outlive their children and grandchildren. So, in drafting any provision of the will that pertains to the distribution of assets it is important to consider to whom should the assets be distributed if the named beneficiary dies. In a typical situation a testator may decide that she wants all her property to be distributed to her four (4) children equally but if any children predeceases her then that child's share shall be distributed to that child's children. There are a number of ways to accomplish this goal. The simplest would be something to the effect "I give and devise the residue of my estate in equal shares to my children, <u>per</u> <u>stirpes</u>." [See NMSA 1978 § 45-2-709 (C)]. However, if the testator said "I give and devise the residue of my estate in equal shares to my children by right of representation" and then did not define what "right of representation" meant, a different result may occur. [See NMSA 1978 § 45-2-709 (B)]. Under the Probate Code "right of representation" results in shares of deceased persons being aggregated and then divided. For instance, the testator has four children: A, B, C, and D. Child C has one child and child D has three children. If the testator's will provides that the residue of her estate is to be distributed to her children, <u>per</u> <u>stirpes</u>, and if C and D predecease the testator, C's child would receive ¼ of the testator's estate and D's three children would each receive $1/12^{th}$ of the testator's estate. If, however, the testator's will provides that the residue of her estate is to be distributed to her children by right of representation and there is no independent definition of "right of representation," then C's share and D's share are aggregated and C's child would receive $1/8^{th}$ of the testator's estate and each of D's children would receive 1/8th of the testator's estate. Accordingly, it is important to be very precise when drafting the dispositive provisions of a will to ensure that the intended result is achieved.

Another inquiry to make concerning the disposition of assets is whether the assets are to be distributed outright or to remain in trust. It is common to think of trusts when there are minor children. However, there are reasons why testators should consider leaving property in trust, as opposed to outright, for adult beneficiaries. First, in New Mexico, as in other states, one reaches the age of majority at eighteen (18). Query if a large sum of money is left to an eighteen (18) year old, how much of that money would be left a year later? Not to only pick on eighteen (18) year olds, but many adults are not fiscally responsible. If the intended beneficiaries are not fiscally responsible and if the amount to be inherited is sufficiently large (i.e., over $500,000) it might be wise to leave the inheritance to the intended beneficiary in a trust that is established under the will. Even if the intended beneficiary has reached the age of majority and is fiscally responsible, if the size of the bequest will be large (i.e., over $500,000), it might still be wise to leave the inheritance in trust. By placing property in trust for the beneficiary, the property should be protected from the beneficiary's creditors, including a spouse in the case of a divorce.

3. Other Strongly Recommended Provisions

a. Apportionment of Estate Taxes

A provision should be included in the testator's will concerning the allocation of estate taxes in the event there is any estate tax liability. New Mexico has adopted the Uniform Estate Tax Apportionment Act ("ETA"). The ETA in effect provides that if any estate taxes are owed, the estate taxes should be apportioned in accordance with estate tax liability. Arguably, this type of apportionment results in an economically equitable result. However, there may be situations where economically equitable may not be fair. For instance, the testator decides to leave a painting with a fair market value of $250,000 to her favorite niece and the residue of her $6,000,000 estate to her son. Absent a statement to the contrary, the niece, under today's tax laws and rates, would have to pay approximately $14,583 in estate taxes. If the will, however, provided that no estate taxes were to be apportioned to the niece or to anyone receiving a specific bequest of artwork, then the niece would not have to pay any estate taxes; and the son's share of the estate would bear the entire estate tax burden.

b. Survival Requirement

The purpose of a will is to provide for the disposition of the testator's property in accordance with her wishes. To ensure that the property is distributed to the persons she intends it is advisable to include a survival requirement in the will. Such a provision would provide something to the effect that in order to receive a bequest under the testator's will the beneficiary must survive the testator by a certain period of time such as ninety (90) days. The reason for this requirement is that if the intended beneficiary dies within a short time period after the testator and there is no survival requirement, the property would pass from the testator to the beneficiary. If the beneficiary dies two (2) weeks after the testator, then the property will be disposed of in accordance with the beneficiary's will or the laws of intestacy as applied to the beneficiary. For instance, assume the testator's will simply provides that she leaves the residue of her estate in equal shares to her two sons, A and B. The residue of the testator's estate is worth $5,000,000. At the time of testator's death, son A was married for two (2) months to a woman the testator did not like. Son A did not have a will and did not have any children. Two weeks after testator's death son A is killed in a car accident. Under the terms of testator's will, $2,500,000 will be paid to son A's estate and will be distributed to his grieving widow under the laws of intestacy. If the testator's will, however, provided that her sons had to survive her by ninety (90) days, then testator's entire estate would be distributed to son B.

c. Addressing Assets Subject to Debt

If a specific bequest of an asset is subject to a debt (i.e., a house subject to a mortgage), then it is advisable to provide in the will whether the bequest is to be taken subject to the debt or whether the debt should be paid by the estate prior to the distribution. Absent any instruction to the contrary, the beneficiary would be responsible for the encumbrance. [See NMSA 1978 § 45-3-814].

4. Provisions for Fiduciaries

At a minimum a testator should name the person(s) she wants to be the personal representative of her estate. The personal representative of the estate is the person who is responsible for administering the estate; meaning that all outstanding bills and taxes are paid and that the assets in the estate are distributed in accordance with the provisions contained in the testator's will. The person(s) named or appointed to be the personal representative in the testator's will is given priority to act as personal representative. [See NMSA 1978 § 45-3-203 (A)]. The naming of a person as personal representative, however, does not vest that person with the authority to act. Only the court can do that. Thus, the person named as personal representative needs to file an application or petition with the court requesting appointment as personal representative. [See NMSA 1978 §§ 45-3-301 and 45-3-402]. As a general rule, unless it is blatant to the court that something is wrong with the will, the court will order that the person named in the testator's will to be personal representative be appointed personal representative and the court will issue the appropriate Letters Testamentary vesting the personal representative with the needed authority to act on behalf of the estate. [See NMSA 1978 §§ 45-3-302 through 45-3-305; 45-3-308; 45-3-414].

As a practical matter, it is advisable to appoint someone whom you trust, is organized, will have the time to administer the estate, and will be able to communicate effectively with the beneficiaries. Often testators will name family members to serve as the personal representative. The main reason for this is to save money. The belief is that family members will not charge for their services. While a personal representative may serve for free, the personal representative is not required to serve for free and, if she wishes, she is entitled to compensation for services rendered. [NMSA 1978 § 45-3-719]. If the person named does not have the characteristics described in the first sentence of this paragraph, then the appointment may result in a recipe for disaster. Additionally, if the person named has all the characteristics except that she is one of the beneficiaries and she does not get along with one or more of the other beneficiaries, consideration should be given to not appointing her. If the testator can anticipate fights among the beneficiaries, the testator should consider naming a professional personal representative, such as a trust company or bank. While professional personal representatives will always charge for their services, the fees paid to them may be less than all the attorneys' fees paid by the bickering beneficiaries.

If the testator has minor children or is the legal guardian of a minor or another incapacitated person, the testator should consider also naming the person to act as guardian for the minor or adult incapacitated person. [See NMSA 1978 § 45-5-202 and NMSA 1978 § 45-5-311 (B)(7)]. The guardian will be the person who will be responsible for the minor's support, care, and education and charged with managing the personal care of the adult incapacitated person. [See NMSA 1978 §§ 45-5-209 and 45-5-312]. The guardian, however, is not also responsible for the financial matters of the minor or the incapacitated person unless the guardian is also appointed as conservator. As with the appointment of a guardian a person named or appointed as conservator in the will of the parent of a minor's or incapacitated person is given priority to be appointed by the court as conservator. [See NMSA 1978 § 45-5-510]. There are pros and cons with naming the same person as guardian and conservator. The pro is that it is easier for the person acting as guardian to obtain the funds needed to care for the minor or incapacitated person if the guardian is also the conservator of the minor's or incapacitated person's assets. One reason against having the same person serve as guardian and conservator is that there is no real check on the expenditures made. A second reason for not having the same person serve in both capacities is that the person serving as guardian may not have the financial skills to serve as conservator or the person serving as conservator may not have a good personal relationship with the minor or incapacitated person. As with selecting the appropriate person to serve as personal representative it is also important that the correct person serve as guardian and as conservator.

In selecting a guardian for a minor, testators often select married relatives as co-guardians. In doing this, though, it is advisable that the testator consider whether she would want co-guardians if the named co-guardians divorced. If the answer is no, then only the person who the testator would want as guardian in the event the suggested co-guardians were to get a divorce should be named as guardian. The same philosophy applies to co-conservators.

The final fiduciary that should be named in a will is the trustee for the trust(s) to be established under the terms of the will. Obviously, if no trusts are to be established, then naming a trustee is not important. However, if a trust is to be established a trustee will be needed. For the most part, the same characteristics mentioned above for the personal representative also apply when selecting a trustee. If the trust assets will be significant or if the trust will be in existence for a long period of time, it is advisable to consider a professional trustee. As with personal representatives, a trustee is entitled to compensation for services rendered. [NMSA § 46A-7-708]. Professional trustees will charge for their services. Professional trustees, though, have in place systems to ensure that the trust will comply with all state and tax filing requirements. Also, professional trustees generally have experience dealing with beneficiaries. Having a professional trustee as opposed to a relative of a beneficiary should also reduce potential uneasy or uncomfortable feelings between family members.

III. REVOCABLE TRUSTS

Trusts can also be used to distribute a person's assets following death. Unlike, a will, though, a revocable trust established during the grantor's lifetime is a document that has legal effect during the grantor's lifetime. Since the trust is effective during the grantor's lifetime, the trust often provides the rules governing the management and distribution of the grantor's assets during the grantor's lifetime as well as following the grantor's death. As a practical matter, the grantor is generally the beneficiary and the trustee of the trust during her lifetime. If the grantor becomes incapacitated and is unable to take care of her own affairs, the person named as the successor trustee becomes the trustee and administers the trust for the benefit of the grantor. Thus, a trust also provides an alternative for having to petition a court for the appointment of a conservator if the grantor becomes incapacitated and is unable to manage her financial affairs. As noted above, though, careful consideration should be given to who should be named as successor trustee. If a family member is named as a successor trustee and will be a beneficiary of the trust following the grantor's death and if there is discord among family members, having a family member as successor trustee may not be advisable. As mentioned above, anytime family members do not get along it is advisable to consider using a professional trustee, such as a trust company or bank. The amount paid in trustee fees generally will be less than the amount paid in legal fees when actions are brought by disgruntled family members to have the trustee removed and a conservator appointed.

Following the grantor's death, the trust is administered and distributed in accordance with the dispositive provisions of the trust agreement. As mentioned above, a revocable trust will not reduce the grantor's estate tax liability as the assets in the revocable will be included in the calculation of the grantor's estate for federal estate tax purposes. [See IRC § 2038]. A revocable trust, however, is not subject to probate. But if the grantor's goal is to totally avoid probate, then that can only be accomplished if all assets in which the grantor has an interest will pass by operation of law, pass by beneficiary designation, or are owned by the revocable trust at the time of the grantor's death.

Assets are owned by the grantor's revocable trust if they are transferred to the trust by the grantor or if the trust is the beneficiary of the asset. Assets are transferred to a revocable trust by re-titling or re-registering the assets in the name of the trust. Thus, if the grantor owns real estate, then the grantor would have to execute a deed conveying the real property from the grantor to the grantor as trustee of the grantor's trust (i.e., Snoopy Brown (grantor) conveys to Snoopy Brown, Trustee, Snoopy Brown Revocable Trust u/t/a dated 11/11/11). The deed then would be recorded with the county clerk's office for the county in which the real estate is located if the real estate is in New Mexico. If the grantor has real estate in another state, the recording of the deed would be in the proper governmental office in that state which is generally a county clerk's office or a register of deeds office. If the real property that is being transferred to the grantor's revocable trust is subject to a mortgage it may be necessary to determine if the mortgage contains a "due on sale clause." A "due on sale" clause means that the transfer of the real property may trigger the mortgagee's right to immediate payment of the balance owed on the mortgage.

If the real property transferred to the revocable trust is located in New Mexico, the transfer of the property to the grantor's revocable trust will not trigger payment under the mortgage [See NMSA 1978 § 48-7-20(H)]. However, if the real property is in another state, then the transfer could trigger the payment. One solution in that event is to contact the mortgagee. The mortgagee can consent to the transfer without triggering a due on sale clause. Sometimes, the mortgagee may require a fee for allowing the transfer. Another option if the real property is located in a state that allows Transfer on Death Deeds ("TODD"), such as New Mexico, is for the grantor to execute and record a TODD for the property. The effect of a TODD is that title to the property is transferred to the named grantee by operation of law on the death of the grantor. [See NMSA § 45-6-401]. In this case the named grantee would be the applicable trust. To be effective the TODD must be recorded during the grantor's lifetime.

If real property is transferred to the trust during the grantor's lifetime, the trustee should also contact the insurance company insuring the property and request that the trust be named as an insured party on the policy.

Again, if one of the grantor's goals is to avoid probate, the grantor should also transfer her intangible assets to the trust such as bank accounts, stock, and interests in partnerships and limited liability companies. As to bank accounts, this is accomplished by contacting the bank and requesting that the bank account be re-titled in the name of the trust. Generally, many banks require documentation that the trust is allowed to have a bank account. Banks will often request that they be provided with a copy of the trust agreement. As the trust agreement provides dispositive provisions that are of no concern to the bank, it is recommended that a Certificate of Trust be prepared and given to the bank. The Uniform Trust Code which has been adopted by twenty-three (23) states, including New Mexico, provides that the Certificate of Trust, if drafted in accordance with the Uniform Trust Code, may be provided with the Certificate of Trust. [See NMSA 1978, § 46A-10-1013]. If a bank or other third party does not accept the Certificate of Trust in lieu of the trust agreement, that third party may be liable for damages. [See NMSA 1978, § 46A-10-1013]. Also, before having any bank account re-titled in the name of the trust, it is advisable to ask whether the same terms and benefits apply to the re-titled account. For instance, if the grantor currently owns a certificate of deposit (CD) paying three percent (3%) interest and if the bank would treat the re-titling as a cashing in of the CD and issuing a new CD paying a whopping 0.9% interest, it would be advisable to wait until the CD matures to re-title it in the name of the trust.

If the grantor owns publicly traded stock, the transfer of the stock into the trust would be accomplished by contacting the transfer agent for the particular stock. If the grantor has a broker or if the stock is held in a brokerage account, then the transfer of the stock or the brokerage account can generally be accomplished by contacting the broker or the brokerage company and signing the required documents.

As to closely held corporations, partnerships, or limited liability companies it is advisable to obtain copies of the bylaws or shareholder agreements if a corporation, the partnership agreement if a partnership, or the operating agreement if a limited liability company to determine if there are any restrictions on the transfer of ownership. Sometimes the restrictions may be that the transfer must be approved by the other owners of the company or by the company. In that case, in addition to drafting the document to transfer the grantor's ownership interest in the entity to the trust, a separate document may have to be drafted to obtain the required approval.

Next, there are those assets the ownership of which are not documented by a registration type document, such as jewelry, china, silverware, artwork, etc. Again, if the primary goal is to avoid probate, these assets should also be transferred to the trust. This would be accomplished by preparing an assignment of these assets signed and dated by the grantor whereby the grantor transfers the ownership of these assets to the trustee of the revocable trust.

Next, there are the assets that are governed by beneficiary designation. The two largest categories are life insurance policies and retirement assets. As to life insurance policies there is generally the option of transferring ownership of the policy to the trust or just naming the trust as the beneficiary of the proceeds. As to qualified retirement assets (accounts in 401(k), profit sharing or pension plans) and as to Individual Retirement

Accounts (IRAs) and 403(b) plans, ownership of the accounts may not be transferred to the trust. Legally, the documents creating these assets prohibit such a transfer as a transfer would trigger a taxable event. Thus, as to these assets the trust would be named as the beneficiary. If a trust will be the beneficiary of qualified retirement assets, IRAs, or 403(b) accounts, and if the trust will remain in existence after the grantor's death, care must be given to make sure that the trust satisfies the requirements of Treasury Regulation § 1.401(a)(9)-4 Q&A(5) so that the benefit of having distributions spread out over the life expectancy of the beneficiary can be achieved.

Finally, there are the anticipated inheritances. If the grantor knows or has reason to believe that she will be the beneficiary of someone else's estate (i.e., a parent's) the grantor may want to advise her parent or other possible person that she has created a trust and that any bequests to her should be made to her trust.

IV. IRREVOCABLE LIFE INSURANCE TRUSTS

Irrevocable trusts, like revocable trusts, provide for the disposition of assets following the grantor's death and the assets owned by the irrevocable trust are not subject to probate. Unlike, the revocable trust, though, assets in an irrevocable trust generally are not included in the grantor's gross estate for federal estate tax purposes. The reason for this is that the grantor of an irrevocable trust generally does not retain any of the incidents of ownership that would result in the assets in the irrevocable trust being brought back into the grantor's gross estate. [See IRC §§ 2031-2042]. Since the grantor must part with all dominion and control over an asset as a requirement for the asset not being included in the grantor's estate, irrevocable trusts generally are only funded with those assets that the grantor has decided she does not want to use or obtain a benefit from during her lifetime.

Life insurance policies are often good assets to place in an irrevocable trust. The reason for this is that often the purpose for purchasing these policies is to provide for something following the grantor's death and not for use by the grantor during the grantor's lifetime. Reasons for purchasing life insurance policies include the following: (i) to provide income for a spouse or children following the grantor's death; (ii) to provide liquidity for the payment of estate or income taxes as a result of the decedent's death; or (iii) to equalize inheritances among beneficiaries.

If a grantor establishes an irrevocable trust and funds it with a life insurance policy, it is preferable that the irrevocable trust be established first and that the trust purchase a policy insuring the grantor's life. If the grantor already owns a life insurance policy and wishes to transfer the life insurance policy to the irrevocable trust, the estate tax benefit of having the proceeds of the life insurance policy excluded from the grantor's estate will only be achieved if the grantor lives for three (3) years. [See IRC §2035(c)].

Regardless of how the trust is funded, either with a new or a transferred policy, the beneficiaries of the trust would generally be the persons who would have been named as beneficiaries of the policy. If the trust is funded either with a current policy of monies to purchase a new policy, the funding of the trust would be a completed gift for gift tax purposes, but if the beneficiaries of the trust were given the right to withdraw the property transferred to the trust the transfer would qualify for the annual exclusion from gift taxes under IRC § 2503(b). If the value of the property transferred to the trust did not exceed the annual exclusion amount, there would not be any gift tax liability. If the grantor continued to pay for the insurance premiums each payment would be a subsequent gift. Again, if the beneficiaries are given the right to withdraw from the trust the value of each subsequent premium, those payments would qualify for the annual exclusion from gift taxes. If the transfers did not exceed the annual exclusion amount, there would not be any gift tax liability. In order to satisfy the right to withdraw requirement, the trust agreement must provide for the right to withdraw and notice must be given to the trust beneficiaries of their right to withdraw and of the contributions to the trust.

V. CONCLUSION

As mentioned at the beginning, estate planning is more than completing a form downloaded from the Internet. While a will or trust may provide the testator's or grantor's wishes concerning the disposition of her assets, the reality is that the testator's or grantor's goal will only be accomplished if the assets the testator or grantor intends to have distributed following her death are in fact governed by the terms of her will and trust. This may require more than just drafting a will or trust agreement, it may require re-titling assets or beneficiary designations.

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