Thomas: When drafting a will, be as specific as possible

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A "last will and testament" is an important legal document that is the first building block to any good estate plan. Broadly stated, a will is the legal declaration of a person's intentions which he or she wishes to be performed after his or her death. A will is generally defined as an instrument by which a person makes a disposition of his property to take effect at his death, and which by its own nature is ambulatory and revocable during his lifetime.

How to structure a simple will

1. Preamble. The first paragraph of the will not only should contain the name and domicile of the testator but, most importantly, that the will is indeed the testator's last will and testament and all wills and codicils previously made are revoked. The revocation at the beginning of all prior wills "wipes the slate clean" and sets the stage for the testator's new intent to be expressed below.

2. Debts, expenses and taxes. The payment of debts, expenses and taxes are mandatory, with or without the clause, "Debts, expenses and taxes." Why, then, is the clause necessary? Since most personal representatives are not professional fiduciaries, they need to be reminded of their duties. Without this clause, the personal representative may administer the estate and forget to pay these obligations. Additionally, the omission of this clause could lead a court to interpret that certain debts of a testator are not payable by the estate. The most obvious example under Indiana law is a spouse's responsibility to pay the medical expenses of his or her spouse if the spouse incurring the medical expenses has no assets from which to pay (Doctrine of Necessaries). Without direction from the will, the surviving spouse may be personally liable for medical expenses that would typically be paid by the estate.

3. Specific bequests. From a will construction standpoint, a specific bequest needs to be expressed before the residuary clause. If the residuary clause is before the specific bequest, you obviously have no specific bequest to devise. This seems elementary, but unfortunately it is a common drafting error.

In leaving a specific bequest, it is paramount that the beneficiary and the bequest be fully described. Not only should the beneficiary's full name be expressed, but also his or her last known address at the time of the making of the will. This is especially important if the beneficiary is not a family member, as it may be difficult to track down the beneficiary many years later when the will is finally probated and the personal representative is seeking to make distribution. Specificity as to the property bequeathed avoids any

dispute as to what property is intended for which beneficiary. Language such as "I give, devise and bequeath to John A. Jones my T.C. Steele painting that he loved so much" would prove inadequate if the testator has four T.C. Steele paintings at the time of death. Better language would be, "I give, devise and bequeath to John A. Jones, of 123 Main Street, Springfield, Illinois, my T.C. Steele painting that has hung above my fireplace for many years, measured 18 x 24 without frame, and depicts the Old Nashville Theater in Brown County, Indiana." Again, the more specific, the better.

If the specific beneficiary predeceases, where does the property go? It depends on how you have structured the language. If, using the above example, you add "In the event that John A. Jones predeceases me, then this specific bequest shall go to his sister, Sally A. Jones," then you have provided a contingency. Without the contingency, the bequest would fall into the residuary clause and be distributed accordingly. The testator may not want that result.

It is not unusual for a testator to reconsider the specific bequest of personal property during his or her lifetime. A diamond ring may have originally been willed to a daughter, but then the testator decides the daughter has plenty of jewelry and wants to leave the ring to a granddaughter. A son may be receiving a gun collection, but the testator decides the son does not seem appreciative enough and wants to divide the collection among all his nephews. If you have not yet experienced these changes of mind and heart, you will through the course of your practice. Changing a will four or five times to reflect a new intent is sometimes cumbersome, inconvenient, and in the case of multiple codicils, can lead to ambiguous language subject to interpretation. How, then, can you mitigate this problem of changing intent for specific bequests? Rather than changing the will, language can be inserted that directs the personal representative to distribute the tangible personal property pursuant to a list signed and dated by the testator and accompanying the will. The testator can change the list as often as he or she wants without changing the will. The key is making sure the most current list winds up with the will at the time of death. While not perfect, this does allow the testator some freedom to change without making a new will. The will construction statute provides for this mechanism. Ind. Code § 29-1-6-1(m).

4. Residuary clause. Any property not earlier devised in the will is distributed through the residuary clause. You need to name either specific residual beneficiaries or a class of beneficiaries ("to all my children, equally"). You should ascertain how the testator wishes the residuary estate to be divided. A "per stirpes" distribution divides the residuary among persons by considering the class or generation to which they belong. A clause which reads "to my children, equally, per stirpes," will divide the residuary in equal shares, giving one share to each living and deceased child. A predeceased child's share will pass to his or her children to be divided equally among them.

5. Administrative clauses. The administrative provisions are the last part of a simple will structure. Typical provisions include the naming of the personal representative and his or her successors; the powers of the personal representative; whether the personal representative will serve with or without a bond; and whether the estate will be supervised. Other administrative provisions may deal with spendthrift clauses and compensation for fiduciaries. Naming an individual as personal representative instead of a corporate fiduciary can present a host of problems, but it is the preferred appointment by the vast majority of clients. Harder consideration of a corporate fiduciary should take place if there are significant assets, the deceased had children with more than one spouse or the testator contemplates problems because of certain personalities within the family.

Ultimately, to ensure that your client's property will go to the beneficiaries of his or her choosing, as opposed to the beneficiaries that the state chooses, it is imperative that the last will and testament be very specific and provide for as many contingencies as possible.•

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