

## SO HOW DO YOU WRITE A WILL TODAY?

So how would you write a Will today?

Imagine the scene, you are sitting there at your desk, looking on ebay for that perfect scales of justice for your credenza when your long suffering secretary wanders in and said, “Mr. And Mrs. Smith have called. They would like you to write them a Will to sign tomorrow because they are going on vacation next week.” Realizing that you would not wish to be burdened by such mundane trivia of the practice while waiting for your next million dollar case to wander in, you cleverly reply, “Oh well, tell them to call Harlan Dodson. He writes articles about this sort of stuff.”{{plug}}

Long suffering secretary then remarks on a couple of unrelated matters such as that it is the 22<sup>nd</sup> day of the month and you do not have rent or payroll covered yet. Your acute insight honed by cross examination seminars causes you to realize there is something more to what she is saying than simply three disconnected pieces of information. “Oh.” say you, “If I wrote the Wills and they paid me, then we would have enough money to cover the rent.” At which point long suffering secretary rewards your insight by handing you a cover of that ever helpful publication, The Tennessee Trial Lawyer, opened to this article.

So how do you write a Will today? First you get the basic family information and for our purposes here we will assume a man and wife reasonably happily married with a couple of kids. On the first death they want to leave everything to the surviving spouse and on the second death leave everything either outright to the kids or in trust, depending how old are then.

Next, you determine what sort of Tennessee inheritance tax and federal estate tax may be involved. This has gotten a bit more complicated.

In order to do this you first determine which of 4 categories fits the client. The first category covers the husband and wife’s estates which are very unlikely to ever total \$1,000,000. For them you can use a very basic simple Will and not be concerned with death tax planning.

The second category would be a husband and wife whose combined estates might total at least \$1,000,000 but would not in any event exceed \$2,000,000. In that case you need to plan for Tennessee inheritance tax but not for federal estate tax (at least until 2011).

The third category would be the husband and wife whose combined estates might exceed \$2,000,000 but are unlikely to exceed \$4,000,000. That is going to require planning for both Tennessee inheritance tax and federal estate tax.

The final category would be for those having combined estates above \$4,000,000 and for those you would be best advised to refer them to someone else anyway. {{another plug}}

The Tennessee inheritance tax is a progressive tax beginning at 5.5 and capping out at 9.5% on amounts over \$440,000. The federal estate tax is basically a flat tax at 42%.

In determining how large the estates are for death tax purposes, recall that this may get a bit complicated also. Certainly the estate would include whatever passes through probate. However, it will also include a portion of the value of assets passing by survivorship, or assets as to which the proposed decedent has made any transfers but retained control.

Also, in calculating the gross estate, the proceeds of any life insurance policies that are payable to the estate of the decedent, or in which the decedent had any incidents of ownership (howsoever slight), are included. Life insurance may be removed from the gross estate if the policy is owned in a properly drawn irrevocable life insurance trust, but that is a topic for another article.

Once you have an idea of the size of the gross estate, the two primary tax provisions with which you are concerned are the marital deduction and the lifetime exclusion. We still have an unlimited marital deduction for the federal estate, and Tennessee inheritance tax purposes. Thus, amounts which are left outright to the surviving spouse or which are left in a properly drawn trust such as a marital power of appointment trust or a qualified terminable interest provision trust will qualify for a marital deduction on the death of the first spouse. Remember, however, that this is really only a deferral because those assets remaining at the death of the surviving spouse will be taxed in her estate.

For Tennessee purposes there is an exemption against the inheritance tax in the amount of \$1,000,000 per person which is not scheduled to change. For federal purposes this exclusion gets a bit more complicated. A decedent dying in the years 2007 and 2008 has a \$2,000,000 exclusion. That exclusion increases to \$3,500,000 for a decedent dying in 2009. In 2010 the estate tax is repealed (and a number of other complexities arise should that actually occur). Finally, in the year 2011 the exclusion is scheduled to return to \$1,000,000. It is to be hoped, but far from certain, that Congress will manage to rationalize the estate tax exemption by picking some consistent amount prior to 2010.

Under existing laws an individual's inheritance tax or estate tax exclusion is lost unless used at their death. Thus, while a Will leaving everything to the surviving spouse simply would generate no tax at the first death, for any husband and wife having an estate which might exceed \$1,000,000, likely leaving everything to the surviving spouse would not be wise because the exemption for the first spouse to die would be wasted.

In order to accomplish any of the plans discussed below, you will need to find good forms which can be downloaded so that they will not have to be retyped by long suffering secretary. One suggestion is Volume XV of the *West Tennessee Practice Series* (another plug) which will have forms for each of these types of plans updated annually in the supplement.

One way to leave the value of the entire estate to the surviving spouse but to use the first spouse's exemption is to add what is called a bypass trust (the exemption is sometimes referred to as a "credit" and the bypass trust sometimes referred to as a "credit shelter trust"). In this plan, the amount of available exemption, as needed, would go into a trust at the first death. That trust could pay all income to the surviving spouse for her life, and likewise be subject to encroachment for her if necessary. Alternatively, the income or encroachment from the bypass trust should be made available to the children and their issue as well.

For a couple who fall into the second category of \$1,000,000 gross estate but not over \$2,000,000, this is an obvious plan. Some amount up to \$1,000,000, the Tennessee inheritance tax exemption, would be left in a bypass trust for the surviving spouse and/or children and the remainder would go to the surviving spouse in some type of marital deduction gift.

It is fairly likely that either the simple Will or the plan for the couple having no more than \$2,000,000 in the gross estates will have taken care of your clients, and coincidentally the rent.

However, if the estates fall in the third category from \$2 to \$4,000,000 it is necessary to do different planning for the federal and Tennessee exemptions. The key to doing this lies in recalling that the qualified terminable interest provision trust does not automatically qualify for the marital deduction but only does so if there is an election to so qualify. This allows a QTIP to be treated in one way for Tennessee inheritance tax purposes and another way for federal estate tax purposes.

In this third category plan, the estate of the first decedent is divided into three share:

(i) Part A would be the amount overlapped by the Tennessee exemption and the federal exemption which is \$1,000,000. This part A would go into a traditional bypass trust.

(ii) Part B would consist of the gap between the Tennessee exemption and the federal exemption, currently \$1,000,000. Part B would go into a trust drafted so that it met the requirements of a QTIP. The Executor would then elect QTIP treatment for Tennessee purposes making it a marital trust and not elect QTIP for federal purposes making it a traditional bypass trust for federal purposes.

(iii) Part C, the remainder of the estate, would then go into one or more forms of marital qualified gifts for both Tennessee and federal purposes.

The effect of this plan would be that there is no tax on the first death, no federal tax on either Part A or Part B on the second death and the Tennessee inheritance tax on whatever remains in Part B on the second death.

And so that is how today you write a Will for a husband and a wife with two children, and coincidentally pay the rent.