CAN I DEVISE MY PROPERTY TO ANYONE?

By: James W. Mallonee

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I frequently have questions from clients who ask if they can devise their property to anyone? The short answer to that question is generally yes; but, with some thoughts about the consequences of doing so. Many times, this comes down to whether siblings, children or a spouse are still alive at the time of a testator or testatrix's death. This article will explore the major situations where consultation with a lawyer is best suited to help in preparing a Will to avoid possible pitfalls when devising property.

The devise of homestead property is always of concern. As written in earlier articles, under Florida's Constitution a person's homestead cannot be devised away from a living spouse or minor child. It will not matter if the spouse or minor child are not living in the homestead property. The Constitution does not differentiate between a spouse or minor child living in the residence or not.

In Florida, a minor is designated as anyone who is under the age of 18. Thus, if a child who is 17 years of age moves out of the homestead property to another residence or state, and the parent who permanently resides in Florida dies; the property cannot be devised via a Will to anyone including the surviving spouse. Therefore, if the maker of a Will elects to devise the homestead property to a friend and there is a surviving spouse or minor child living, the gift will fail and the surviving spouse or minor child will take the property via a life estate or outright depending on the situation.

However, suppose there is no minor child or surviving spouse but only siblings, nephews or nieces of the deceased person. In this situation, the deceased person can devise the property to any person or charity he or she desires. Recent Florida cases have confirmed the right of a testator or testatrix to devise their homestead property to anyone they wish provided there is no surviving spouse or minor child.

The only downside for gifting homestead property to a non-heir (e.g. friend or partner) is the loss of protection against creditors who can cause the property to be forcibly sold to pay-off the decedent's debts. With this in mind, a testator or testatrix needs to think through all of the consequences of gifting their homestead property.

The other concern when thinking about gifting property out to non-heirs is the real possibility of an objection to the Will because of undue influence. Objections of this kind can easily be filed by a decedent's majority age children, spouse or siblings who were not included in the decedent's Will. Proving undue influence is not an easy task and has to be proven with a strong case showing that the recipient of the decedent's assets isolated the decedent or was constantly making decisions for the benefit of such recipient. These situations are often referred to as the Carpenter conditions.

The Carpenter conditions are a list of examples the Florida Supreme Court put together that can be used to meet the requirements for a case of undue influence. Other conditions that stand out occur where a person's Will is significantly altered in favor of one person just a few days or weeks prior to death. This is especially relevant if the decedent had a standing long-term Will and such Will was changed by using a new lawyer to draw up a contrary Will prior to death. The flags of undue influence immediately go up.

The last major hurdle to take into consideration when gifting property to anyone is the age of the individual. Florida law will prevent the outright gifting of assets to a minor when such gift is greater than $50,000.00. This includes the gross amount of any gifts by taking into consideration the total amount of the gift being made. Thus, if the total amount of gifts being made to three people (including the minor) is $60,000.00 and $15,000.00 of the $60,000.00 is going to the minor, a guardian ad-litem will be put into place to assure the funds are properly delivered and held for the benefit of the minor. This usually amounts to some form of a trust, guardianship or conservatorship being put in place until the child reaches the age of majority or possibly beyond.

Thus, making a gift to a minor needs to be thought out as to who may control the funds while the devisee remains a minor. Ideally, you would arrange for a trust to be funded at a decedent's death with a trustee that is capable of prudently investing the funds. This person must also be one who can be relied upon to make fiduciary decisions in a minor's best interest.

If you are concerned about gifting your assets to non-heirs or minors and want to avoid possible pitfalls in doing so, meet with the attorney of your choice and have that discussion. It may well be one of the best investments in time you make.

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