Estate Planning 101
Ensuring The Estate Plan Is Valid

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Estate Planning for the Modest and Millionaires

Many think "estate planning" is only for the wealthy. However, almost everyone has an estate, whether it is a modest $100,000 condo and a bank account – or millions of dollars in stock and real estate. Therefore, a "plan" of some sort is needed – be it simple, "mid-sized" or complex – to designate who shall control and inherit the "estate."

A complete estate plan contains 3 basic components.

The first and most important component is a Will or Revocable Trust to direct (i) who controls the estate, and (ii) who inherits the estate and upon what terms and conditions.

A Revocable Trust generally is favored over a Will because it has the advantages of (i) avoiding probate, (ii) reducing the risk of a court guardianship, and (iii) keeping financial information private.

The second component is the Durable General Powers of Attorney (or "DGPOA"). By the DGPOA document a client authorizes another person to act on the client's behalf while living. The DGPOA typically is used to manage the client's personal affairs – such as bill payment and property management – if the client becomes incompetent.

The third component is commonly referred to as a Living Will. In the Living Will the client (i) directs whether or not life-support is to be removed, and (ii) designates the person who will serve as the client's health care surrogate if the client becomes incompetent.

The Miami Beach Heiress – A Valid Estate Plan?

Regardless of the simplicity or complexity needed for one's Will or Revocable Trust, it is critical to ensure that it is prepared by qualified legal counsel and with protocol and procedure consistent with the situation – so that the estate plan will withstand court scrutiny if challenged. This is particularly critical if it contains any "disinheritance" or unusual provisions.

A recent case provides a good illustration of this point.

Millionairess Gail Posner died in March at age 67. Until her death Mrs. Posner lived an eccentric life in Miami Beach with her chihuahua "Conchita." For example, Ms. Posner gave Conchita a $15,000 Cartier necklace as well as a Cadillac Escalade. True to form, Ms. Posner died with an unusual estate plan.

Mrs. Posner's estate plan did leave her only child $1 million, but it also created an $11 million trust for Conchita, and it also gave another $25 million to her bodyguards and personal aides. Further, Mrs. Posner's estate plan was executed under somewhat mysterious circumstances. Needless to say, Mrs. Posner's grown child was not pleased with his $1 million inheritance and has filed suit to challenge the estate plan.

Regardless of the case's eventual outcome, it serves as a good reminder that money often brings out the worst in people – and that one's estate plan should be in order to minimize the risk of family disharmony and contentious litigation.

Are All Provisions Valid – No!

Florida, like every other state, has unique rules pertaining to estate planning documents. Therefore, it is critical to recognize that one's Will or Revocable Trust itself may be valid – but some of the most important terms of the Will or Trust may be void.

Executor Provisions

Unbeknownst to most, Florida statutes mandate that an executor (or personal representative) must be (i) a close relative, (ii) a Florida resident, or (iii) a Florida bank or trust company. Thus, a trusted family friend who does not reside in Florida cannot be one's executor – no matter what the Will dictates.

Unfortunately, the failure to designate a qualified executor is a common error found in the estate plans of persons with "out-of-state," internet or "Will kit" drafted estate plans.

Disinheritance/Penalty Provisions

Many states permit a penalty clause as a part of an estate plan. A penalty provision typically states that if a beneficiary challenges the estate plan and loses, then his or her inheritance is forfeited. Such provisions are often used to keep an "unruly" heir under control.

However, a penalty clause – no matter how strongly worded – simply is void in Florida and will not be enforced by a court. Therefore, it is important that a client with an unruly heir be advised of the other options available to deal with the heir.

Homestead Provisions

Under Florida law, one's homestead (unless jointly owned by spouses) must be bequeathed outright to one's spouse – and any other bequest of the homestead is statutorily void. Also, if the deceased had minor children, then even a bequest of the homestead to the spouse is invalid.

Instead, in both situations the Florida statutes automatically "rewrite" the client's estate plan.

In such a case, the surviving spouse becomes a part owner of the homestead and the children (even if minors) also become part owners. Therefore, not only does the surviving spouse not own the homestead free and clear – but also upon a future sale the children are entitled to a share of the proceeds.

As with the executor issue, the failure to properly address the homestead is a potentially disastrous, but not common, estate planning mistake.

Summary

A lifetime of savings and family harmony can all too easily be disrupted by a failure to properly plan for one's passing. Therefore, to avoid significant problems for one's loved ones – as well as to protect one's testamentary wishes – it is well worth the modest effort required to implement a valid and comprehensive estate plan.

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