STOVER & SPITZ LLC

ATTORNEYS AT LAW

How the Best Laid (Estate) Plans Can Go Astray

After weeks, months, or maybe years of procrastination, you finally made the appointment, gathered all of your financial and family information together, met with the lawyer and together you carefully crafted an estate plan specifically tailored to your family situation. Now you have signed the will directing where and to whom all of your assets will pass on your death. What can go wrong? Plenty!

While a will (or a revocable trust) is still an essential document, in many, if not most, cases, it is not the last word. Joint ownership arrangements and beneficiary designations can undo a carefully considered estate plan.

Beware the well intentioned suggestion to "put your sister's name" on mom's checking account for "convenience." The account could be set up so that your mom remains sole owner, with your sister as agent. However, in many cases a joint tenancy account will be created with your mom and sister as co-owners, with the result that your sister becomes the sole owner of the account at death. If mom's will says that you and your siblings will share equally in her estate, but the checking account goes to your sister alone on mom's death, family relationships may never be the same, especially if your sister decides to keep the money, which she would be legally entitled to.

Mom may also be advised to name her children as payable on death ("POD") beneficiaries on her accounts, as this will avoid probate. With mutual funds or security accounts, these are referred to as transfer on death ("TOD") accounts. Truly, this arrangement will avoid probate, which really means that the directions in mom's will will be ignored, as POD and TOD designations trump the will. If a child predeceases mom, the POD/TOD designation will usually result in the surviving siblings splitting the share of the deceased sibling, while the will typically would provide that the children of the deceased sibling (the grandchildren of the creator of the account) would take their parent's share.

Retirement accounts and insurance policies will, in almost every case, pass pursuant to a beneficiary designation, usually chosen at the time the policy is purchased or the account created. Decades can pass between the date these beneficiaries are named and the payout. The beneficiaries chosen when one is 25, unmarried and childless, will probably be very different than the choices that would be made 20, 30 or 40 years later when that same individual is married with children and possibly grandchildren. These beneficiary designations can almost always be changed; it's a matter of reviewing the designations from time-to-time and recognizing the need to do so.

Obviously, the importance of accurate and current beneficiary designations cannot be overstated. An important part of every plan we help clients with is providing detailed titling information and beneficiary designation recommendations to insure that assets pass as intended.

WINTER 2015 NEWSLETTER

Estate Planning for Blended Families

When a couple marries after a prior marriage ends, their estate planning often presents different challenges than the estate planning of a couple in their first marriage, especially when one or both of them have children from a prior marriage.

Premarital Agreement

One of the first estate planning decisions when getting remarried should be the consideration of a premarital agreement. Absent a premarital agreement, each spouse has certain rights to the other spouse's property in the event of death or divorce. For example, the surviving spouse may be able to take up to half of the deceased spouse's estate at the first spouse's death under Colorado's elective share law. A premarital agreement can waive the right to the elective share and other benefits provided to the surviving spouse under the laws of Colorado and other states. Accordingly, a premarital agreement can give each spouse a clean slate to leave assets as he or she determines, without concern that the surviving spouse (or someone acting on the spouse's behalf) will take a greater share than intended.

The Colorado legislature recently passed the Uniform Marital and Premarital Agreement Act and also modified the elective share law. Both sets of laws impact spousal rights.

Colorado recently enacted the Uniform Marital and Premarital Agreement Act. The new Act imposes certain requirements in order for a marital agreement or premarital agreement to be enforceable. Those requirements include the following: 1) the agreement cannot be entered into involuntarily or under duress, 2) each party must have access to independent legal representation, and 3) each party must provide adequate financial disclosures before signing the agreement.

Updating Prior Estate Planning Documents

When getting remarried, existing estate planning documents should be reviewed and potentially updated. The spouses may want to revise their estate plans to leave some assets to each other. Even if they do not want to leave assets to each other, they may want to name the other spouse in certain roles, such as agent in a Medical Power of Attorney for making medical decisions. If the couple has entered into a premarital agreement, that agreement may require the spouses to leave some assets to each other, in which case the estate planning documents need to carry out those obligations.

If each spouse is satisfied with their prior estate planning documents, the wills may nevertheless require updating because of a Colorado statute that presumes that if a will is entered into before marriage, then the person signing the will (the testator) must have wanted to leave a share of the testator's estate to the new spouse. Accordingly, the new spouse may receive a share of the testator's estate, as if the testator had not left a will. This right can be waived in a premarital agreement.

One further complication associated with remarriage is with retirement plans that are subject to the Employee Retirement Income Security Act (ERISA), such as 401(k) plans. ERISA imposes certain requirements on ERISA plans. For example, a plan participant who is married cannot name a non-spouse as primary beneficiary of an ERISA plan unless the participant's spouse consents. This requirement can pose a trap for the unwary. For example, if an individual has a 401(k) plan naming his children as primary beneficiaries, and then he remarries, he needs to re-execute the beneficiary designation for the 401(k) plan naming his children as primary beneficiaries (if that is his intent) and have his spouse sign a consent that is normally on that same form. If he fails to do this, his spouse (rather than his children) will receive the 401(k) plan. A premarital agreement cannot effectively waive the rights of each spouse to the other's ERISA plans. However, some retirement assets are not subject to ERISA, such as traditional IRAs.

Planning Options

For couples who want to leave at least some assets to each other, some options for structuring their estate plan are as follows:

Estate Planning For Blended Families *(Continued)*

1. **Leaving Assets Outright:**
Spouses may decide to leave all or some of their assets outright to the surviving spouse. This approach has the advantage of simplicity. However, assets left outright to the surviving spouse then fall under the complete control of the surviving spouse. The surviving spouse can leave the assets as he or she chooses. Also, the assets are susceptible to any creditor claims against the surviving spouse, and could be subject to the rights of a new spouse if the surviving spouse were to remarry.

2. **Leaving Assets in Trust for the Spouse:**
Spouses may decide to leave all or some of their assets in trust for the surviving spouse. Depending upon how the trust is structured, the trust can provide some degree of protection for the assets from the surviving spouse's creditors and rights of a new spouse. Also, the first spouse to die (who leaves assets to the trust) decides who ultimately receives the assets of the trust. For example, the trust could provide that the surviving spouse will be the beneficiary for his or her lifetime, and at the surviving spouse's death the balance of the trust will be distributed to the first spouse's children. However, there are drawbacks to trusts, including the fact that, for income tax purposes, it is not ideal to leave retirement assets to a trust. This fact can complicate planning for some couples, since retirement assets may constitute a large part of their net worth.

3. **Mixed Approach:**
Some estate plans combine various planning options. Each spouse may wish to leave some assets directly to that spouse's children at the spouse's death, with the balance of assets passing outright or in trust for the spouse (or a combination of both).

Conclusion

When planning for any couple, whether a first marriage or subsequent marriage, the issues raised in this article are just some of the considerations. Other factors include estate tax planning, charitable planning, whether assets should be left outright or in trust for children and other beneficiaries, choice of personal representative and other fiduciaries, planning for incapacity and many other decisions. We can advise you about options and implement an estate plan to carry out your wishes.

Portability Requires Timely Filed Estate Tax Return

Under current law, any federal estate tax exclusion amount that remains unused at a spouse's death may be available for use by the surviving spouse, in addition to the surviving spouse's own estate tax exclusion amount. This benefit is commonly referred to as "portability."

For example, assume Husband dies in 2015 leaving his entire estate to Wife, and having made no taxable transfers during life. An election can be made on Husband's timely filed federal estate tax return ("Form 706") to permit Wife to use Husband's unused estate tax exclusion amount. Then, assuming that Wife has made no taxable transfers during her life, Wife's estate tax exclusion amount in 2015 will be $10,860,000 (Wife's $5,430,000 estate tax exclusion amount plus Husband's $5,430,000 estate tax exclusion amount). If Husband used some, but not all, of his exclusion amount, then whatever amount was unused could be made available to Wife with the portability election.

Portability of the deceased spouse's unused estate tax exclusion amount is only available if an election is made on a timely filed Form 706 following the death of the first spouse to die, regardless of whether the estate of the deceased spouse is otherwise required to file a Form 706. The Form 706 is due nine months after death, with an additional six month extension available. When one spouse dies, serious consideration should be given to filing a Form 706 to take advantage of portability.

2015 tax figures:

For the year 2015, the estate and gift tax exclusion amount is $5,430,000 (up from $5,340,000 in 2014); the same is true for the generation-skipping transfer (GST) tax exemption.

For the year 2015, the gift tax annual exclusion remains at $14,000.

STOVER & SPITZ LLC
ATTORNEYS AT LAW
Roosevelt Place
636 Coffman Street, Suite 301
Longmont, CO 80501-4974

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303-682-0433
www.stoverlawcolorado.com

ROLL CALL

Jennifer Spitz wrote an article for the Fall 2014 issue of Council Notes, which is the newsletter published by the Trust and Estate Section of the Colorado Bar Association. The article was titled "Mineral Royalties as Trust Income." It addressed planning consideration when a trust holds oil, gas and other mineral interests. Jennifer continues to be actively involved with trust and estate legislative projects through the Colorado Bar Association.

Tom Stover attended the Rocky Mountain Regional Meeting of ACTEC in Custer State Park, South Dakota. Tom and Jennifer both attended the National Fall ACTEC meeting in New Orleans. ACTEC is the American College of Trust and Estate Counsel. Its members are select trust and estate attorneys primarily in the United States. There are only about 60 ACTEC fellows in Colorado. Tom is the Colorado State Chair of ACTEC.

Tom also spoke to the Boulder County Estate Planning Council in August and the Boulder/Longmont Chapter of the Colorado Society of CPAs in October about estate planning with large estate and gift tax exemptions and portability.

Stover & Spitz LLC is a Tier 1 Trust and Estates law firm, as recognized by U.S. News Best Law Firms.