

The Estate Planning Advisor

A “Good” Will Is Not Enough

By Richard J. Shapiro, J.D.

It is a popular misconception that merely signing a will, even one that is well drafted, creates a “successful” estate plan. But all too often the will fails to address the client’s needs, since the will frequently does not “control” the disposition of the bulk of the person’s assets upon death.

A successful, estate plan should be designed to meet all of the clients’ needs and planning objectives. The first critical step is to determine the amount and nature of the clients’ assets, as well as the client’s goals, hopes, dreams and aspirations. In our firm’s practice, we ask that prospective estate planning clients complete both a “data gathering” form and a “goals” form. Some of the most commonly selected goals include: protecting your estate in the event your spouse remarries after your death; protecting your children’s inheritance in the event a child divorces; providing for appropriate “helpers” upon your disability; protecting an inheritance for a minor or disabled child or grandchild’ planning for pets; avoiding probate; and minimizing or eliminating estate taxes.

At the initial meeting, the attorney and clients should have an in-depth discussion to further define the client’s planning goals. For effective planning, the attorney should “interview” the clients to learn about them and their loved-ones. Armed with this information, the attorney can walk the clients through a variety of planning options that will achieve the clients goals, including the possible uses of wills, trusts (both revocable and irrevocable), powers of attorney, health care proxies, living wills, and other “ancillary” documents.

Once the documents are drafted and signed, there is still more work to be done. It is critical that the attorney and the clients review how the client’s assets are owned, as well as the beneficiary designations for retirement accounts, life insurance policies and annuities. Leaving assets in joint ownership and failing to change beneficiary designations to match the dispositive provisions of the estate planning documents will almost always lead to a disconnect between the client’s stated planning goals and the actual results. Thus, the client’s assets must be appropriately “funded” to ensure that upon the client’s death, the assets will pass in a manner that matches the planning goals.

For example, if a married couple seeks to provide for “remarriage protection” upon the death of the first spouse, then a desired percentage of the couple’s assets (often 50%) must pass into a trust, rather than outright to the surviving spouse. The trust may be designed to permit the surviving spouse to be the controlling trustee, but can also provide that the spouse loses some or all control over the trust if he or she remarries without executing a pre-nuptial agreement with his or her new spouse. This type of provision can help ensure that regardless of which spouse dies first, at least a portion of the couple’s combined estate will pass to the children, regardless of what may transpire over the remainder of the surviving spouse’s lifetime. This remarriage protection is not effective if the couple’s assets are owned jointly with rights of survivorship, since joint ownership ensures that the assets will pass directly to the surviving by operation of law.

Once the initial funding is complete, it is a mistake to assume that the planning is “finished”. A successful estate plan requires regular maintenance to keep up with (i) changes in the clients’ personal and financial situation; (ii) changes in the laws (both tax and non-tax); and (iii) enhancements in the attorney’s knowledge and experience. If both the attorney and the client commit to a regular maintenance program, then when the estate plan “matures” upon a client’s death, there is a far greater likelihood that the plan will meet the client’s planning goals and objectives.

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