

Reflections on an Estate Planning Career

In my previous career I worked for almost twenty years as a bank trust officer. I decided to attend law school when I was forty years old. Some thought that the practice of law would entail a major career change. Professionals who work in the estate planning and legal communities know that my decision did not amount to a major change. I think my experience in banking and in the practice of law for the last fifteen years gives me a good perspective from which to share my thoughts on these matters.

Many commentators and those selling various products stress that probate is to be avoided at all costs. I respectfully disagree, and think that probate needs to be addressed on a state by state basis. Here in Vermont I believe that our probate courts do an outstanding job of looking out for the interests of heirs, and making sure that expenses are kept within reason. Probate is an informal, economical forum in which to resolve disputes.

Probate is the process by which the assets that are held in one's sole name are disposed of, either through the provisions of one's Will, or the laws of intestacy in the state in which he or she resided. As surprising as this may seem, roughly two-thirds of those that die in our country do so without a Last Will and Testament. I like to say that if you don't have a Will, the state has one for you, and it may or may not be what you would have wanted. Vermont's laws of intestacy reflect our agricultural roots. I believe most couples with children would want their entire estates to pass to their surviving spouse. Vermont's intestacy statutes leave a portion of one's estate to a surviving spouse, and the balance to one's children or other relatives.

Even young couples with modest assets that have children should have Wills, if for no other reason than to name a guardian for their children. In recent years the Internet and various so-called "Will kits" have encouraged many individuals to draft their own Wills and other legal documents. I have been the recipient of too many Wills that were drafted by individuals that did not comply with the requisite requirements in the Vermont statutes. The relatively small amount of money spent having an attorney draft a Will should provide considerable peace of mind. Here in Vermont, probate courts provide a valuable service by retaining original Wills. Wills are considered private while one is alive; probate courts will release them only to the maker and copies to his or her guardian.

Property that is owned jointly, or that passes by beneficiary designation, such as retirement accounts and life insurance policies, does not pass through probate. Especially with the tremendous increase in the value of retirement accounts, more and more property is passing outside of probate. When couples divorce it is essential that they review the form of ownership of their assets and their beneficiary designations.

I think that joint ownership makes good sense for most couples that have been married for a considerable period of time, and are both the parents of all of their children. When couples hold their property jointly, they should nevertheless have

Wills to address the possibility of their simultaneous death; dispose of their property upon the death of the second spouse; and to appoint executors.

Estate taxes are not a concern for most of my clients, given the extent of their assets. The amount that is now exempt from estate taxes in Vermont is \$2,750,000. In addition, assets left outright to a surviving spouse, through joint ownership, beneficiary designation, or a Will, pass under the so-called “unlimited marital deduction.”

I find myself drafting fewer trust agreements than I did when the amount that was exempt from estate taxes was considerably lower than it is now. With this said, there are a number of good reasons to consider a trust in one's estate plan. Those include provisions for minor children that postpone distributions beyond the age of majority, which is 18 in Vermont; provisions for a spouse in a second marriage; provisions for children with special needs so as not to disqualify them from any benefits to which they might otherwise be eligible; planning for incapacity; and provisions for a surviving spouse for couples with substantial assets that could be subject to estate taxes. Trusts can effectively double the amount that a couple can leave without estate taxes.

Powers of attorney are another important estate planning tool that can be designed to avoid the expense and delay inherent in guardianship proceedings. For good reason, courts do not appoint guardians through involuntary proceedings unless there is ample proof that one has become unable to make his or her financial decisions, or decisions concerning one's own personal care. Because there is usually no judicial oversight, it is essential that one have complete confidence in the agent that he or she names in a power of attorney.

A few years ago Vermont revoked its statutes that provided for so-called “living wills” and “powers of attorney for health care,” and replaced them with a fairly open-ended statute that provides for advance directives. Living wills and powers of attorney for health care validly executed under the prior statutes continue in full force and effect. The authority granted under living wills, powers of attorney for health care, and advance directives does not take effect until such time as one is unable to make his or her own health care decisions. Although I think that it is important to have an advance directive, it is perhaps even more important to discuss one's wishes concerning terminal care with his or her family and physician.

Vermont is incredibly generous in its provisions for its residents with disabilities or those with limited resources. As baby boomers begin to enter assisted living facilities and nursing homes in the future, it seems clear that all states will need to further tighten Medicaid regulations that provide for long-term care. Long-term care insurance is appropriate for many middle class individuals that want to be sure that they leave their estates to their children without having those assets diminished by their own health care costs.

I am occasionally asked for a recommendation for a financial planner or stockbroker. There are a number of excellent brokers and financial planners in our

community. I believe that as we get older, the relationship that we enjoy with a local person sitting across a desk becomes more important than matters such as fees and investment performance.

As the financial services industry consolidates, there is a temptation to try to handle everything under one roof. I believe that estate planning is best done as a team effort that involves clients, their accountants, insurance agents, the financial planners, trust officers, and other advisers.

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