Reflections on an Estate Planning Career

In my previous career I worked 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 that much of a change. I think my experience in banking and in the practice of law for the last ten years gives me a good perspective from which to share my thoughts on these matters.

Many commentators, as well as those selling various products, stress the idea that probate is to be avoided at all costs. I respectfully disagree, and believe that the probate process needs to be addressed on a state by state basis. Here in Vermont, I believe our probate courts do an outstanding job of looking out for the interests of heirs, devisees and legatees, and making sure that expenses are kept within reason. Probate Court is an informal, economical forum within which to resolve disputes. With this said, I believe that there are some probate proceedings which should usually be avoided through proper planning. Those proceedings include guardianships and trusts under wills which entail judicial oversight for what can be considerable periods of time.

Probate estate proceedings include the process through which the assets held in a deceased person's sole name are disposed of, either through the provisions of that person's will, or the laws of intestacy of the state in which the deceased person resided. As surprising as this may seem, roughly two-thirds of those who die in our country each year 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; however 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 but who have minor children should have wills, if for no other reason than to name a guardian for those children. In recent years the Internet and various so-called "will kits" have encouraged many individuals to prepare their own wills and other legal documents. I have seen too many wills drafted by untrained individuals that did not comply with the requisite requirements of the Vermont statutes. The relatively small amount of money to be spent having a skilled attorney draft a will should ensure the desired result and provide considerable peace of mind. Here in Vermont, probate courts provide a valuable service by retaining original wills for safekeeping. Wills are considered private while one is alive; probate courts will release them only to the maker and copies only to the maker's court-appointed guardian.

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

I think joint ownership of assets makes good sense for most couples who have been married for considerable periods of time, and when both are parents of all of their children. When couples hold their property jointly they nevertheless should have wills to address the possibility of simultaneous death; dispose of their property upon the death of the second spouse; and to appoint executors and guardians for their children.

Estate taxes should not be a concern for most Vermont residents, given the extent of their assets. The amount now exempt from estate taxes is $2,000,000. In addition, assets left outright to a surviving spouse, through joint ownership, beneficiary designation, or a will, pass tax free under the so-called "unlimited marital deduction." The amount exempt from estate taxes is scheduled to rise to $3,500,000 in the year 2009. Estate taxes are scheduled to be repealed in 2010. Under the sunset provisions of the current law, the amount that will be exempt from estate taxes in 2011 will revert to $1,000,000. Most commentators agree that when there is finally a compromise between Congress and this administration, or a subsequent one, the amount which will be exempt from estate taxes will be considerably higher than now.

I find myself drafting fewer trust agreements than I did when the amount exempt from estate taxes was considerably lower than now. With this said, there are a number of good reasons to consider a trust in one's estate plan. Those reasons include provisions for minor children which 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 public benefits to which they might otherwise be eligible; planning for incapacity; real estate that is owned in another state; and provisions for a surviving spouse for couples with substantial assets which could be subject to estate taxes. Trusts can effectively double the amount that a couple can leave without incurring 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 competent financial decisions, or sound 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 named in a power of attorney.

A few years ago Vermont revoked its statutes providing so-called "living wills" and "powers of attorney for health care," and replaced them with a fairly open-ended statute providing 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 the signer 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 family, physicians and any spiritual advisors.

Vermont is incredibly generous in its provisions for residents with disabilities and those with limited resources. As “baby boomers” begin entering assisted living facilities and nursing homes in the future, it seems clear that all states will need to tighten Medicaid regulations which provide for long-term care. Long-term care insurance is appropriate for many middle asset value individuals who 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 which 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 accomplished as a team effort involving clients, their accountants, insurance agents, financial planners, trust officers, attorneys, and other advisers.

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