

I'll Do It Later

May 2010 from James M. Kane, Attorney

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We all put off important tasks, particularly those where the immediate pay-off appears distant and far-removed. Core estate planning documents fit this category.

For most of us the only real payoff of getting our core documents in place is, at best, the quieting of that nagging inner-voice of 'I really need to take care of this'.

As to payoffs, we also are aware that the pertinent payoff is for our families after our death. Dying without a Will is easy. Picking up the pieces afterwards is not.

But even if we move on toward completing this task, inertia sets in during the process because estate planning documents as to who gets your property when you die are simply not that exciting as a motivating factor.

And, why can you not just write a simple list on a page or two for your estate planning? And what about the internet sites that advertise inexpensive Wills that you prepare yourself?

This newsletter helps to give you some points to consider about various threshold estate planning questions. These points, of course, apply differently to clients depending on their particular situation.

The following point leads the way in this discussion.

Dying Without a Will

A common misconception is that the "state will get all your property" if you die without a Will.

This is not correct; however your family will end up feeling as though the state gets all the property after dealing with the time and expense of the legal burdens and hurdles from having no Will.

When a person dies without a Will, the legal term is that the person died "intestate". [By contrast, a person with a Will dies "testate".]

Georgia law under O.C.G.A. § 53-2-1 mandates who gets your property if you die without a Will, as follows:

- (i) All to your spouse if you have no descendants;
- (ii) In equal shares to your spouse and children, but with your spouse getting no less than one-third (regardless of the number of children);
- (iii) If no spouse and no descendants, then to your parents;
- (iv) If none of the above, then to your siblings;
- (v) If none of the above, then to your nieces and nephews;
- (vi) If none of the above, then to your grandparents;
- (vii) If none of the above, then to your aunts and uncles;
- (viii) If none of the above, then to your cousins;
- (ix) If none of the above, then on and on to more distant ancillary relatives as defined

under this statute.

This last group is sometimes jocularly referred to as "laughing heirs", meaning that they laugh with glee upon receiving their newfound inheritance without having known the person (you) who died.

Another tall hurdle with an intestate estate is that the person administering the estate must be appointed by the court (there is no Will naming an executor) and is subject to a vast array of rules, procedures and limitations, most of which require ongoing court papers, oversight and approval of the probate court.

Four General Points

First, for many clients good estate planning documents need to include more than a simple list of beneficiaries. The documents need sufficient flexibility so that changes can be made under the terms of the documents without court intervention in response to future events (both tax and non-tax reasons, bankruptcy or divorce of a beneficiary, spendthrifts, drug or alcohol problems of the beneficiaries, changes in the tax law, etc.). Court intervention can be very costly as to both time and money.

Keep in mind, when we are dead our estate planning documents become our alter ego. The documents become our edict in our absence.

Second, I have been involved in numerous time-consuming and expensive litigation cases where family members fight over poorly-drafted documents that a beneficiary – due to the defect in the document – asserts in his or her favor as the basis of the litigation.

I also have handled Will contest litigation where a disgruntled beneficiary seeks to set aside the Will. There are, however, numerous preventive techniques that in most of these cases could have eliminated or greatly bolstered the defense in the litigation.

Third, the IRS, in particular, takes advantage of conflicting interpretations of poorly written

estate planning documents to its benefit in seeking more tax, particularly estate tax.

Fourth, and this point certainly is not rocket science. But, I am continually puzzled by the number of married couples that lose the estate tax-savings benefit of the estate exemption at the first-to-die spouse's death. This is simply because the estate plan does not provide the first spouse with enough property to apply against his or her estate exemption.

Failure to use, for example, the first-to-die spouse's \$3.5 million estate exemption can result in the family paying an additional \$1,575,000 of estate tax unnecessarily [\$3.5 million times 45% estate tax rate].

There are ways to prevent this loss, including the use of an inter-vivos QTIP trust for the married couple. This loss of one spouse's estate exemption is, by the way, particularly prevalent in second (or more) marriages.

Other Points to Consider

In addition, these other points below are helpful in considering the status of your estate planning (or lack thereof):

- Your core documents ideally should include all written provisions necessary so as to have your property held in trusts for your beneficiaries after your death (including your surviving spouse), compared merely to giving the property outright to the beneficiaries. The written trust provisions will be included in your core documents so that no new or separate trust documents will later have to be written.
- Trusts enable you to spell out the controls over the property for your beneficiaries.
- This control will help protect the trust property from the beneficiaries themselves and from third-party claims with a level of asset protection for the trust property (such as better protection from divorce, lawsuits, the beneficiaries' inability to handle money and limitations on spending too much money, and so forth).

- There also are many estate, gift and income tax planning features available with the use of trusts that are not available with an outright distribution of your property.
- The beneficiaries (after your death) can serve as trustees over their own trust share, if so included in the provisions of your core documents.
- Certain trust provisions, called "powers of appointment", will give the beneficiaries -- at their option -- a degree of power to lift some of the controls you place over the trust property.
- A question to keep in mind for your estate planning documents is what provisions you wish to include for your children's spouses (and possibly the spouses of their descendants). This is particularly important for clients with children who are married, but with no children of their own.
- The above power of appointment is a tool within the written trust provisions that can enable your children later to bring their spouses in as trust beneficiaries of trust income or

principal if they so choose.

- Your estate planning documents with the use of trusts coupled with generation-skipping tax ("GST") features can help reduce or eliminate estate tax on your property as it passes down your family line to children and grandchildren during the duration of the trusts. Georgia law typically limits a trust to 90-years. This is a reduction or elimination of estate tax that your children and grandchildren otherwise have to pay on your property in their own estates when they die.
- There are alternative avenues for trusts that last more than 90-years for clients with large estates. A handful of other states allow trusts to last longer than Georgia's 90-year period. This longer trust duration, combined with the above GST trust provisions, can further reduce the impact of downward generation levels of estate tax on the trust property for the generational family members who die during the longer term of the trusts (thus possibly great-grandchildren, great-great grandchildren, and so forth).

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