Pathways

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ASK AN EXPERT

Q: What do I have to do as trustee of our marital trust when my spouse dies?

Most husband-wife revocable trusts require a surviving spouse to take several actions. One important step is to divide the trust estate into either two or three separate sub-trusts. The purpose of the division may be to protect children or other family members of the deceased spouse from disinheritance by the surviving spouse and/or to make optimal use of the deceased spouse's estate tax exemption. In any case, a key task that the trustee (usually the surviving spouse) must perform is to properly and timely allocate assets among the sub-trusts. Failure to do so may cause tax and other problems.

A well-drawn trust permits the trustee to allocate each asset entirely to one sub-trust or another, if that is beneficial, so long as the total *value* of the assets allocated to each sub-trust is appropriate under the allocation formula in the trust document. Estate tax, income tax, and practical considerations all influence the allocation plan. It may be necessary to appraise business and real estate holdings. The trustee, in consultation with attorney and accountant, should develop an allocation plan as soon as asset values have been determined, but in any event within six months after the deceased spouse's death.
–Jim Deeringer

Q: Does the surviving spouse have to send a notice to trust beneficiaries?

Yes. In a typical trust, a part of the trust becomes irrevocable when a spouse dies. Within 60 days, the surviving spouse (or other trustee) must send a written notice to beneficiaries and heirs that contains language specified in the Probate Code. If notice is properly given, recipients will have only 120 days in which to contest the trust. If notice is not given, however, a disgruntled heir or beneficiary may have two years or more to contest the trust. Thus, it is important to send out a timely notice, to the proper recipients, that complies with the Probate Code.
–Gina Lera

The general information in this newsletter may or may not be appropriate for your particular situation. Before taking any action based on this newsletter, you should consult with your estate planning attorney.

Why Wills Matter: Estranged Father Inherits from Son He Never Met

A recent decision from the California Court of Appeal powerfully illustrates the importance of estate planning.

In *Estate of Shellenbarger* (2008) 169 Cal.App.4th 894, the court considered whether a father was entitled to inherit from his son who had died without a will at the age of 41. The father had never seen his son, having moved far away while his then-wife was pregnant. In the ensuing years, the father obtained a divorce and allegedly did not pay child support as required by court order.

When the son died, his mother was appointed administrator of his estate. She argued that the father should not receive half of the son's estate based on principles of equity. The court rejected that argument, explaining that California has a rigid set of statutory rules that dictate who inherits from a person who dies without a will and that "it is vain to argue against the injustice of the rule." Thus, even though it was fundamentally unfair for the father to reap a financial windfall after the death of his son, the court's hands were tied by the "intestate succession" provisions of the Probate Code. Since the son died without a spouse or children, his father was entitled to share equally with his mother in the estate, even though the mother and not the father had been close to the son.

The *Shellenbarger* case thus presents a cautionary tale. Our laws create a "default statutory will" that may lead to unhappy and unjust consequences when a loved one dies without any estate plan.
–Jeff Galvin

New Law Impacts No-Contest Clauses

"Anyone who contests this will shall receive nothing under it." Most no-contest clauses are longer than this example, but it illustrates how the ubiquitous clause works. In theory, no-contest clauses are common because people want to ensure that their plans for disposing of property won't be disturbed. In reality, however, many lawyers routinely include no-contest clauses in wills and trusts.

No-contest clauses can be helpful in a variety of situations, such as where the drafter chooses to distribute property unequally to his or her children. To deter litigation, the drafter should consider making a large enough bequest to the potential challenger so as to create a downside to litigation. Though father and mother may want to disinherit junior altogether, giving him a ten percent share may discourage him from pursuing costly litigation.

The law takes a mixed view of no-contest clauses. On the one hand, they are generally enforceable because they allow people to have more control over how they transfer property. On the other hand, they are disfavored because they can penalize beneficiaries who might voice legitimate concerns.

The positive and negative attitudes towards no-contest clauses caused conflicting court decisions and made it difficult for lawyers to advise clients. The Legislature initially responded by enacting a "declaratory relief" process that allowed potential contestants to first ask the court whether a proposed action would trigger a no-contest clause. This preview device caused a torrent of declaratory relief cases that burdened the courts and often delayed the resolution of disputes.

Last year, in Senate Bill 1264, the Legislature again overhauled the law. The changes will take effect on January 1, 2010 for most documents drafted before or after that date. Under the new law, no-contest clauses generally will <u>not</u> be enforceable <u>unless</u> they fall within three exceptions. One narrow exception will be based on the nature of a contest and will be triggered by the typical no-contest clause. The other two exceptions will not apply absent no-contest clause provisions expressly addressing them. One involves the characterization of property as community or separate, and the other involves creditors' claims. The courts, however, will no longer hear declaratory relief actions as to the applicability of no-contest clauses.

The new law may reduce litigation but raises new issues. California courts will be grappling with the new statutory language, and clarifying the gray areas, for several years. Since declaratory relief will no longer be available, it will be all the more important for attorneys to be vigilant when drafting estate planning documents and when advising beneficiaries about potential challenges to wills and trusts.

–Sil Reggiardo

Update Your Beneficiary Designations

When was the last time you reviewed the beneficiary designations for your retirement plans and life insurance policies? If you are like most people, it probably has been years or even decades. Since completing the forms, you may have had children, been divorced, and/or remarried. Failing to update your designation forms can have undesired consequences.

You might presume that your will directs the disposition of your plans and policies. In fact, however, the proceeds only pass by will if your designation form specifically names your estate as the beneficiary, or if the named beneficiary predeceases you and the plan directs that your estate is the default beneficiary.

If your named beneficiary survives you, he or she generally will receive the benefits no matter what is stated in your will and no matter what has transpired in your life since you last updated the form. For example, if you named your spouse as the sole beneficiary of your plan or policy during your marriage and neglected to remove that person as a beneficiary after your divorce, the former spouse may still be the rightful beneficiary.

Also keep in mind that the identity of the beneficiary may have income and estate tax consequences and thus should be consistent with the overall estate plan. Your estate planning professional can advise you in this regard.

Making a proper beneficiary designation is a key part of your estate planning. Please ensure that your assets are distributed according to your wishes by updating your designation forms.

–Kelly Tiberini

Does Spot Need a Trust of His Own?

For most people making estate plans, informal arrangements can be made with family members and friends to care for pets. Sometimes, however, folks want to make special plans to provide for their cherished dogs, cats, horses and other animals. Leona Helmsley's multimillion-dollar trust for her dog, Trouble, was a well-publicized example.

Enter the California legislature. Senate Bill 685 amends the Probate Code, effective January 1, 2009, to provide new rules for "pet trusts." A person can create a pet trust that will last for the lifetimes of designated animal beneficiaries. When the pets die, the assets remaining in the trust may be distributed to contingent beneficiaries, such as friends or family members of the settlor, or a favorite charity.

Pet trusts usually specify that a person will act as trustee. If nobody is designated, the court may appoint a trustee.

One interesting aspect of the new statute is that animal care groups are designated as interested parties. A nonprofit charitable organization that cares for horses, for example, may file a petition in court to challenge how the trustee of a pet trust for the benefit of Trigger is caring for the horse.

Indeed, serving as trustee of a pet trust involves more than petting, feeding and walking a furry friend. The trustee may have to prepare written accountings of trust expenses and provide those accountings to two-legged contingent beneficiaries. Also, the contingent beneficiaries, upon reasonable request, have a right to inspect the pet, the place where the pet is kept, and the books and records associated with the pet's care. The "fur may fly" in the courtroom if the contigent beneficiaries feel that too much is being spent on the pet.

Bottom line: the new statute creates an option for pet lovers to consider when creating or amending their estate plans.

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