Practical Probate

Why Estate Plans Fail: Structuring Assets

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The Will

A central component of many estate plans is a last will and testament. A Will directs distribution of the deceased person's assets through the probate process.

Wills don't control distribution of certain assets, however. Assets not controlled by a will include assets with a beneficiary designation (life insurance policies, qualified retirement accounts, accounts in financial institutions), assets owned in survivorship with another (real estate, motor vehicles), assets in a trust, and Florida homestead property where the deceased is survived by a spouse or minor children.

Assets owned in one of the ways described above pass immediately upon death to the person or persons designated on the asset title document. Examples of asset title documents include stocks, bonds, real estate deeds, motor vehicle title, or a financial institution's account documents. As long as the person or persons named in survivorship or as beneficiary survived the decedent, the Circuit Court (the Florida courts that have jurisdiction over probate matters) has no jurisdiction to determine the lawful owner of those assets; ownership passes by operation of law upon the death of the owner (for assets with beneficiary designations) or one of the owners (for assets owned in survivorship).

In order for an asset owned by the deceased to be controlled by his or her will, the asset must be owned solely by the deceased person at the time of his or her death. There cannot be a beneficiary designation or survivorship ownership of the asset.

This is the common "disconnect" that some people have between these two concepts that may cause an estate plan to fail. The example below illustrates how this might work.

An Estate Plan Fails

John Smith, an unmarried Palm Beach County resident and widower, has his attorney prepare an estate plan for him. John tells his attorney it's important that all three of his children are treated equally when he dies: each child must receive an equal amount of John's assets. John executes the estate plan his attorney prepared for him. The estate plan includes a will, power of attorney, and health care documents. John's new will transfers all his assets upon his death in equal shares to each of his 3 adult children.

Next, let's look at all the assets that John owns. John added his daughter Glenda as the co-owner of his checking account. John chose to do this in case he becomes incapacitated or dies. In either of those situations, John's hope is that Glenda would use the money in the checking account to pay expenses for John (if he's incapacitated) or pay John's final expenses after he dies. In this situation, however, Glenda would be under no legal obligation to use the funds in the checking account in the way John wants. John also owns an IRA; his son Jeremy is named beneficiary of the IRA. John

owns 3 houses – all 3 are in John's name only. John also has an investment account in which his deceased wife remains the beneficiary.

3 years later, John passes away. His will is admitted to the Circuit Court of Palm Beach County. His estate is administered according to his will. At the time of his death, the value of his assets are as follows: a checking account with a balance of $67,000; an IRA with a balance of $220,000; 3 houses with a value of $575,000; and an investment account with a balance of $550,000.

Even though John's will was designed so that his children each get an equal share of his probate estate, after John's death the outcome is a very unequal distribution of all of John's assets as shown in the chart below.

Asset	Glenda	Jeremy	Donna
1/3 Probate Assets	$349,666	$349,666	$349,666
Checking Acct	$67,000		
IRA		$220,000	
Total	**$416,666**	**$569,666**	**$349,666**

Analysis: Problems with Survivorship and Beneficiary Designations

Why did this unequal distribution of John's assets occur? There was no problem with John's will – it clearly provided that all his probate assets would be distributed equally between his 3 children. The problem is that many of John's assets bypassed the will upon his death. The mistake that John made – and in my experience, many people make – is failing to carefully inventory and review all assets after their will is executed. This important but often overlooked step includes analyzing which assets would pass under the will and which would pass outside the will. Next, John should have accounted for how much each of his children would receive as a result of survivorship, beneficiary designations, and the probate process. This step would look something like the table above.

Survivorship and beneficiary designations on some of John's assets caused the distribution of his estate to be different from what he intended. John should have changed or eliminated beneficiary designations on his assets so that equal distributions to his three children would have occurred.

One Solution

By making each of his three children equal beneficiaries of each asset, that asset would pass without the need for court oversight. More importantly, it would ensure that the asset would be divided equally among John's three children. The downside to this approach is that beneficiary

designations must be periodically reviewed to ensure consistency. As new assets are acquired, ownership of the new asset must also be carefully crafted for consistency with the estate plan. Another problem is that it's generally not possible to do this with a bank account owned by more than one person, so the checking account might need to be treated a different way.

Alternative Solution

A second approach would be to eliminate all beneficiary designations. This would ensure that all assets would pass through the will and be divided equally. However, this approach subjects all of John's assets in the court process after he dies. The effect of would be a delay in the transfer of assets. It would also preclude the convenience of having Glenda as a co-owner of the checking account. Without that feature, no one would have access to John's checking account should he become incapacitated or die.

The Best Solution

A third approach would be for John to prepare a trust. With this approach, John would transfer all his assets (except his qualified retirement account) into the trust. The assets in John's trust would be used only for John's benefit during his lifetime, and John would be the trustee while he's alive and has capacity. Should John become incapacitated, the successor trustee would take over the trust and administer it for John's benefit. This could prevent the need for a guardian of John's estate to be appointed to manage his finances. After John dies, the assets in the trust would then be distributed in equal shares to John's three children. This could prevent the need for probate proceedings after John's death, saving his family the time and stress of court proceedings.