Preventing a Will Contest

Emotions can run high at the death of a family member. If a family member is unhappy with the amount they received (or didn't receive) under a will, he or she may contest the will. Will contests can drag out for years, keeping all the heirs from getting what they are entitled to. It may be impossible to prevent relatives from fighting over your will entirely, but there are steps you can take to try to minimize squabbles and ensure your intentions are carried out.

Your will can be contested if a family member believes you did not have the requisite mental capacity to execute the will, someone exerted undue influence over you, someone committed fraud, or the will was not executed properly. (For more information on will contests, click here.)

The following are some steps that may make a will contest less likely to succeed:

- Make sure your will is properly executed. The best way to do this is to have an experienced elder law or estate planning attorney assist you in drafting and executing the will. Wills need to be signed and witnessed, usually by two independent witnesses.
- Explain your decision. If family members understand the reasoning behind the decisions in your will, they may be less likely to contest the will. It is a good idea to talk to family members at the time you draft the will and explain why someone is getting left out of the will or getting a reduced share. Whether you should state the reason in the will itself depends on state law; in some cases, its better to remain silent. Discuss this with your lawyer.
- In some states, a no-contest clause can be useful; in others it will have little or no worth. And leaving something of value to the potentially disgruntled family

often is counter-productive because it will mean that person becomes an “interested person” entitled to certain privileges in the probate process. It’s better to disinherit the person entirely, but again discuss this with your lawyer.

- Prove competency. One common way of challenging a will is to argue the deceased family member was not mentally competent at the time he or she signed the will. You can try to avoid this by making sure the attorney drafting the will tests you for competency. This could involve seeing a doctor or answering a series of questions.
- Videotape the will signing. A videotape of the will signing allows your family members and the court to see that you are freely signing the will and makes it more difficult to argue that you did not have the requisite mental capacity to agree to the will.
- Remove the appearance of undue influence. Another common method of challenging a will is to argue someone exerted undue influence over the deceased family member. For example, if you are planning on leaving everything to your daughter who is also your primary caregiver, your other children may argue your daughter took advantage of her position to influence you. To avoid the appearance of undue influence, do not involve any family members who are inheriting under your will in drafting your will. Family members should not be present when you discuss the will with your attorney or when you sign it. To be totally safe, family members shouldn’t even drive you to the attorney.

Again, I emphasize that some of these strategies may not be advisable in certain states. For an article on how to use a will to disinherit a relative, click here.

elamod

Is It Better to Remarry or Just Live Together?

Finding love later in life may be unexpected and exciting, but should it lead to marriage? The considerations are much different for an older couple with adult children and retirement plans than for a young couple just starting out. Before deciding whether to get married or just live together, you need to look at your estate plan, your Social Security benefits, and your potential long-term care needs, among other things. Whatever you decide to do, you may want to consult with your lawyer to make sure your wishes will be carried out.

Here are some things to think about:

Estate Planning. In your will, in most states spouses are automatically entitled to a share of your estate (usually one-third to one-half). One way to prevent a spouse from taking his or her share is to enter into a prenuptial agreement in which both spouses agree not to take anything from the other's estate. If you want to leave something to your spouse and ensure your heirs receive their inheritance, a trust may be the best option.

Long-Term Care. Trusts and prenuptial agreements, however, won't necessarily keep a spouse from being responsible for your long-term care costs or vice versa. In addition, getting married can have an effect on your or your spouse's Medicaid eligibility. If you can afford it, a long-term care insurance policy may be a good investment once you remarry.

The Family Home. Whether you are getting married or just living together, before combining households you will need to think about what will happen to the house once the owner of

the house dies. If the owner wants to keep the house within his or her family, putting the house in both spouse's names is not an option. On the other hand, the owner may also not want his or her heirs to evict the surviving spouse once the owner dies. One solution is for the owner of the house to give the surviving spouse a life estate. Once the surviving spouse dies, the house will pass to the original owner's heirs.

Social Security. Many divorced or widowed seniors receive Social Security from their former spouses, and remarriage can affect benefits. If you are divorced after at least 10 years of marriage, you can collect retirement benefits on your former spouse's Social Security record if you are at least age 62 and if your former spouse is entitled to or receiving benefits. If you remarry, you generally cannot collect benefits on your former spouse's record unless your later marriage ends (whether by death, divorce, or annulment). However, if you are a widow, widower or surviving divorced spouse who remarries after age 60, you are entitled to benefits on your prior deceased spouse's Social Security earnings record.

Alimony. If you are receiving alimony from a divorced spouse, it will likely end once you remarry. Depending on the laws in your state and your divorce settlement, alimony may end even if you simply live with someone else.

Survivor's Annuities. Widows and widowers of public employees, such as police officers and firefighters, often receive survivor's annuities. Many of these annuities end if the surviving spouse remarries. In addition widows and widowers of military personnel may lose their annuities if they remarry before age 57. Before getting married, check your annuity policy to see what the affect will be.

College Financial Aid. Single parents with children in college may want to reconsider before getting married. A new spouse's income could affect the amount of financial aid the college

student receives. Some private colleges may even count the combined income of a couple that lives together if they commingle their e

ela

How Your IRA Can Benefit Both Your Heirs and Charity

Do you want to use your IRA to help a charity, but also benefit your heirs? Instead of leaving your IRA directly to your children, you can leave it to a charitable remainder unitrust (CRUT) while still benefiting your children. With rules about inherited IRAs potentially in flux, this may be an attractive estate planning option.

Currently, when a non-spouse inherits an IRA, the beneficiary can choose to "stretch" out the IRA by taking distributions over his or her lifetime and passing what is left onto future generations. This allows the money to grow tax-deferred over the course of the beneficiary's life and to be passed on to his or her beneficiaries.

While a stretch IRA can be a good deal for your beneficiaries, it isn't always taken advantage of. If the inherited IRA isn't retitled properly, the IRA will have to be liquidated. In addition, it may not be an option for much longer because both Congress and President Obama have proposed changing the law to limit distributions to non-spousal beneficiaries to five years.

Instead of leaving an IRA directly to your heirs, an alternative is to leave the IRA to a CRUT. A CRUT is an irrevocable trust that provides the beneficiaries with income for a set number of years or for life. The beneficiaries receive a set percentage from the trust during their lifetime. When they die, the remainder in the trust goes to the charity (or charities) of your choice.

To name a CRUT as the beneficiary of an IRA, you must first put a provision in your will creating the CRUT. This needs to be done by an attorney. Then you can change the beneficiary on the IRA to the CRUT. While your heirs may receive less money overall than if they had stretched out the IRA, they should receive more money than if they were required to cash out the IRA after five years. Naming a CRUT as a beneficiary on an IRA also has positive estate tax implications. The estate will receive a deduction based on the remainder interest of the CRUT.

ela

Estate Planning for a Vacation Home

If you are lucky enough to own a vacation home, then you need to

figure out what will happen to it after you are gone. Many parents hope to keep vacation homes in the family, but guaranteeing that can be tricky.

While meant to be fun and relaxing places to get away from everyday life, vacation houses can cause problems between siblings after their parents pass away. Some siblings may want to use the house, while others may need cash and want to sell. There may be disputes over who pays maintenance costs or when different families can use the house.

One option for passing on a vacation home is to leave it to your children in your will. The problem with this is that if the children own the house equally as joint tenants or tenants in common and one sibling wants to sell, that sibling can demand to be bought out. If the other siblings can't come up with the money to buy out the sibling, the sibling who wants out can force the sale of the house.

Before you decide to leave your vacation house to your children outright, you should have a family meeting to find out whether all the children actually want the house. If they do, you should discuss who will be responsible for maintenance and property taxes, and who has the right to use the property, among other issues. Putting a plan in writing can help prevent or resolve disputes down the road. The plan can also include a buyout option if any heirs decide they do not want to own the property. The buyout price can be less than if the property is sold to a third party and payment terms can extend over several years.

Rather than giving the property to your children outright, you can also put it in a trust or a Limited Liability Company

(LLC). LLCs have become a popular estate planning tool for vacation homes. Using an LLC allows parents to transfer interest in the LLC to their children while still retaining control. Parents can use the annual gift tax exclusion to slowly gift their children additional interest in the LLC each year. The LLC agreement can designate a property manager, provide instructions on maintenance costs and property taxes, and include buyout options. Property in an LLC is also protected from creditors. (Unfortunately, in many states – including Maryland and D.C. – there will be a significant transfer tax to accomplish the transfer – ideally, the vacation property should be titled in an LLC upon purchase.)

Another option is to put property into a qualified personal residence trust (QPRT). A QPRT allows the parents to live in the home for a certain number of years and at the end of the term, the children own the home. The main purpose of a QPRT is to reduce taxes on property, but QPRTs are tricky and must be set up just right or there will be no tax savings. For more information about QPRTs, give us a call.

ela

Six Things to Consider Before Making Gifts to Grandchildren

Grandparents often are particularly generous to grandchildren as they see their family's legacy continuing on to a new generation. In many cases, grandparents feel they have ample resources and their children or grandchildren may be struggling financially. Assistance with summer camp fees, college tuition, wedding costs or the downpayment on a first

home, can relieve pressure on the next generation and permit grandchildren to take advantage of opportunities that otherwise would be out of reach. Some grandparents also don't feel it's right that children and grandchildren should need to wait for an inheritance, when they have more than they need.

Helping out family members is to be encouraged, but can raise a number of legal issues involving taxes and eligibility for public benefits, as well as questions of fairness among family members. Here are six issues grandparents should consider before making gifts to family members:

- **Is it really a gift?** Does the grandparent expect anything in return, for example that the funds be repaid or that the money is an advance on the grandchild's eventual inheritance? In most cases, the answer is "no." But if it's "yes," this should be made clear, preferably in writing, whether in a letter that goes with the check or, in the case of a loan, a formal promissory note.
- **Is everyone being treated equally?** Not all grandchildren have the same financial needs, and grandparents don't feel equally close to all of their grandchildren. While it's the grandparent's money and she can do what she wants with it, if she's not treating all of her grandchildren equally, she might want to consider whether unequal generosity will create resentment within the family. Many elder law clients say that what they do with their money during their lives is their business. They may help out some children and grandchildren more than others based on need, with the expectation that this will be kept private. But they treat all of their children equally in their estate plan.
- **Beware taxable gifts.** While this is academic for most people under today's tax law, since there's no gift tax for the first $5.25 million each of us gives away, any gift to an individual in excess of $14,000 per year must

be reported on a gift tax return. Two grandparents together can give up to $28,000 per recipient per year with no reporting requirement. And there's no limit or reporting requirement for payments made directly to medical and educational institutions for health care expenses and tuition for others.

- **529 plans.** Many grandparents want to help pay higher education tuition for grandchildren, especially given the incredibly high cost of college and graduate school today. But not all grandchildren are the same age, making it difficult to make sure that they all receive the same grandparental assistance. Some grandchildren may still be in diapers while others are getting their doctorates. A great solution is to fund 529 accounts for each grandchild. These are special accounts that grow tax deferred, the income and growth never taxed as long as the funds are used for higher education expenses. Click here to read more about 529 accounts.
- **Don't be too generous.** Grandparents need to make sure that they keep enough money to pay for their own needs. While small gifts probably won't make any difference one way or another, too many large gifts can quickly deplete a lifetime of scrimping and saving. It won't do the family much good if a grandparent is just scraping by because he's done too much to support his children or grandchildren.
- **Beware the need for long-term care.** In terms of making certain that they have kept enough of their own savings, grandparents need to consider the possibility of needing care, whether at home, in assisted living or in a nursing home, all of which can be quite expensive. In addition, those seniors who can't afford to pay for such care from their own funds need to be aware that any gift can make them ineligible for Medicaid benefits for the following five years. For details, click here.

There are even more issues to consider that may involve

specific family situations. Some grandchildren shouldn’t receive gifts because they will use them for drugs, or the gifts may undermine the parents’ plans for the grandchild or their authority. In some instances, grandparents may want to consider “incentive” trusts, which provide that the funds will be distributed when grandchildren reach certain milestones, such as graduation from college or holding down a job for a period of time. Communication with the middle generation can be key to making certain that gifts achieve the best results for all concerned.

Talk to your attorney about devising the best plan for yourself and for your grandchildren.

ela