THOITS LAW

Trusts & Estates Notes

A Series of Articles on Legal Issues Regarding Estate Planning and Estate Administration

Creating the First Estate Plan

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Individuals and couples who wish to create their first estate plan have needs that are as varied as those of other clients. However, they are particularly likely to benefit from help with the recurring issues discussed in this article.

Avoiding Unintended Consequences.

Individuals and couples who have not previously created an estate plan are often not aware of the benefits of foundational estate planning. The law imposes “default” provisions for those who have no estate plan or whose attempted planning is incomplete or defective (including, in some cases, those who have attempted do-it-yourself planning). These default provisions may cause any number of undesirable or even disastrous results, such as: unnecessary taxation upon the death of a surviving spouse, or upon the transfer of assets to a surviving, non-citizen spouse; needless taxation of insurance proceeds; missed opportunities for stepped-up basis in assets because of the manner in which they are titled; unnecessary (and inconvenient, and expensive) probate proceedings; lump sum distributions of significant wealth to a child at a young age; and payment of taxes and expenses by beneficiaries for assets they do not even receive. These sorts of results are easily avoided as a part of the basic estate planning process.

Coordinating Instructions.

Clients seeking a first estate plan may lack coherent directions for disposition of their assets. They are often surprised at the amount of wealth their estate plans will eventually direct. This includes not only obvious assets, such as a home or brokerage accounts, but also assets that are sometimes overlooked, such as potential life insurance proceeds, retirement assets (e.g., 401(k) accounts), and business interests. The directions for the disposition of such assets has usually been made in an uncoordinated manner based upon the circumstances that existed at the time that, e.g., different accounts were opened or real property was purchased.

Such clients are often startled to learn how their assets would have passed upon their death under their current planning (or lack thereof). For example, some assets (e.g., life insurance and retirement accounts) might pass according to out-of-date beneficiary designations to individuals the client no longer wishes to benefit. Assets might also be directed to the right beneficiary, but in the wrong manner (e.g., in a lump sum, free of trust, as soon as a child reaches adulthood). Further, such clients may have decided how to take title to real property based on casual advice (e.g., from a friend, realtor, or website), without understanding the significant estate planning and tax consequences of this decision. They may also have made decisions based on a misunderstanding of the law; most commonly, this occurs when individuals erroneously believe that all of their assets will automatically pass to a surviving spouse.

Thus, one of the key benefits of foundational estate planning is to provide a "check-up" for an individual's or couple's assets, to ensure that: (1) each individual asset will pass to the right beneficiaries in the right manner; and (2) the overall distribution of assets to different beneficiaries (and allocation of expenses and taxes) is in accordance with the individual's or couple's wishes.

Planning for Young Children.

Frequently, individuals and couples who wish to create their first estate plan will be parents of young children, and will require appropriate planning for the benefit of those children.

Targeted Planning for Specific Assets and Circumstances.

Clients obtaining foundational estate planning may also wish to take advantage of planning devices to address particular assets or circumstances. Common examples include: ownership of assets that may create legal liabilities (such as income-producing real estate); ownership of significant life insurance policies; planned distributions to a non-citizen spouse; planned giving of substantial gifts to charity; and ownership of concentrated stock positions that have the potential to increase dramatically in value. Individuals and couples who have not previously created an estate plan may be unaware of the benefits of specific planning devices in these and other common situations.

Selecting a Team of Financial Professionals.

Often, individuals and couples who do not have an estate plan also have not yet selected a team of financial professionals, but now feel the need to do so. For example, along with an estate planner, such clients may need a financial advisor, an accountant, or an insurance broker. An estate planner can explain what each of these professionals does, which team members are needed by particular clients, and how different professionals charge for their services. Clients who do not have these relationships in place also often seek recommendations of professionals who are capable, appropriate for those clients' needs, a good fit with their personality, and focused on working with similar clients (so that they are familiar with the recurring issues such clients face).

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