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The Benefits of Proper Estate Planning

By Richard M. Morgan & Loraine M. DiSalvo

To see what happens without proper estate planning, let us consider a common family situation. Assume that you own most or all of the significant family assets in your individual name and you die leaving a spouse and minor children. If you die in Georgia without a valid will, your probate estate assets will be distributed in accordance with the Georgia rules of intestacy (your probate estate will include any assets you own except those which pass to a surviving joint owner under a right of survivorship – this does not include all jointly owned assets, however – and any assets which pass to a beneficiary other than your estate under a beneficiary designation). The Georgia intestacy rules provide generally that your spouse and each of your children will receive an equal share of your estate, with your spouse entitled to at least a 1/3 share Since your children are minors, your spouse can petition the probate court to serve as the natural guardian/conservator for the children, to take care of their shares of your property. Of course, your spouse will have to obtain an insurance bond to ensure that the children's shares are not used improperly, and your spouse will need to file an inventory and (at least) annual returns with the probate court showing the activities with regard to the children's shares. While your spouse may use the income (i.e., interest and dividends) from the children's shares for the children's benefit, the spouse may not use any of the principal without prior Probate Court approval. Your spouse may not use any of the children's shares for his or her own benefit, except for his or her annual statutory guardianship fees of generally 10% of the income from the children's shares plus, eventually, up to 5% of the principal. Your minor children will own more of your probate estate assets than your spouse, and this includes your residence and any other asset you owned outright at your death. THIS RESULT IS A BONA FIDE DISASTER.

To avoid this result, many couples will try to keep assets from becoming part of a spouse's probate estate by owning most of their assets jointly with rights of survivorship, and having the rest of their assets pass by beneficiary designation to the surviving spouse at the first spouse's death. This method, if done perfectly, can help ensure that the most significant assets pass to the surviving spouse upon the death of the first spouse to die, rather than to the spouse and the children. However, with this method planning you fail to address numerous other issues, such as:

Selecting an Executor

Selecting an Executor who will ensure that your wishes are properly followed, especially upon your surviving spouse's death;

Selecting a Guardian

Selecting a guardian to take care of your minor children after the surviving spouse's death;

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Protecting Children's Inheritances and Selecting Trustees

Providing for your children to receive their inheritances in trust, with a Trustee you select, who will take care of the children's inheritance. A trust should be used for minor children, at a minimum, so that no conservator and court supervision is needed and the children will not receive control of their inheritances immediately upon turning 18. A trust can also be used to stretch out the asset distributions to the children over a period of years, to help reduce the risk that an immature or foolish act will not cost a child his or her entire inheritance. For example, a child can be given his or her inherited property in installments, such as 1/2 at 30 and the remainder at age 35. This allows a child to have a second chance if they foolishly spend the first installment. Of course, your trustee can use the trust assets for your children's benefit prior to the trust assets being distributed outright to them. In addition, a trust which uses our "GST planning" which remains in place during a child entire lifetime can bring other benefits to the child, such as some protection from the child's future divorce or creditor problems and some protection from estate and other wealth transfer taxes when the child wants to pass inherited assets to his or her own children. The child can even be given the ability to control his or her own trust at some point, if desired.

Providing for Beneficiaries with Special Needs Using Supplemental Needs Trusts

If you have loved ones who qualify or may need to qualify for needs-tested government benefits such as Medicaid, either because they are in a nursing home, have a mental or physical disability, or otherwise, you can use supplemental needs trust planning to provide significant extra benefits for those loved ones. If you simply leave assets outright to a person who needs to qualify for needs-tested government benefits, then that person may need to spend most or all of those assets, before he or she can qualify for the needed benefits. By having assets put into a supplemental needs trust for the benefit of that person, however, the assets should be available to provide for "extras" which are not covered by the needs-tested benefits, but the assets should not be counted as belonging to the person for purposes of determining whether or not he or she is eligible to receive the benefits. This type of planning can let you maximize the benefit your loved one receives from your assets.

Helping Ensure Your Assets Benefit Your Desired Beneficiaries

You can help ensure that assets not needed by your surviving spouse during his or her lifetime actually pass to your children (or your other desired beneficiaries), instead of to your surviving spouse's possible new spouse or additional children if your spouse remarries and/or starts another family after your death. You can also help ensure that your intended beneficiaries receive the benefits you want them to receive, at the time you want them to receive them. This can be especially important in the blended family situation, which is extremely common nowdays. For example, if you have children from a prior marriage, you may not want all of your assets to benefit your spouse at your death, and you may prefer that some of your assets pass directly to your children at your death. As another example, if you or your spouse has children from a prior marriage and you also have children from your marriage to each other, you may want to have different proportions of your property pass to your prior marriage children and to your children from your current

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marriage, to account for the fact that the prior marriage children may also inherit from their other parent's family as well as from you, while your current marriage children will likely only inherit from you and your spouse.

Providing for the Future of Your Business

You can use a wide array of techniques to help ensure that your business will make a smooth transition in the event of your death or disability, or the death or disability of a co-owner. You can also help ensure that your business will eventually be controlled by persons you select, whether those persons are family members, co-owners, employees or others.

Avoiding Disputes

Well-done estate planning can be very helpful in reducing or eliminating the possibility that a dispute will arise after your death, and in helping to minimize the damage caused by any disputes which do arise.

Reducing or Eliminating Gift, Estate, and Generation-Skipping Transfer ("GST") Taxes

Proper estate planning should include thorough consideration of the estate, gift, and generation-skipping transfer ("GST") taxes which may apply to assets you transfer to others during your lifetime or at your death. It should also include appropriate measures designed to reduce or avoid your exposure to these taxes, to the extent you want to do so. Estate tax reduction planning is designed to help maximize the benefits of the estate tax applicable exclusion amount and your gift tax annual exclusion and lifetime gift tax exclusion amounts, to help you ensure that your property passes to your desired beneficiaries rather than to the government in the form of taxes. With proper planning before the first spouse's death, married couples can effectively double their available estate tax exclusion amount, which can produce significant estate tax savings. Please note that your estate value, for estate tax purposes, is generally equal to your net worth (i.e., assets less debts) plus the face amount (i.e., death benefit) of your life insurance policies. If you are still projected to owe estate taxes after fully using your available applicable exclusion amounts, various other estate tax reduction strategies can help further minimize or eliminate this remaining projected tax liability.

Reducing Income Taxes

You can take steps to reduce the extent to which your beneficiaries pay income taxes on the assets they receive from you after your death. For example, proper beneficiary designations on your IRA and qualified plan accounts can allow your beneficiaries to realize the maximum available deferral of income taxes while your overall estate distribution intent is still carried out. During the estate planning process, other income tax strategies may also become available, including, for example, the Bradshaw Sale technique to lock in capital gain rates on appreciation in real estate prior to development, the use of a charitable remainder trust prior to the sale of a substantially appreciated capital gain asset, especially where you would like to benefit charitable beneficiaries at your death, or the use of a grantor charitable lead trust to create a large and immediate charitable income tax deduction while also helping your favorite charitable organization(s).

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[1] The surviving spouse could file for a "year's support" to possibly obtain a larger share of the estate.

[2] We use the term "GST planning" to discuss planning which uses long-term trusts to provide asset protection, divorce protection, and wealth transfer tax planning to our clients' children because this planning traditionally revolves around maximizing the use of the clients' exemptions from the generation-skipping transfer ("GST") tax. The GST tax is a tax which applies any time assets move from one generation (the client) to a lower generation (the client's grandchildren) in a manner that causes the assets to avoid being subject to tax at an intervening generational level (i.e., at the client's children's level). Assets in trust which have been made GST tax exempt trust using a client's GST exemption are not supposed to be subject to estate taxes at the death of the client 's child, when the remaining trust assets will potentially move to the child's own children.

[3] The estate tax "Applicable Exclusion Amount" is the amount which each individual U.S. citizen can transfer at his or her death without estate taxes. The Applicable Exclusion Amount is scheduled to return to $1,000,000 on January 1, 2013. Each U.S. citizen also has the ability to make up to $13,000 per recipient per year in gifts using the gift tax annual exclusion (please note that gifts must meet certain requirements to qualify for the gift tax annual exclusion), and the ability to make up to $5,000,000 in lifetime taxable gifts during 2011 and 2012 but scheduled to revert back to $1,000,000 beginning in 2013. The estate tax Applicable Exclusion Amount will be reduced to the extent you made taxable gifts made during your lifetime.

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