Estate planning 101

Stop and think about the pieces

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Many people don't understand that when it comes to transferring property after death a will does not cover all assets. When designing someone's estate plan, it's critical to look at the different types of property so the decedent's intentions will be carried out correctly.

"An estate plan isn't just getting signed documents in place, it's also looking at the asset base to make sure everything will match up and play out properly," says Mary Jo 'MJ' Baum, an attorney at Semanoff Ormsby Greenberg & Torchia, LLC. "Otherwise, the estate plan or will isn't worth the price you paid for it."

Smart Business spoke with Baum about properly transferring property at death and the problems that can arise if a will is not crafted correctly.

How is property transferred at death?

There's a misconception that a will controls the disposition of all of a person's assets at death. The truth is that if you own an asset with your spouse or child as 'joint tenants with rights of survivorship' — for instance, a bank account or primary residence — it's the last person standing who receives the asset in full. After the first death, the surviving co-owner only needs to show a death certificate to retitle the joint bank account to the survivor's sole name.

This also holds true for joint tenants with rights of survivorship (JTWROS) real estate. Usually a new deed is not prepared after the first co-owner's death. Instead, it is normal for a new deed to be prepped only when the surviving co-owner subsequently transfers the property by sale or gift. For 'chain of title' purposes, that deed then recites the death of the first co-owner, which resulted in the survivor's exclusive ownership and set the stage for the instant sale or gift.

Another asset category is property subject to a beneficiary designation. For life insurance, annuities, IRAs and 401(k) or other retirement plans, the owner designates a beneficiary in writing on a form supplied by the provider. The last designation on record with the provider controls. Unless a beneficiary designation asset is made payable to the owner's estate, reference to that asset in a will has no meaning.

A shortcut form of beneficiary designation asset is one that is earmarked as an in trust for (ITF), pay on death (POD) or transfer on death (TOD) asset. Accounts retitled in these ways won't be available to fund a bequest in the will or to pay for the funeral or death taxes. This is tricky because the monthly statement for the bank/brokerage account often only shows the owner's name and doesn't reflect that it's an ITF/POD/TOD account.

Another asset category is one where an asset is owned by a trust. These have an underlying written trust document containing specific terms that apply to the trust's assets.

Essentially, the only property that is disposed of by will is property that is titled in the decedent's name alone, which is not subject to a regular or shortcut form beneficiary designation, or owned as 'tenants in common' (TIC). With TIC ownership, two or more people possess portions of the asset together, but not with rights of survivorship. Each person's portion is his or hers to control or transfer. Each person's separate portion is treated as the person's sole name property.

What problems can arise if a will is not written correctly?

In one post-death situation I handled, a gentleman had written his own will. He had been widowed, was remarried and had children from his first marriage. His will stated that at his death his life insurance was to pay for his funeral, his second wife could live in his house for the rest of her life and then it would pass to his kids, and specific bank accounts were bequeathed to his kids. Of all of the provisions he wrote, not one was validated because the extra-testamentary asset arrangements trumped his will's contrary provisions. Even worse, the will contained no residuary clause — a 'catch all' provision in a will that disposes of property not expressly disposed of by other provisions. He had sole name assets not mentioned and no residuary clause to cover them. So, in essence, he died without a will as to those assets, leaving his wife and children to parse their way through the intestate laws.

Don't let this happen to you. ●