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EVEN THE MOST THOUGHTFUL AND WELL-CRAFTED WEALTH TRANSFER PLANS CAN BE THOROUGHLY THWARTED WHEN THE OWNERSHIP TITLES AND BENEFICIARY DESIGNATIONS ASSOCIATED WITH YOUR ASSETS CONTRADICTTHE INTENTIONS SPELLED OUT IN YOUR PLAN DOCUMENTS. A PERIODIC REVIEW OF THESE DOCUMENTS AND PLANS IS AS IMPORTANT AS PERIODIC REVIEWS OF YOUR INVESTMENTS.

Entitled!

Properly titling your assets may be the most important single element in getting your estate plan right.

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Recently, we reviewed the estate plan of a Massachusetts client with a $50 million-plus estate. The estate plan was relatively simple and we had a lot of ideas to take it to the next level. But first things first.

The client's existing plan gave all of her financial assets, in equal shares, to her three children. One third went outright to her son and elder daughter, but the remaining third was to be put in trust for life for the benefit of her younger daughter, who had lifestyle issues, with any remaining principal at the daughter's death to her descendents.

The problem was, the lion's share of the financial assets were in brokerage accounts and those accounts were of a type known as "transfer on death," or TOD. A TOD account pays directly to the named beneficiary at the death of the owner. In legal parlance this is known as title transferring by operation of law. In some cases this can be an attractive way to transfer assets – it is quick, clean and avoids probate. In others, it can be calamitous, such as could have been the case here.

When assets pass by beneficiary designation, they go directly to the beneficiary and are not controlled by the will or other estate planning documents of the client. No one tells you this when you ink someone's name on an account document.

In this particular case, that meant the client's assets went directly not only to the son and first daughter, which was fine, but also to the younger daughter, and never went into trust as was intended. This was, most decidedly, not a good result!

Ask for an Estate Review

Your Fieldpoint Private Advisor can work with my office for a complementary estate plan review. In it, we will work to understand your intentions, and then review your estate documents and the titling of your assets, and will point out where we see misalignment and make recommendations to resolve.

As with asset allocation, every estate plan needs to be "rebalanced" from time to time, as intentions evolve, assets change, and children mature (or un-mature, as the case may be!) If this is of interest, please talk with your Fieldpoint Advisor.

Fortunately, we caught and corrected this by simply deleting the TOD provision, but up to that point it was a disaster waiting to happen.

Another situation, which in practice is not uncommon, happens when the "standard" estate planning documents are drafted, creating a family or credit shelter trust. In this scenario the trust is to be funded with the estate tax exemption dollar amount (currently $11.4 million per person), with the balance of the estate assets going to fund a marital trust. This is right down-the-middle-of-the-fairway estate planning, but you are back to "the best laid plans of mice and men" if a large swatch of the decedent's assets are "non-probate" property, and not controlled by their will or trusts.

These include (see below) not only property passing by beneficiary designation, as in the above example, but also all forms of jointly held property that include a right of survivorship. Most married couples own real estate this way, for example. So, again, we not infrequently see estate planning documents that by all indications appear to be well-drafted, however when digging deeper and reviewing the way in which the client's property is titled, we discover that much of the client's property is of the non-probate variety. This asset titling error does a complete end run of the wills and trusts that were designed to direct and manage it, essentially negating the client's estate plan.

The moral of the story is one of the cardinal rules of estate planning. You can have a brilliantly crafted set of estate planning documents, but if the beneficiary designations of your assets are incorrect, all is for naught!

A BRIEF TUTORIAL

So as a quick "Ways to Hold Title 101," here are the usual suspects:

In **individual name** (or fee simple absolute, as they tell you in law school): This is the default condition, unless otherwise designated property is held this way and will be controlled by the will and trusts.

In **joint name**: With this designation, each party is said to own, jointly, an "undivided share." Jointly held property comes in number of flavors. The most frequently encountered are:

- Joint with Right of Survivorship (JTWROS)

  In this form the entire interest of the first owner to die transfers to the survivor at death. If you are married you probably own your home this way.

- Tenancy in Common

  This is still jointly held, but the interest of the first to die does not transfer "automatically." Rather, it becomes part of the probate estate of the decedent and transfers by the terms of their will.

- Community Property/Marital Property

  Some states, including notably California and Texas, view property acquired during marriage as owned equally by both spouses, no matter who actually acquired it. On a state- by-state basis, this type of property can be owned "in common" or with right of survivorship.

By **beneficiary designation** (operation of law): Common forms of this are the beneficiary designations you make on your life insurance policy, IRA, 401(k), etc. and include, as seen above, the TOD choice on your brokerage account.

When property is jointly held with a right of survivorship or beneficiary designation, it is considered "non-probate." Again and crucially, non-probate property passes directly to the beneficiary, is not subject to the probate process, and thus is not controlled by the clients' estate planning documents.1 The two situations described above are classic examples of this problem.

DAMAGE CONTROL

Still, all may not be lost. Under the property laws of most states, a recipient of assets has the ability to disclaim or renounce them. This is true not only for property received by testamentary document, usually meaning a will or trust, but also property received via the non-testamentary methods (eg. beneficiary designation) that are the subject of this article.

1. An exception to this nomenclature is property held in revocable trusts. It is not subject to probate, but is controlled by the terms of trust, which usually imbed a full-blown estate plan. These are frequently used in conjunction with "pour-over" wills.

A disclaimer has the same effect as if the person disclaiming had died before the actual decedent. For example, in the case of jointly held real estate where a husband predeceased his wife but the wife then disclaimed her interest, it would be as though the husband held the real estate in his individual name at his death. As such, it would be controlled by his will and other documents.

In cases of property received as the beneficiary of life insurance policies, IRAs, 401(k)s, etc., disclaimers have more troublesome mechanics. If, for instance, as in the above example, a wife received the proceeds of a life insurance policy at her husband's death, she could disclaim her interest in it. However in this case, the proceeds would not necessarily become assets of her husband's probate estate, rather they would be paid to whoever the contingent beneficiary of the policy is. This could be the estate, but is usually the children, and disclaiming is fully a volunteer process. There are children who might further disclaim in favor of the estate, and there are children who might well **not!**

AND IN CONCLUSION

At the risk of oversimplifying a complex topic, we focused here on financial assets, but these issues affect non-financial assets like real estate, and possibly other types of property, as well.

The point is, effective estate planning is a two-step process. It is not only design, but also implementation. A perfectly crafted (and perhaps quite expensive) set of estate planning documents can be rendered practically non-functional by failure to dot the i's and cross the t's of asset titling. Think entitlement, and please don't hesitate to call us in to give things a second look. ▪

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