

G R A Y

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ESTATE PLANNING MATTERS!

Minnesota Adopts New Trust Law

On March 19, 2015, Minnesota became the 31st state to adopt the Uniform Trust Code. The new Minnesota Trust Code (“MTC”) will become effective on January 1, 2016, and provides a much-needed, comprehensive model for the law of trusts in Minnesota. Trustees, beneficiaries, advisors, and other third parties will benefit from the MTC’s clear, concise, and more flexible provisions. To learn more about the MTC and its impact, please visit our website at www.gpmlaw.com/TECP.

Charitable Planning with Retirement Assets Bequests At Death

A donor who wants to make charitable gifts at death should consider making those gifts from her retirement accounts because an IRA or other tax-deferred retirement account is the best asset to leave to charity at death. The reason is simple—unlike almost all other assets, a retirement account is potentially subject to income tax in the hands of the beneficiary who inherits it. Each withdrawal from the account is gross income to the beneficiary. A spouse or child pays income tax on that amount, but a charity, as a tax-exempt Section 501(c)(3) organization, does not.

The simplest way for a retirement account owner to leave the account to charity is with a “beneficiary designation.” The IRA custodian, or the plan administrator for a qualified retirement plan such as a 401(k), can provide a beneficiary designation form. To avoid subjecting the account to unnecessary income tax, the beneficiary designation should name the charity directly, not the donor’s estate or revocable trust.

A married donor may wish to leave a retirement account for the benefit of two beneficiaries, a surviving spouse and a charity. Depending on the donor’s preferences, there are at least four possible ways to accomplish that:

- The donor names the spouse as beneficiary; the spouse rolls the account over to a new IRA and takes at least the Federal minimum required distribution from that IRA each year; the spouse names the charity as beneficiary of the new IRA.
- The donor names the spouse as beneficiary of a fraction of the account and the charity as beneficiary of the rest of the account.
- The donor creates a charitable remainder trust and designates it as beneficiary of the account; the trust makes a defined annual payment to the spouse; at the spouse’s death the remaining trust assets go to the charity.
- The donor designates a marital trust as beneficiary of the account; the trust pays the spouse all income of the account each year and has discretion to distribute account principal to the spouse as well; at the spouse’s death the remaining account and trust assets go to the charity.

Gifts During Lifetime

Over the last several years, Congress has extended the “IRA Charitable Rollover” a number of times, however, it has not been extended to 2015. When the law was in force during those past years, donors were able to make charitable gifts directly from their IRAs during their lifetimes, and qualify those

gifts as part of their required minimum distributions from their IRAs, if the following requirements were met:

- Donor over age 70 1/2.
- Equal to or less than \$100,000 in the tax year.
- Made directly outright to the charity from the donor's IRA and not made to a typical family foundation, widow and orphan control, supporting organization, or donor advised fund.

Those donors excluded the gifted amounts from their income and could not deduct the charitable gifts.

Some donors will choose to make gifts to charity from their IRAs in 2015 in the hopes that the IRA Charitable Rollover law will be extended this year. Those donors take the risk that if the law is not extended to 2015, the gift will be treated as a distribution to the donor and included in gross income, followed by a charitable gift that would be deductible subject to the donor's applicable deduction limitation, with the result that the donor might have additional income tax. Donors desiring to make a lifetime gift from an IRA in 2015 when the IRA Charitable Rollover law is not in force should consult their tax advisors about the risks if the law is not extended.

Estate Planning for Second Marriages and Blended Families

Estate planning for second marriages can be complicated and emotional, but it is far better to do the hard work of planning than it is to do nothing. Spouses in second marriages may have very different goals and ideas about how the assets will be distributed in the event of separation or divorce. Second marriages can also require addressing additional difficult questions, such as what goes to the children of the first marriage, what goes to the children of the current union, and what goes to the surviving spouse at death. While these issues might be difficult and uncomfortable, it is very important to plan for them before it is too late.

Consider the following scenario: Al was divorced four years ago and has two children, Jason and James, with his former spouse. Al and Barb were recently married. Al dies and leaves everything outright to Barb with the expectation Barb will provide for Jason and James. Barb remarries and has children with her new spouse. Barb's new spouse convinces her to leave all of her assets (including the assets she received from Al) to their children. Jason and James are left with nothing. This is just one of the scenarios that spouses in second marriages need to consider. Using the estate planning tools available, spouses in second marriages can plan solutions for these kinds of situations.

Impact of Divorce on Your Current Estate Planning Documents

Following a divorce, it is important to consider its impact on your current estate planning documents. In the absence of language addressing the impact of divorce, any terms disposing of property to the former spouse in a will or beneficiary designation, except for ERISA governed accounts (a 401(k) for example), are revoked under Minnesota law. Similarly, in the absence of language to the contrary in a revocable trust, provisions of the trust are given effect as if the former spouse died on the date the marriage was dissolved or annulled. Effectively, unless a trust or will says otherwise, a former spouse is removed as a beneficiary of the other spouse's will and trust at divorce.

Planning for Divorce Obligations

Spouses in a second marriage may have different estate planning considerations than those in a first marriage. For instance, divorce decrees can create ongoing obligations to a previous spouse, such as alimony, ownership of home, required bequests in will, or other payments due. There may also be court ordered obligations to children of the former marriage. Clients may choose to take advantage of estate planning vehicles such as life insurance, irrevocable trusts, beneficiary designations, and 529 Plans to satisfy those obligations. Additionally, for the spouse who may be giving up a career or alimony from a prior divorce, ensuring an acceptable property settlement or spousal maintenance payout prior to remarriage may be an important factor.

Antenuptial Agreements

An antenuptial agreement can provide a starting point for an estate plan. For the spouse who endured a contentious divorce, he or she may want the comfort of knowing that estate and asset division has already been

worked out in the event of a death or divorce using an antenuptial agreement. While some may relate an antenuptial to “planning for my divorce,” the peace of mind and clarification of property division can help diffuse a potentially uncomfortable topic with a future spouse and the respective children.

Taking Care of the Surviving Spouse and Children at Death

In first marriages, it is common for a spouse to leave all of his or her property outright to the surviving spouse. In a second marriage situation, the benefits and risks of an outright gift should be weighed carefully.

Outright gifts to the surviving spouse have several advantages: (1) the transfer qualifies for the estate tax marital deduction and defers the payment of estate tax until the second death; (2) it gives the surviving spouse flexibility and access to all of the funds; and (3) it does not require any oversight, special elections in tax returns, or reporting.

Leaving property outright to the surviving spouse also contains some risks, for example: (1) the surviving spouse could remarry and leave all property to a new spouse; (2) the property could be diminished by creditors of the surviving spouse; (3) the surviving spouse could frivolously spend the property; or (4) if the decedent had children from a prior relationship, there is a risk that the surviving spouse will leave everything to his or her biological descendants and exclude the pre-deceased spouse’s children.

Instead of leaving all property outright, a marital trust for the benefit of the surviving spouse may provide a good alternative that will not only allow the deceased spouse to provide for his or her surviving spouse but also to control where the property goes upon the surviving spouse’s death.

Marital trusts often provide for the surviving spouse by requiring a mandatory distribution of income to the surviving spouse for his or her life. In addition, the trust can provide that principal is available for the surviving spouse, often for his or her health, education, and support, if necessary.

By using a marital trust, the first-to-die spouse can also control where the remainder will go at the surviving spouse’s death. For instance, following the surviving spouse’s death, the first-to-die spouse can direct that the remaining trust assets go to his or her children from the first marriage, from the second marriage, or both from both marriages. In the example above, Al could have used a marital trust to ensure that Barb was taken care of during her life, while also ensuring that Jason and James received some of his estate assets.

Other Estate Planning Considerations

Fiduciaries

Selecting fiduciaries, such as personal representatives, trustees, attorneys-in-fact, and health care agents, is an important part of the estate planning process. In a second marriage situation, special care should be taken to ensure that fiduciaries will act in a fair and objective manner. If there is any risk of future conflict, an independent fiduciary may be a wise choice to preserve family harmony. For example, appointing the step-child of the surviving spouse as sole trustee of a trust that is primarily for the benefit of the surviving spouse could easily lead to family discord.

Property Ownership

In first marriages most married couples own their property as joint tenants with rights of survivorship. In second marriages this is not always the case, especially when there is an asset disparity between the spouses. With joint tenancy assets, the surviving joint tenant becomes the sole owner and can dispose of the property as he or she sees fit. Because of the lack of control after the first death, it is much more common to have alternate property arrangements in a second marriage. For instance, the property owning spouse can give a life estate to the surviving spouse, allowing him or her to use the property for the remainder of his or her life. At the surviving spouse’s death, the property will pass to beneficiaries named by the property owning spouse prior to his or her death.

Conclusion

Estate planning is important for everyone, but it is especially important for non-traditional families. By working with a GPM estate planning attorney to identify the potential issues presented by second marriages, spouses in second marriages can address and often resolve those issues and create positive outcomes for the surviving spouse and children. Contact your GPM estate planning attorney to begin or update your estate plan.

This article is provided for general informational purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult a lawyer concerning any specific legal questions you may have.

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Wait! Your Estate Plan May Not Be Complete

You have signed your estate planning documents and you are feeling a great sense of relief. But wait, in order for your estate plan to work as planned, you need to ensure that additional steps are taken. Below are a few follow-up items you will want to discuss with your estate planning attorney:

- **Beneficiary Designations:** Assets that have beneficiary designations do not automatically pass under the terms of your will or trust. These assets pass according to the beneficiaries listed on the beneficiary designation form. You will want to work with your estate planning attorney to ensure you use language on your beneficiary designation forms that corresponds with your overall estate plan.
- **Revocable Trust Funding:** One of the advantages to using a revocable trust in your estate plan is that you are able to avoid probate. However, this only works if all of your assets otherwise subject to probate have been transferred to your revocable trust. You will want to work with your estate planning attorney to determine which assets should be transferred to your revocable trust and which assets do not need to be transferred.
- **Asset Equalization:** If all of your assets are currently held jointly or by one spouse, on the first death, there may not be sufficient assets to fund a family trust, and your plan may not work the way it is designed as planned. It is important to discuss asset ownership with your estate planning attorney to ensure the plan you put in place will work on the first and second death.

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