Estate Planning Ain't What It Used To Be

Now that we all have begun to start our Spring cleaning, what better time to review our estate plan. I am constantly amazed at how many clients do not understand how their estate will pass on to the next generation. I find that many clients have misconceptions about what assets must pass through probate. So here is a one minute lesson on what happens to the assets of a loved one upon their passing.

First, we need to identify what assets the decedent owned. Sometimes this is east. Other times this can involve a lot of searching. Please take the time to compile a list of your assets and important documents so that your loved ones will know where everything is located.

Second, we need to identify which assets had a joint owner with survivorship rights. In Florida an account titled as Joint Title With Survivorship Rights (JTWSR) or as a Tenancy-by-the-Entirities (TBE) will pass to the other joint owner(s). A Tenancy-by-the-Entirities is a special type of Joint Ownership with Survivorship Rights available to a married couple. Typically, TBE property as a designation of "husband and wife", "his wife" or "her husband" after the names on the title. One important point here is that in Florida bank accounts are presumed to be Joint Title With Survivorship Rights. Thus, upon the death of one owner, the other owner(s) will inherit the account. Thus, if you have added one child's name to the account and die, then that child will get the account regardless of the fact that your will may leave everything equally to your four children.

Third, if the asset did not have a joint owner with survivorship rights was there a beneficiary designation? If so, then the beneficiary inherits the asset. This can not only be true for life insurance but also for IRAs, 401(k)s, 403(b)s, annuities, bank accounts and brokerage accounts. Generally, tax deferred retirement plans can be rolled into an IRA for the surviving spouse. If left to the children, they can be "stretched" to grow tax deferred over the life of the child. Income taxes must be paid when the money is distributed with the exception of the Roth IRAs.. Annuities can be either qualified or non-qualified and may have income tax consequences for the beneficiaries. Nowadays, a decedent can transfer banks accounts through use of a "pay on death" designation" and brokerage accounts by use of a "transfer on death" designation. Again, the beneficiaries of these accounts inherit the account regardless of what your will says. It is interesting to note that beneficiary designations are only useful in leaving lump sums to individuals. Thus, if the money needs to be "tied up" because the children are minors, spendthrifts or "special needs" children, beneficiary designations are not for you.

Fourth, if the asset was not jointly titled with survivorship rights and did not have a beneficiary designation, was the asset in a trust? If so, then the trust document will determine who receives the asset. Additionally, trusts are very useful for avoiding or minimizing estate taxes if the decedent's estate exceeds the current exemption of $2 million.

Lastly, if the asset was only in the decedent's name with no beneficiary designation, then the asset must go through probate administration. Probate is the Court supervised process of appointing a Personal Representative (Executor) to muster the assets, pay the creditors and distribute the assets to the beneficiaries of a Last Will and Testament or by the Florida Intestate (without a will) Statute. THUS, ALL WILLS GO THROUGH PROBATE! If you are looking to avoid probate you must either have a joint owner with survivorship rights, a beneficiary designation or the asset must be in a trust. Yes folks, it is that simple. Also, remember that if the asset is jointly held with a spouse, you may have a probate situation on the second spouse's death.

Finally, as with any area of law, there are some exceptions. Homestead, Family Share or Spousal Elective Share property have their own rules. I will save that discussion for my next column.