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COMMENTARY

Estate Planning for the Migratory Client: Some Details to Consider

It seems that there have been more relocations than ever. Accordingly, it's important to take stock of the impact a change in legal jurisdiction has on estate plans for clients.

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Trusts and Estates

By Rebecca Rosenberger Smolen and Amy Neifeld Shkedy | February 27, 2023 at 12:23 PM

We have always had estate planning clients changing their residency to and from Pennsylvania. There are a multitude of factors that cause these shifts. The reasons range from job opportunities, retirement to warmer climates, family ties, and so on. These days, with the increasing availability of remote working opportunities thanks to modern technology, which have most certainly grown and flourished during the pandemic, it seems that there have been more relocations than ever. Accordingly, it's important to take stock of the impact a change in legal jurisdiction has on estate plans for clients.

As a general matter, we have not found any reason to be concerned that a client's estate planning documents that were valid under the laws of a state where the client resided at the time of executed become "invalid" in a new jurisdiction. This seems to be a result of the principles of comity under the full faith and credit clause of the U.S. Constitution. However, just because the historic documents are valid, doesn't mean there aren't good reasons to update them, when time permits, to adapt to the typical estate plan structure of the new jurisdiction. Each state has its own statutory provisions and common law that impact the customary and optimal approach to estate planning in a particular jurisdiction. At the very least, we find it is advisable to update general (financial) powers of attorney and living wills (i.e., advance directives) and health care powers of attorney to conform to local law so that there will be less chance of complications due to the potential uncertainty of third parties in relying on documents that are designed for another state's laws.

Key terminology can even be different from state to state, which can cause confusion if not updated. For example, what we call an executor or administrator in Pennsylvania is called a personal representative in Florida (and other states). In Pennsylvania, courts appoint guardians to manage estates of incapacitated and minor persons, but, in California (and other states), they appoint conservators.

Further, in states, such as California, where property owned by married couples is subject to a community property regime, at death there is a concept of "community property" and "separate property" which is not at play in states like Pennsylvania and New Jersey that are "common-law" property jurisdictions where ownership of property at death is strictly determined by title.

Generally, for community property interests, the surviving spouse may have a current property interest in assets titled to the first spouse to die, and vice versa. This circumstance requires special tailored language in estate planning documents to properly address community property interests, as well as forensic accounting/tracing efforts to identify what property falls into each category as part of the planning process during life, and administration process at death. Oftentimes a special marital property agreement is appropriate for folks exiting a community property jurisdiction to avoid a clash of jurisdictional legal principles at death that can create an expensive mess to untangle at death if not addressed in advance.

There are also creditor protection and local tax issues that come into play. For example, in Florida there is a “homestead” exemption for a primary residence that can impact the reach of creditors’ claims, property rights of minor children and spouses, and real estate taxes. A client who changes residency from Pennsylvania to Florida will need to consider the impact of the homestead exemption and how to incorporate it into an estate plan. Also, for a client moving to a no income tax jurisdiction like Florida, the client will need to consider measures to avail any existing and future trust structures of Florida tax law and effectively exit the tax jurisdiction of Pennsylvania.

Another key distinction from jurisdiction to jurisdiction is whether or not it is necessary or appropriate to try to avoid probate at death. While in many states that is a typical goal, that is not the case as a general matter for Pennsylvania or New Jersey residents because our probate process locally is pretty efficient and not particularly costly (and is beneficial for an orderly administration, resulting in reduced costs/hassles for beneficiaries in nearly all cases, contrary to the challenging presumptions by many folks in the financial services industry who also advise our clients). That is significantly different in jurisdictions like California, New York, and Florida (among many others) where the probate process is court supervised and much more complicated and costly than in Pennsylvania or New Jersey.

A final area of common focus for clients moving in or out of Pennsylvania is the impact that the state inheritance tax system may have on the structure of the estate plan. Pennsylvania is one of the few states to continue to tax the inheritance of most beneficiaries other than surviving spouses and charities. As a result, for married couples, it is usually considered a worthy objective to structure an estate plan to avoid an inheritance tax until the death of the surviving spouse. The easiest way to do this, of course, is to keep an estate plan simple and just allow all the assets of the first spouse to die to pass to the surviving spouse. However, there are many reasons for most families that militate against doing this—mostly related to the possibility of diverted assets upon the potential remarriage by the surviving spouse or tax planning reasons. When that is the case, the key will be to structure the estate plan around a trust that is for the sole use of the surviving spouse to avoid the imposition of the inheritance tax on the first spouse’s death.

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