COMMENTARY

Planning for the Family Catastrophe: Addressing the Unexpected

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By Amy Neifeld Shkedy and Rebecca Rosenberger Smolen | May 31, 2023 at 11:15 AM

When new clients come to our office asking us to prepare wills for them, the vast majority come in already knowing to whom they wish to leave their assets at death (the ones that don’t know often procrastinate and, in many cases, leave it to the very end). In the case of a typical married couple, they generally wish to leave their assets to (or for the benefit of) one another and their children and grandchildren. While we help them understand how to best structure the disposition of the assets for their family members and, most often, recommend trust structures, knowing the objects of one’s bounty is the most important aspect of the plan. Without that, there can be no estate plan. The one question that a lot of our clients are not expecting toward the end of our estate planning meeting is how they want their assets to pass in the event of a “family catastrophe.” As if planning for death isn’t difficult enough, there is even more to think about should this unexpected contingency become a reality.

For most of our clients, we recommend including a family catastrophe provision in their wills. This is usually more important for smaller families; whereas, a larger family with several children and multiple grandchildren tend to be safer from this remote event. Before we even make it to the “family catastrophe” portion of the will, we would need to get past the multiple tiers of beneficiaries that we have first built into the plan. In the case of a married couple with children, that means that the spouse, all of the children, grandchildren, great-grandchildren, etc. (including those descendants alive at the time of the will signing and those born or adopted after) would have to have died. In that event, the estate assets would pass to the beneficiaries named in the family catastrophe clause of the will.

It’s important to understand that this, often remote, contingency could happen sooner or far into the future. Most people think that a family catastrophe would occur at one moment in time, such as when there is a family vacation and the plane goes down. Often, a planned family vacation is the impetus for clients to schedule appointments with us in the first place. It seems that more and more families have been planning vacations since the end of the COVID shutdowns. As our clients prepare for these trips, that’s when we get the phone call about updating their wills (or preparing new wills for first timers).

The family catastrophe contingency could also happen 75 years down the road long after our clients die. In other words, this

could happen if under the terms of someone's estate plan, there are ongoing trusts for children and perhaps grandchildren and then the last grandchild (or even great-grandchild) dies and there are no more living descendants. For this reason, when planning for the family catastrophe, we need to make sure that our clients are thinking about who would still be alive in the near and far future, and we plan for contingencies to try to make sure that there will be one or more living beneficiaries to receive the assets down the road.

Clients often consider the relative financial needs of family members and friends when deciding who to include in the family catastrophe provision. This can be a huge windfall for the individuals named in the family catastrophe clause. For many, naming charitable organizations in the family catastrophe clause may be more appealing and practical than naming distant relatives or friends to receive all of the assets in this remote event. It is quite common for our clients to have us draft provisions to include some combination of both charities and individuals.

Without a family catastrophe clause, in the event that all of the beneficiaries named in the will have died, the estate would pass in accordance with intestacy laws in the state where the decedent died as if the decedent had died without a will in place. The intestacy laws are drafted to try to predict (without knowing anything about the particular individual) how a decedent would have wanted his or her assets to pass in the event of death by leaving the assets to the nearest relatives. While many people assume that dying without a will means the estate escheats to the commonwealth or state, that is not necessarily the case (although it could happen if a decedent is not survived by a spouse or descendants and the decedent's grandparents and descendants of such grandparents are also all deceased). Relying on intestacy laws, of course, has its flaws. For example, it doesn't take into account step-children and doesn't know when a relative is estranged. Certainly, a well thought out family catastrophe provision can take all of this into account and even benefit charities, which an intestate statute could never do.

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