Insight on estate planning

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You haven't included a no-contest clause in your will

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Effective estate planning for unmarried couples

Unmarried couples face many of the same estate planning concerns as married couples. But because they don't have the same estate planning options as those who are married, special planning is required to ensure that major decisions regarding their finances and health are protected.

Transferring assets

If you're not married but in a long-term relationship, on your death your assets will remain in your estate rather than automatically pass to your partner, as they typically would to a spouse if you were married. Thus, you must stipulate in your will that all (or the portion you desire) of your assets should transfer to your partner. Without a will, your partner has no legal right to inherit from you.

There are several ways to ensure your partner receives your assets according to your wishes, including:

Life insurance. Designate your partner as the beneficiary of your life insurance policy.

Living trust. Establish a living trust and name your partner as beneficiary. This will help to ensure that your assets are administered according to your wishes. (For more information on living trusts, see "Trust a living trust" on page 6.)

Joint tenancy. Joint tenancy is a form of co-ownership in which two or more people own property in equal undivided interests. For example, if you buy a home with your partner and intend to share ownership, establishing a joint tenancy ensures rights of survivorship. When you die, your partner inherits the home without probate administration.

But be aware that, even though joint tenancy avoids probate, property in joint tenancy with rights of survivorship doesn't automatically avoid estate tax. For unmarried couples, the value of property held jointly is included in the gross taxable estate of the first to die, unless the estate can prove the surviving partner contributed to the cost of the property. To prove the property wasn't a gift and verify your and your partner's shares of the ownership, keep accurate records of payments on jointly held property.

In addition, consider establishing a domestic partner agreement to support your will. It can outline your wishes for your estate and your partner's rights to jointly held property.

Employee benefits. You may want to designate your partner as the beneficiary of your employer-sponsored retirement plan, such as a 401(k) plan. If your employer doesn't allow this, name your estate or trust as the beneficiary and name your partner as the beneficiary of your estate or trust.

Managing financial and medical affairs in the event of incapacitation

Unmarried couples don't have automatic power to make decisions regarding each other's finances and health care in the event of incapacitation. But you have options to ensure that you and your partner are able to make decisions and act on each other's behalf should either of you become incapacitated, such as:

A general durable power of attorney for finances. This will allow you and your partner to manage each other's finances, property and other assets. Be sure to designate each other as your attorney in fact. This will help to avoid delay in the administration of assets should one partner become incapacitated.

A durable power of attorney for health care. This details your wishes regarding important issues about your health care — such as medical treatment and life support decisions. A power of attorney for health care gives your partner the authority to make such decisions on your behalf. You should also be certain to provide a copy of the document to your primary care physician so he or she knows that your medical information can be shared with your partner, and so that there will be no uncertainty should any medical decision need to be made on your behalf.

Without these documents, you have no legal standing to manage each other's assets or communicate with medical staff about health care decisions in the event of incapacitation.

Make estate planning a priority

Comprehensive estate planning is essential for unmarried couples. Careful planning ensures that you and your partner are included in important financial and medical decisions should one of you become seriously ill and that, on your death, your assets are transferred according to your wishes. Before making any estate planning changes, check with your state's estate tax laws regarding domestic partners.

Taxing matters

Unmarried couples often are at a disadvantage in terms of how they're treated for federal gift and estate tax purposes. For example, asset transfers between spouses are tax-free under the unlimited marital deduction — with a non-U.S. citizen spouse, you must take a few extra steps to get such protection — but asset transfers between unmarried couples are subject to taxes.

But there are some tax breaks you and your partner can use in your estate plan:

- The lifetime gift tax exemption allows you to give away assets totaling $1 million — gift-tax-free.
- The estate tax exemption allows you to bequeath assets up to $2 million (less any gift tax exemption used during your life) free from federal estate taxes. Under current law, the amount is scheduled to increase to $3.5 million in 2009, be repealed along with the estate tax in 2010 and be reinstated in 2011 at a reduced amount of $1 million.
- The annual gift tax exclusion currently allows you to give $12,000 per recipient per year free of estate tax.

Consult with a tax professional to determine if there are other tax breaks that you and your partner can use.

10 strategies for keeping sibling rivalry in check

Ken and Sarah, siblings in their late 30s, became business partners after their father, Bob, retired from the real estate development business he founded. Ken, who had been with the company for more than 10 years, was displeased that his father made Sarah — who'd been with the company for only two years — a 50% co-owner. Sarah had an MBA and several years of experience as an executive at a Fortune 500 company, and she felt that the family business needed to make some major changes to boost revenue and control costs. The result was constant conflict and power struggles that left Bob concerned about the fate of his children's relationship — and the company's future.

Bob's situation isn't unique. Transferring ownership of a business to multiple adult children can be a delicate proposition, particularly when it comes to determining roles and responsibilities and encouraging teamwork. Let's take a look at what steps you can take to keep sibling rivalry in check and ensure your company's continued success.

Common sources of conflict

There are many factors that can contribute to sibling conflicts, power struggles and, ultimately, a failed succession plan, such as differing:

- Visions for the future of the business,
- Business strategies,
- Management styles,
- Personalities, and
- Values.

One sibling's lack of faith in a partner's ability to perform his or her job is another common source of conflict. And if a business is having financial issues, that can magnify all of these conflicts.

In most cases, sibling partner conflicts aren't about only business matters or only personal issues. They generally are a result of interpersonal issues combined with matters related to management, finances and ownership.

How to mix business with family

There are several ways to improve communication, resolve conflict and create effective business relationships among siblings. Before you hand over the reins to your heirs, here are 10 strategies to help lay the groundwork for a successful partnership.

1. Engage in strategic planning. This will help establish a shared vision of the company's future and provide a foundation for each sibling's role and responsibilities. The process also will help reinforce goals and values and identify areas of disagreement that may require some attention.

2. Establish a leadership model. You and your children should decide on a basic leadership model and spell out how it will work both day-to-day and long term. You aren't limited to one sibling taking on the role as leader. For example, your heirs could be co-CEOs, or they could designate a leader for a set period of time and then rotate the position to another qualified sibling.

3. Share the power. Regardless of who is CEO, each partner should have a degree of power — particularly within a well-defined niche or area of expertise — and the authority to respectfully challenge the designated leader. Partners should listen to all points of view, accept the final decision and work toward its implementation.

4. Put historical information in writing. All too often, important and historical knowledge and practices are stored in the mind of the founder of the business. It's essential to document a company's core competencies and establish systems, processes and structures to help ensure sustainability of the company. This can be helpful to reduce disagreements about what really happened in the past, and can provide guidance with respect to decisions about the future of the company.

5. Create communication agreements. Good communication is key to successful sibling relationships, but good communication practices don't just happen. A communication agreement can help create a culture in which effective communication becomes an everyday practice by documenting how partners should interact, resolve disagreements and make decisions.

6. Don't rely on consensus. Many family business owners prefer to reach decisions by consensus. But when consensus is difficult to reach, important decisions could be delayed. In these instances, siblings should agree in advance on who will break a tie and set a deadline for making the decision.

7. Establish an outside board. Another alternative to deal with a deadlocked group is to have independent advisors on hand to facilitate debates and provide a resolution when partners are unable to agree.

8. Document everything. All agreements, such as those pertaining to compensation, responsibilities, stock transfer capability, and the disposition of stock in the event of death, disability or retirement should be recorded on paper.

9. Get away. Schedule periodic business retreats to provide a forum for introspection, problem solving, planning and policy making. Retreats also can provide a private environment to discuss concerns and deal with family issues that are affecting the business. Choose a facilitator with experience working with family-owned businesses to help initiate solutions and compromises that create balance between family and business priorities.

10. Agree on an exit strategy. One sibling may choose to retire or withdraw from the company altogether. An exit strategy can help spell out the conditions for withdrawing or eliminate a sibling's potential retirement concerns, such as maintaining his or her lifestyle or relinquishing his or her control of the company.

Siblings should be encouraged to joke around and recall childhood stories when appropriate — continuing to laugh and have fun can offset the pressures of the business.

Play nicely together

Implement these strategies to help create successful business relationships among your children, foster the continued success of your company and provide fulfilling careers, work-life balance and financial security for generations to come.

Trust a living trust

A primary goal of estate planning is to ensure your assets are distributed to your loved ones according to your wishes and in a timely manner. A living trust (also referred to as a revocable trust, declaration of trust, or inter vivos trust) can help you achieve this goal.

Trust guidelines

When you establish a living trust, you transfer ownership of all of your assets to the trust. You can name yourself or someone else, such as a family member, friend, bank or trust company, as the trustee.

If you name someone else as trustee, you can require him or her to consult you before buying or selling assets. And if you're not satisfied with your named trustee, you can modify his or her powers, name a new trustee, or revoke the trust completely.

The trust becomes irrevocable when you die, and the trust assets are distributed according to your wishes — for example, immediately, during a period of years or based on specific milestones, such as a graduation or birthday. Meanwhile, any assets remaining in the trust can continue to grow and provide for your family for years to come.

Why it's a good idea

A living trust offers several estate planning benefits. First and foremost, assets held in the trust prior to death avoid probate.

Probate can be time-consuming because of the required notifications and court proceedings. In addition, it's a public process, so anyone can learn about your financial affairs, which can increase the chance that someone will challenge your wishes regarding how your assets are distributed. Avoiding probate is especially beneficial when you own real estate or other property in more than one state, so that your estate might have to go through ancillary probate (multiple probate proceedings).

Living trusts also can be particularly useful for married couples in community property states who had a substantial amount of property or assets prior to the marriage. The trust can help keep those assets separate from those that would be considered community property.

Considerations and limitations

Some time, paperwork and cost are involved in establishing a living trust. For example, the titles to your assets must be transferred to the trust.

In addition, you have to ensure future assets are registered to the trust. You also will need

Added protection in the event you become incapacitated

With a living trust, the trustee can manage your financial affairs should you become incapacitated. Or, if you're the trustee, you can name a successor trustee to take over management of the trust and make financial decisions on your behalf in such a situation.

You can specify in the trust how incapacity must be determined — typically, one or two letters from a physician are required. You may also include special provisions, such as specifying that you want to be cared for at home rather than at a nursing home or other long-term care facility, and authorizing the trustee to continue making charitable contributions.

Providing instructions about your comfort, care and finances is especially important when your successor trustee is a bank or other institution or a distant family member who may not be aware of your personal wishes.

a pour-over will to transfer any assets outside the trust to the trust on your death. Professional fees, such as investment advisory and trustee fees, will apply if you appoint a bank or trust company as the trustee.

It's also important to understand a living trust's limitations. The trust doesn't reduce estate taxes, because trust assets are included in your taxable estate. It also doesn't protect assets from your creditors, because you're still in control of the trust assets.

Right for you?

A living trust can provide for your family's financial future per your wishes. But a living trust isn't necessary for everyone. Discuss with your estate planning professional whether a living trust is right for you.

Estate Planning Pitfall

You haven't included a no-contest clause in your will

You've long suspected that a disagreeable family member with a penchant for stirring conflict might object to the terms of your will. If so, he or she could cause lengthy probate delays and subject your family to costly and time-consuming litigation. Not including a "no-contest" clause in your will can leave your estate — and loved ones — unprotected.

A no-contest clause is a will provision that penalizes a beneficiary who makes a challenge to your will. It doesn't guarantee that there will be no will contests, but it makes a beneficiary considering such litigation think twice. And, of course, laws of the state where the will is being probated will dictate rules with regard to the challenge. It's possible that a beneficiary could be penalized — for instance, by losing a part of an inheritance — even if the challenge is successful on another part.

This clause is most effective when the challenger stands to lose something of value. So when drafting a no-contest clause, it's important to bequeath something to likely challengers. Otherwise, they have nothing to lose except time and legal fees.

And, if someone is completely disinherited and is successful in contesting your will, he or she may be able to have your will nullified in whole or in part. If this occurs, your entire family is subjected to time delays and receiving diminished inheritances, which could cause substantial hardship on your loved ones.

Be aware that, because the judicial view of no-contest clauses isn't consistent in all states, they might not be the best solution in all situations. Many states have legal provisions that invalidate such a clause if the challenger of the will has a probable cause to contest. But many states still hold the view that the last wishes of the deceased should be honored, and that the no-contest clause should therefore remain effective.

Consult with your estate planning attorney about your state's law on no-contest clauses to determine the potential effectiveness of including such a clause in your will. Other strategies, such as forming a trust, may better ensure that your estate plan carries out your wishes.

About Us

Tarlow, Breed, Hart & Rodgers, P.C. is committed to providing high quality, comprehensive legal services to its clients. Formed in 1991, we have focused our practice on offering sophisticated legal counsel to entrepreneurs, businesses, individuals, families and institutions. We offer expertise in corporate law, employment matters, mergers and acquisitions, litigation and dispute resolution, estate planning, taxation, real estate, bankruptcy and municipal law. Our objective is to help clients make informed decisions and achieve their goals. By carefully listening and utilizing our expertise and firm resources, we find creative solutions for our clients. This approach has resulted in lasting relationships of trust and confidence with our clients.

Our seven core practice areas cover a range of issues that face our clients.

Corporate Law and Business Transactions

Our Corporate Law and Business Transactions Group represents entrepreneurs and businesses in all aspects of business law including choice of entity, contract negotiations, mergers and acquisitions, employment matters and financing transactions.

Litigation and Dispute Resolution

Our Litigation and Dispute Resolution Group has extensive experience in complex commercial litigation in all state and federal courts, involving contract disputes, shareholder rights, environmental litigation, employment law, probate litigation and many other areas.

Estate Planning and Administration

Our Estate Planning and Administration Group provides sophisticated wealth transfer and estate planning strategies to individuals and families, with special emphasis on developing business succession solutions to family—owned businesses. We represent clients in all aspects of the administration of decedents' estates and family trusts.

Real Estate

Our Real Estate Group provides effective and efficient legal counsel to developers, investors and banks in all aspects of commercial and residential real estate transactions and financing.

Taxation

Our Taxation Group has extensive experience in planning and structuring business and financial transactions in order that the lowest legal amount of federal and state taxes are imposed on our business and individual clients.

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Our Hospitality Group has extensive experience in every phase of restaurant and lodging operations and development.