How Should A Married Couple Title Their Assets?

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Not long ago, a lady who had been recently widowed came into my office and informed me that she and her husband had owned a vacation home in southwestern Virginia. It was a valuable property and she was positive that she and her late husband had owned it jointly with the right of survivorship. Assuming that to be true, she would now have unlimited control over the property during her lifetime, including the unrestricted power of sale. However, when she brought in the deed, I saw that the vacation home was titled in the husband's name alone. Since the husband's will provided for his property to pass into a trust to benefit several children as well as his wife, the dynamics of the administration of his estate as well as the planning for the future of the vacation property vastly changed. The widow did not own the entire property by survivorship as she believed. Instead, the vacation home will have to go through the husband's probate estate and the children will have to be dealt with on any decisions relating to the control, use or sale of the property.

Just as important as the proper allocation of securities in both up and down markets is the proper titling of your assets. People are frequently unaware that the titling of assets controls not only such factors as the disposition of property at death, but also whether the property will be exposed to liabilities from negligence claims, creditors, claims of former spouses, and the like.

Too often, when I am asked to help with a deceased person's estate, I find the following situation. The nominated executor brings the decedent's will and revocable trust into my office. Both documents may be beautifully prepared. The will may direct that all assets "pour over" to the revocable trust. The revocable trust sets up a marital trust and a "bypass" trust, the latter of which can offer positive federal estate tax protection. The bypass trust may also provide for the children as well as the surviving spouse to benefit from the trust assets during the spouse's lifetime, or for the control of payments to a disabled family member. Then I examine the titling of the decedent's assets. I find that no property can pass into the estate or the revocable trust because the property is all owned jointly with the spouse with the right of survivorship. The titling of the assets "trumps" the beautifully prepared estate planning documents so that those documents have little, if any, effect.

Examine your account statements, bonds and stock certificates, vehicle titles, deeds of real estate,
and other documents to learn how your assets are currently titled. Frequently, acronyms are used. For example, *jtos* or *jtwros* means joint tenants with the right of survivorship; *t/e*, or tenants by the entireties, is a form of joint ownership with the right of survivorship which is available only to married couples; tenancy in common may be indicated by *t/c* or *tens/com*; *pod* means payable on death. In Virginia, we frequently use our *tod* (Transfer on Death) statute for securities and the like for *inter vivos* transfers to a revocable trust. This usually keeps the Trustee out of the picture until death. Each of these forms of ownership has extraordinary significance when it comes time to divide property in a divorce or to distribute the estate of a decedent.

For example, consider whether you and your spouse may need to plan to avoid or minimize estate tax. The current estate tax exemption is $3.5 million (subject to Congressional change). Many people do not think they could possibly leave an estate worth more than $3.5 million. However, they fail to take into consideration that they may have several conventional life insurance policies as well as accident policies which provide for double indemnity (twice the face value of the policy) in the event of accidental death. The full amount of life insurance proceeds, as well as the value of all other assets you own or control, are counted as part of your estate for estate tax purposes. With the escalating values of today's homes, the ownership of large amounts of life insurance (particularly by young or middle-aged families), and any substantial amounts in IRAs and pension and profit-sharing plans, a married couple can readily leave an estate exceeding $3.5 million. For example, if a husband leaves everything to his wife, and the wife has some assets of her own, there may not be an estate tax when the husband dies first. But when the wife later dies, if she still owns all the husband's property as well as her own, then her estate may well exceed her $3.5 million exemption. In such scenarios, the husband and wife should have appropriate estate plans involving the use of "bypass" trusts and appropriate titling of their assets so as to avoid any potential estate tax liability. (Remember, tax avoidance is O.K., but tax evasion is not.)

Frequently it is wise for tax purposes to title certain assets in only the husband's or only the wife's name so as to "equalize the estates." This allows both spouses to utilize their full estate tax exemption. Assets that are now owned jointly can be divided between the spouses by outright transfers by deed or gift, or re-registration of accounts. In addition, each spouse should make appropriate beneficiary designations on such assets as life insurance policies and retirement plans such as IRAs and pension and profit-sharing plans.

It is not commonly known that 60 percent of all assets in the United States are transferred at death by means of beneficiary designations, not by will. Yet how many people take the time and trouble to carefully examine who are the beneficiaries on their insurance policies and their pension and profit-sharing plans involving 401(k), IRA (and related "stretch-out" provisions) and other benefits? How many of you have named contingent beneficiaries of your retirement plans so that your children or another person or trust will receive the retirement benefits should your spouse predecease you? A subject unto itself is the designation of beneficiaries for 401(k) plan and IRAs. Under the tax law, the spouse *must* be the beneficiary of all 401(k) plans held by a married person, unless the spouse affirmatively waives his or her rights to such by an instrument *in writing* and signed *under oath* before a notary public or the plan administrator. Generally, your estate should not be the beneficiary of any retirement plan or IRA because such designation may shorten the tax deferral opportunities.
On the other hand, in modest estates of less than $3.5 million with little chance for substantial future appreciation, it may be appropriate for a husband and wife to own all of their assets jointly with the right of survivorship. In this manner, probate can be completely avoided. If the first to die in such a scenario is the husband, the widow could then have unfettered control of all family assets during her lifetime and dispose of them as she desires at her later death.

Probate is not always bad in Virginia and in many other states. Virginia's probate statutes are not nearly as complex as those of same states, nor are its probate taxes as high. However, in close-knit family situations where there has been a lengthy first marriage and all children are in good health and close to both parents, more often than not probate should be aggressively avoided. You will hear from time to time warnings that everyone should have a will. These warnings should be heeded. However, it is just as important, if not more so, to title your assets properly!

Limited liability companies have come of age over the past two decades. If you own a parcel of rental property, you should consider a separate limited liability company (or perhaps an S corporation) to hold title to that parcel. Suppose your tenant or his guest slips and falls on the porch of your duplex, and the claim exceeds the amount of liability insurance and any umbrella coverage which you have on the property. If you had previously placed the duplex in a limited liability company ("LLC"), the equity in the duplex can be subjected to the lien of any resulting judgment, or to the claims of the LLC's creditors. However, your other assets may not be reached as they might be had you owned the property in your own name. If there are only a few rental properties involved it is even advisable to have a separate limited liability company for each rental property, for the very reason stated above. Current estate planning authorities are recommending that persons of wealth go so far as to consider holding title to a primary personal residence in a limited liability company. The more assets a person or his or her family owns, the more these strategies will become important.

For starters, when you contact your lawyer for an estate planning conference or simple will, it will save you and the lawyer time and money if you have a list of all of your assets and how they are titled. I like to go a step further and actually see the beneficiary designation forms of insurance policies and retirement accounts, the originals or copies of recorded deeds, your latest brokerage statements, and the like. With this information "up-front" the entire process of succession planning and administration becomes much easier for everyone.

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