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Inconceivable Changes in Estate Planning

By Abbe I. Herbst

I have been a licensed, practicing lawyer since 1980. Add to that the time that I spent as a law clerk while in law school, and the result is that I have been involved in trusts and estates and tax law for about 35 years.

Of course, it should come as no surprise that tax laws change. When I was in law school, the estate tax marital deduction for assets left between spouses could not exceed one-half of the adjusted gross estate. Now, and for more than 30 years, the estate tax marital deduction is unlimited. But there have been many, many non-tax changes, some the result of changing social attitudes, and some the result of technological and medical advancements that few could have foreseen. Those changes have an impact on estate planning. As I often tell my clients when we make provisions in wills and trust instruments for the possibility that they, their children and grandchildren may all perish together, part of my function is to have clients think about the unthinkable, and so I want to share with you some of those changes in the estate planning landscape. The changes may or may not be relevant to your present situation, but the scenarios should be considered by all, and addressed where applicable.

Digital Assets

Computers, smartphones and the like have become ubiquitous. So, too, are digital assets that are registered to an owner in a digital file stored either on a device that belongs to the owner (i.e., stored locally, as on a computer's hard drive) or elsewhere on devices accessed by contract and stored online ("in the cloud") at various websites. Today, there are assets and records that exist only online, including bank and investment accounts, book entry shares of stocks, credit accounts, PayPal accounts, tax records and returns, airline mileage accounts, insurance policies, medical records and extensive libraries of books, movies, music and photos. We may have successful blogs with many followers, and those lists of followers may have value.

What's more, access to the various digital assets may be denied to our executors after we die — even if they know the assets exist — because they do not know our passwords, or because Gmail, Yahoo!, Facebook and the like all have different rules for accessing the contents of a deceased owner's account. Password-protected assets, if survivors or executors don't know the passwords, are worse than finding a padlocked box or storage unit in earlier times when we lacked the key or the combination. In the old days, we could simply get a lock cutter or locksmith and cut or break the lock. Locating an unknown username and/or password is much more difficult.

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Digital assets should be discussed as part of the estate planning process, both to make sure that their existence, usernames and passwords are known, as well as to address who will be the beneficiary of that treasure trove of photos or extensive music collection. Although a computer itself is tangible personal property, if your collection of digital photos is stored on the hard drive of that computer, or if you are a music composer whose compositions are on your computer, is it your intention that the person to whom you leave the computer as an item of tangible personal property is also the person who is to inherit its valuable contents?

Children Conceived After Death

It used to be so simple. A child was born during the lifetime of both parents, or perhaps the child

who's who

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had been conceived during the father's lifetime (so that the mother was already pregnant at the time of the father's death) but was not born until the father had died. Now, we have the ability to freeze sperm, eggs and even embryos, artificially inseminate using the sperm of the husband or of a donor, transplant embryos to surrogate mothers, etc.

These medical advances have raised many legal issues, such as whether one's genetic material can be the subject of a gift or bequest for use at a later time to create a child, the legal status of such a child, and whether he or she is to inherit from the parents or the parents' ancestors (and, indeed, confusion and uncertainty over who are the parents). Also related are the rights of such children conceived after the death of a parent to enjoy Social Security survivor benefits or to share in wrongful death proceeds.

The law is slowly developing answers to these questions. The important lesson to be learned is that the concept of "family" has undergone profound changes. In planning one's estate, the possibility of so-called posthumously conceived heirs should be considered.

Same Sex Marriages

"Marriage" is no longer limited to the union of a man and a woman — at least not in the nine states and the District of Columbia that allow same-sex couples to be wed within their borders, and to have all the rights and responsibilities of heterosexual couples. The federal government still has the Defense of Marriage Act on its books, although the U.S. Supreme Court has agreed to hear a case questioning the Act's constitutionality.

Where wills and trust agreements make generic references to the spouse of a person as a beneficiary, if a same-sex spouse (present or future) is not to be included, the governing instrument should be clear in defining what is meant. This caveat also applies in defining what is meant when referring to the descendants of a beneficiary.

Clearly, the times are changing. While the law has not always kept up, well thought out estate plans can attempt to fill in the gaps.

Helpful Tip: *The inability to locate passwords after death is a real and growing problem. Indeed, with many websites requiring us to change our passwords periodically, many of us can't remember all our passwords. Records of passwords should be updated regularly, whether on paper, flash drives or through "digital estate services" that permit individuals to manage their passwords securely online. In this way, executors and other survivors won't be forced to hunt for them.*