

Harvell and Collins, P.A., Quarterly Report

1107 Bridges Street
Morehead City, North Carolina 28557

phone 252-726-9050

facsimile 252-727-0055

charvell@harvellandcollins.com

wcollins@harvellandcollins.com

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*It is our pleasure to send you the JANUARY Edition of our **NEWSLETTER** for the year 2012.*

*This **NEWSLETTER** will concentrate on various legal concepts and we would suggest that you keep it with your important files to refer to from time to time.*

*For those of you who have not received our **NEWSLETTER** in the past and are new clients, our **NEWSLETTER** attempts to keep you informed of any new developments in local, state, and federal law that might affect your personal life or your business. The **NEWSLETTER** will advise you on these developments and, when appropriate, make suggestions that will help you deal effectively with these changes. Also, the **NEWSLETTER** will serve as a way to communicate with you. As always, if you would like to have us address a particular matter, please feel free to call or write, and we will address that issue in a future **NEWSLETTER**.*

We are now archiving our most recent Quarterly Newsletter on the website so that our clients may easily access this information once again by visiting our website at www.harvellandcollins.com.

Welcome to 2012!

On behalf of our office, we wish you a Happy 2012. It is the appropriate time to thank you for the opportunity to provide legal services to each and every one of you. We look forward to helping you this year as the need arises.

ESTATE PLANNING AND SETTLEMENT: AN ATTORNEY'S TIPS FROM THE TRENCHES

My name is Brian Schaefer and I would like to share some tips I have learned during my first year of practice as an estate settlement attorney. I have been fortunate to help with a very busy and varied estate settlement practice here, and it has been quite a journey learning the ropes. One benefit of doing probate and estate work is that it has allowed me to see first-hand many estate planning strategies and techniques that work well – and also some that do not. Good estate planning and smooth estate settlement are intricately linked, since effective estate planning means an estate settlement experience that is less time-consuming and involves less “red tape.” To the extent that the settlement process goes smoothly, client fees and expenses are also kept to a minimum. Conversely, when estate planning is neglected, or when it is done incorrectly, this tends to come back to haunt the estate in terms of time and money.

With this in mind, here are some issues that I would encourage our clients to think about when considering their estate planning portfolios. In explaining these ideas, I will also point out a few things that it would be wise to avoid.

Tip Number 1: Make Sure You Have an Updated Will

A valid will allows you to control significant events that affect your loved ones after you pass away. The most obvious is the question of identifying who will inherit which of your assets when you are gone; however, this is by no means the only issue that can be addressed by a will. A will can set up a trust for a minor if any of your beneficiaries may be under the age of eighteen (18) when you pass away. In fact, it can create most any other kind of trust for any of your beneficiaries. This is important, because trusts are often an excellent way to minimize the tax burden that would otherwise eat away at the inheritance of your loved ones.

If you die without a will, your assets are distributed according to the North Carolina intestacy statutes. The problem with leaving the distribution of your assets to these laws is that they are “one size fits all.” They cannot possibly reflect all of the nuances of individual values and preferences that can be captured by a will. These laws also do not offer an avenue for the creation of a trust, even if one of your heirs is just a child. This is problematic, because the direct inheritance of property by a minor necessitates that a guardianship be established for him or her. This is a process that can be time-consuming and expensive.

Once you have a will, you should have it updated regularly to reflect any major life changes, such as marriage, divorce, the birth of a child, or even a change in jobs. When your life circumstances change, there is a good chance your strategies for your estate plan will change as well. These strategies should **always** be reflected in your legal documents. It is always important to remember that a will that fails to reflect your current wishes and

priorities may be little better than no will at all, and could even be worse. It is absolutely vital to keep your will and other estate planning documents current and up-to-date to reflect significant life changes.

Tip Number 2: Make Sure You Have a Power of Attorney, a Health Care Power of Attorney, and a Living Will

A Power of Attorney is a document that appoints another person to make financial decisions in your name. The power you are conveying is, put most simply, the power to do just about anything that involves your money and property. A Health Care Power of Attorney allows you to appoint another person to make health care decisions for you if you become incapacitated and unable to make them yourself. A Living Will allows you to instruct a health care provider as to what actions and medical procedures you wish to be performed in the event you are permanently incapacitated.

These documents, known together as advance directives, are becoming more and more essential to our aging population. With people living longer into their golden years, many face a period late in life when they can no longer competently make important decisions about their finances and/or health care. You should ensure that these decisions will be made by someone you know and trust. The Power of Attorney and Health Care Power of Attorney allow you to do so. As for the Living Will, it is an essential document for anyone who holds clear ideas concerning which health procedures they would consent to in a life-threatening situation or one involving terminal illness.

A sensible time to discuss these documents with an attorney is when you meet with him or her about establishing or updating your will.

Tip Number 3: Keep in Mind the Unpredictability of the Estate Tax Threshold

The estate tax is a burdensome tax that can be levied on the sum total of your taxable estate when you pass away, if that total meets a certain threshold specified by statute. Avoiding its bite should be a top priority for the planning of any estate. The estate tax threshold currently stands at five million dollars (\$5,000,000). This means that so long as the assets in your taxable estate total less than five million dollars (\$5,000,000), you will not have to pay estate tax. If your taxable estate does not meet the threshold, you can avoid the onerous estate tax that would be levied on the total value of your taxable assets when you pass away.

You might now be breathing a sigh of relief, because your taxable estate is comfortably under the estate tax threshold. Not so fast! Keep in mind that we don't know where the estate tax threshold will be in a year or two. In recent memory, the threshold stood at only one million (\$1,000,000.00) dollars, and most experts believe it is going to be

reduced to lower levels again – the question is simply how far will it fall. It could go down to three and a half million (\$3,500,000.00) dollars, two million (\$2,000,000.00) dollars, or even lower.

The upshot of this unpredictability is that you should seek the advice of an estate planning attorney about how best to protect your assets from being hit by the estate tax even if your taxable estate is currently considerably less than five million (\$5,000,000.00) dollars.

Tip Number 4: Appoint an Executor Who is Trustworthy and Organized, Not Necessarily One Who is a Financial Genius

A good executor is one who is conscientious, well-organized, dedicated, and communicative. While possessing a thorough knowledge of personal finance may be somewhat helpful for the executor, especially if the estate is a large one, it is not by any means a necessity. The executor will be guided by an attorney who is knowledgeable about personal finance as it relates to estate settlement. Even in the case of a large estate, any necessary specialized financial knowledge can likely be supplied by a combination of the attorney and a financial specialist such as an accountant.

What tends to hinder the estate settlement process, though, is an executor who is not very organized or responsible, or one who is difficult to reach. So in appointing your executor, think about these qualities first and foremost. I must say that it has been very rare in my experience that there have been any problems in this regard. Most executors have been very committed to their task and have done an excellent job.

Tip Number 5: Be Cautious About Appointing Co-Executors

Among people who are discussing the drafting of their will, we encounter a fair number who express a preference for appointing co-executors. They wish to appoint more than one person to carry out the administrative tasks of helping to guide their estate through probate upon their death. They might have this preference for any number of reasons, e.g., perhaps they think a certain person would have their feelings hurt if they were “left out,” or perhaps they think the co-executors will provide a system of checks and balances on each other, maximizing the chances that the best decisions are made.

Based on my experience, my advice is to be cautious about doing this. Having more than one executor makes the estate settlement process more logistically challenging, and it rarely seems to yield the sort of compensating advantage of checks and balances that the co-executors might be thought to provide. At best, it tends to present a scenario whereby one executor is essentially doing all the work and the other is in a passive role. At worst, it might exacerbate tensions between co-executors if they are family members, especially if they are also both beneficiaries. People who would not relish working together under other

circumstances will certainly not find it any easier to do so at a stressful time such as the passing of a loved one.

This is not to say that appointing co-executors is always inadvisable. Indeed, in some situations it might be the right solution. But the decision should be made in full knowledge of some of the potential drawbacks.

Tip Number 6: Consider Changing the Title on Your Individual Bank and Investment Accounts to Accommodate a Joint Owner

When your cash or investment account is titled in the name of at least one other person, it is a jointly held account that generally features a right of survivorship. This means that, upon the death of one owner, the account passes directly to the other owner(s) without becoming a part of the estate. That is to say, the account avoids probate entirely. This can be a great benefit, because the Clerk of Superior Court probating or administering the estate charges a probate fee equal to a percentage of the total value of the probate assets in the estate. The lower this total value, the better for the estate's beneficiaries, because less money in probate fees means more money to pass along to beneficiaries. As you might imagine, this is especially important if the decedent left a large cash or investment account (e.g., one in the hundreds of thousands of dollars). However, making the switch to a joint account can be very worthwhile for smaller accounts as well.

You should not set up a joint account with just anyone. The co-owner of an account has complete control over the account and can make changes to it unilaterally. In other words, someone who owns an account with you could make decisions on the account without your input. So make sure that you set up a joint account only with someone you know and trust.

Tip Number 7: Be Aware of the Pros and Cons of Paid on Death and Transfer on Death Accounts

Paid on Death (POD) bank accounts and Transfer on Death (TOD) investment accounts are increasing in popularity. Though these accounts have different names they work in the same way. Upon your death they allow for the transfer of your cash or investment account directly to a beneficiary that you specify in an application. The account then transfers to that beneficiary without ever becoming a part of the estate (i.e., without ever going through probate). Thus, POD and TOD accounts offer a potentially attractive combination: they avoid probate and allow the owner to retain complete individual control over the account during his or her lifetime.

While there is nothing wrong with POD and TOD accounts in theory, they can result in some volatile consequences that everyone should be aware of. It may seem like a great

feature of these accounts that they are so easy and convenient (e.g., the beneficiary or beneficiaries can be changed on a moment's notice). But, it is sometimes the case that an account holder in failing health, near the end of life, suddenly changes the beneficiary on the account in a way that is difficult to reconcile with his or her overall estate plan as expressed in the will. One wonders whether it is a change that they would have made if they had been required to be a bit more deliberate. Such a change can be a rude awakening for beneficiaries who thought that they were going to inherit the assets in the account. If you are a potential beneficiary of a POD or TOD account, be aware that this can occur. If you are thinking about using such an account in your estate plan, be aware that last-minute changes to the beneficiary designations on these accounts can potentially create conflict among your beneficiaries after you pass away.

Tip Number 8: Make Sure You Have Adequate Life Insurance

While having a loved one pass away is an event bound to produce sorrow and anxiety, the presence of a generous life insurance payout takes some of the stress and anxiety off the shoulders of the beneficiaries. Life insurance does not pass through the estate, but is rather paid out directly to the beneficiaries named on the policy. With the submission of the proper supporting documentation, the payout generally occurs quickly and with minimal hassle. This can be very helpful to the beneficiaries, who might need to use at least some of the insurance money to pay funeral bills and fund the estate if the estate is a modest one. They can take consolation from the fact that the emotional trauma they feel from losing a loved one is at least not accompanied by great anxiety over how to pay the immediate bills.

Having an IRA policy is also generally a wise move, and for much the same reasons; however, if you are a beneficiary on an IRA policy, be aware that there will be tax consequences for receiving your money. This is why a Roth IRA is generally to be preferred over a traditional IRA: the money that has built up over the years in the policy does not get taxed upon distribution.

Tip Number 9: Try to Foresee any Family Tensions That May Arise After Your Passing, Particularly if Your Spouse is Not Your First

All families have certain tensions and peculiarities within their dynamics, and it is best to think about how these might play out upon your passing, particularly with regard to your choice of beneficiaries, executor(s), and trustee(s) (if you have a trust).

Be especially mindful of this advice if you are married and have children by a previous spouse. Your current spouse and your children from your previous marriage may well be equally dear to you, but the depth of their connection to one another may not be correspondingly strong. They may be sensitive about perceived slights where none were

intended, either with regard to devises made to them under your will, or with regard to appointments of executor and/or trustee.

To the greatest extent possible, discuss your plans in detail with your future executor, your future trustee (if applicable), your beneficiaries, and anyone else affected by your estate plan. While it is true that your legal documents are designed to “speak for themselves” under the law, real face-to-face conversations can clarify your motives for making the decisions reflected in those documents. This will hopefully soothe potential hurt feelings and help to head off any flare-ups that might otherwise occur between family members after you pass away.

**Tip Number 10: If the Decedent’s Estate Is a Modest One,
Be Prepared for the Possibility That it is Insolvent**

An insolvent estate is one whose liabilities (pre-existing debts and estate expenses), exceed the value of its probate assets. Many people pass away with minimal assets in their probate estates. Similarly, many people die having left some bills unpaid, whether these are medical bills, mortgage payments, payments on any other loan such as a car loan, or even cable or telephone bills. Sometimes the executor and the beneficiaries do not even know about some of these debts until they do their due diligence after the decedent passes away. The upshot of all of this is that, if you are an executor or beneficiary of an estate of modest assets, you should be prepared for the possibility that the estate might be insolvent, and keep in mind the following two points:

First, an estate that might be insolvent should not pay any creditors until the question of solvency is determined. Creditors have ninety (90) days to come forward with claims against the estate, and only after this period is over can the issue of the solvency of the estate be determined. If the estate is insolvent, no creditors will be paid from the estate. Each creditor will be sent a letter explaining that the estate is insolvent and lacks the funds to pay their claim.

Second, if the estate is insolvent and therefore unable to pay creditors, friends or family of the decedent might be tempted to step in and pay creditors out of their own pocket. They should be very cautious about doing this. No creditors should be paid before the ninety (90) day period has run, since the issue of the estate’s solvency has not yet been determined. Even after the ninety (90) day period, everyone keep in mind this golden rule: *the decedent’s debts are not your debts*. This rule applies to all persons involved in the probate process, including the executor and the beneficiaries. Be mindful that as soon as you pay one creditor of the decedent, you give the other creditors a legal claim to be paid as well. Thus your well-intentioned payment of the last few dollars of the decedent’s credit card bill might put you on the hook for much more than you thought it would.

The basic point is worth repeating: be very cautious about the paying of bills if there appears any chance at all that the estate might be insolvent.

Tip Number 11: If You are Married, Remember to Prioritize Taking Care of Your Spouse in Your Will Before Your Other Loved Ones

When it comes to devising property to beneficiaries every situation is different, but certain rules of thumb do apply. One of these, for those who are married, is to prioritize the well-being of your spouse ahead of anyone else, including your children. Your spouse will likely feel the financial strain brought on by your passing more acutely than anyone else, especially if he or she has no other means of financial support. Your children, on the other hand, can inherit assets for their support from your spouse when he or she passes away (provided, of course, that he or she is willing to make the appropriate bequests).

The financial protection of the surviving spouse is considered so important that it is ensured by North Carolina statute. The surviving spouse is entitled to a designated share of the decedent's assets whether or not any assets were actually devised to him or her. It is generally sound estate planning to further extend the spirit of this law by leaving your spouse more than he or she would obtain merely by law, if it is at all possible to do so.

Perhaps it is not surprising, then, that spouses commonly leave their entire estate to one another. One reason this strategy is so popular is that, by taking advantage of the unlimited marital deduction, such a bequest can be made entirely free of estate tax.

Tip Number 12: Certain Real Property Transfers are Best Made Prior to Death

In certain situations, the need to transfer real property has the potential to hinder our progress in closing the estate. Here are two such examples:

First, the transfer of real property that is held outside the state of North Carolina can be time-consuming. The transfer generally requires the involvement of local legal counsel in the state in which the real property is located, as well as the running of a new Notice to Creditors and the establishment of a Foreign Personal Representative with the local Clerk of Superior Court. From start to finish, the process takes a period of months. If you have out-of-state property in your name only, consider transferring it before you pass away. One solution might be to have another party come on as joint owner with right of survivorship, which means that the real property will pass to him or her without legal complications upon your death.

Second, beware of timeshares. Timeshares enjoyed a period of great popularity in the not-too-distant past and they offer many attractive features, but they are now regarded by many as a thorn in the side. Faced with the prospect of paying annual maintenance fees,

beneficiaries often do not want timeshares that they have been bequeathed. Sometimes they wish to transfer the timeshares back to the development group or resort that sold them in the first place. Unfortunately, the real estate market is currently so depressed that this is often impossible. For this reason, you would likely be doing your beneficiaries a favor if you can transfer your timeshare away before your passing. Just be aware that, until the real estate market improves, it may be difficult to do this. That is all the more reason, though, to address the situation sooner rather than later.

Conclusion

I hope these tips have been helpful. The point of offering them has not been to give a comprehensive discussion of estate planning and settlement strategies, but merely to point out some of the lessons I have learned in working with estates. Some tips apply to the estate planning side, while others apply to the various players involved in the estate settlement process. Keep in mind that estate planning and estate settlement are not really separate realms, but are rather like two sides of the same coin. A client who does conscientious estate planning sets up his loved ones for a smooth experience in settling the estate when the time comes. Perhaps most importantly, a conscientious estate planning client also sets them up to inherit more of the property that he or she has worked hard to acquire and that he or she has carefully planned to devise.

Postscript

This writing is intended to generally familiarize you with various legal issues. The scope of this document is necessarily limited, and consultation with your attorney should always precede taking any action.