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Report From Counsel

Insights and Developments in the Law

Fall 2019

Smart Estate Planning Can Prevent Epic Legal Battles

The high-profile legal cases around celebrity icons Tim Conway and Stan Lee are putting a spotlight on end-of-life planning. Conway's family eventually reached an amicable agreement after a contentious legal battle in court between his wife and daughter over his conservatorship. Lee's manager and caretaker, Keya Morgan, was charged with five counts of elder abuse against Lee, including false imprisonment, fraud and forgery. Prior to Lee's death, there were reports a number of family members were contesting his estate for the sake of their own financial gain.



Jason
Smolen

Conway and Lee's plight is all too familiar to estate planning attorneys and financial professionals. In fact, TD Wealth surveyed 109 attendees of the 52nd Annual Heckerling Institute on Estate Planning in 2018 to find out what kept them up at night, and discovered family conflict was number one on their list. "Family dynamics can be tricky," observes Jason Smolen, estate planning co-founding principal at SmolenPlevy in Vienna, Virginia. "There are no neutral parties within a family. Everyone is emotionally involved and everyone has an opinion. That's why you really need highly skilled and experienced professionals providing support."

"The conflicts that can happen during estate planning pale in comparison to those that tend to arise when you fail to plan at all," says Estate Planning Principal Dan Ruttenberg. Smolen and Ruttenberg offer the following estate planning tips to prevent an epic legal battle:



Daniel
Ruttenberg

Review and update all of your beneficiary designations

Forgetting to update beneficiary designations is the most common mistake. It's especially important in this day and age, when blended families are common. Designations will overrule whatever instructions you have included in your will, so even a well-thought-out estate plan can be destroyed by an incorrect beneficiary designation. In short, you don't want your insurance money going to the wrong child or a past spouse.

Consider a premarital agreement — Prenups aren't just about protecting the wealthier partner anymore. They are used to facilitate important conversations between the couple getting married to keep a focus on fairness for both parties. When it is time to settle an estate, having an established contract that both partners have created together can help avoid arguments among your family.

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Accolades

SmolenPlevy is pleased to announce Principals Jason Smolen, Alan Plevy, Daniel Ruttenberg and Kyung (Kathryn) Dickerson are named Best Lawyers® for 2020. They are recognized by their peers for their professional excellence in the following legal practice areas:

- Business organizations (*Smolen and Ruttenberg*)
- Family law (*Plevy and Dickerson*)
- Family law mediation (*Plevy*)
- Family law arbitration (*Plevy*)
- Tax law (*Ruttenberg*)
- Trusts and estates (*Ruttenberg*)

In the Community

SmolenPlevy Principal Dan Ruttenberg, Vice President of Devotion To Children, is proud to announce the firm is the Chip Sponsor for Cards 4 Kids. The event is being held on Saturday, September 21, 2019. It raises funds for childcare services for economically disadvantaged families in the Washington, D.C. metropolitan area. Register for the event at <https://www.devotiontochildren.org/C4KEVENTDETAILS/>.

Divorce and Relocation

Divorce can be difficult, especially if one of the parties wants to move out of the area or even out of the neighborhood. The simple act of moving is complicated enough, but when you add children of divorce to the mix, relocating can become a daunting task. Your move could have an impact on your custody or visitation rights.



Alan Plevy

Laws on relocation vary from state to state, but most states require each parent to notify the other parent and the court in writing, at least 30 days before moving residences. This notice should include information, such as the proposed future address, date of relocation and telephone number, if available.

“It is very difficult for the other parent to see the child on a daily or weekly basis if the child moves across the country. Even within the same state, the distance between homes is key,” explains SmolenPlevy principal and family law attorney Alan Plevy. This can mean that the non-custodial parent may not see the child in person, except on holidays, three-day weekends and during the summer, though the parents can use technology to ensure regular communications. There are many reasons for relocation:

- A parent cannot find a job in their current geographic area
- Relocation by an employer
- Escalating cost of living issues
- Military assignments
- To be closer to extended family or other support systems

“In my experience, these cases are difficult because, no matter what the outcome in court, the children will no longer have regular personal contact with one of their parents,” adds Kyung (Kathryn) Dickerson, SmolenPlevy principal and family law attorney. “It is best if the parents can come to an agreement. Unfortunately, all too often these cases

are resolved by the court.”

The court will consider factors, such as the child’s relationship with each parent, the child’s stability at home and school, and the economic factors present. It is not sufficient that a parent argues that the move is in the best interest of the parent seeking to move—the focus is what is best for the child. While relocation that provides a parent with a job has benefits for the child, those benefits are not the sole or primary consideration in evaluating the impact



Kyung (Kathryn)
Dickerson

on the child. Each relocation situation is factually different and seeking legal advice prior to making commitments or relocating with a child is prudent.

Commonly, when courts rule in favor of relocation or if the non-custodial parent agrees to relocation, they are granted the larger blocks of vacation time during a school year and a greater portion of the winter or summer break.

For more information about relocation, contact Alan Plevy at ablevy@smolenplevy.com or Kyung (Kathryn) Dickerson at kindickerson@smolenplevy.com.

Independent Contractors

It is vital that you understand the distinction between independent contractors and employees, because it affects both workers and employers alike.

As an employer, you may genuinely believe that you have hired people to perform services for you as independent contractors. You may discover that, by law, they are considered employees and that you are liable for unemployment taxes and interest. As an employee, you may believe that you were hired as such and are entitled to those benefits afforded to an employee, yet, under the law, you are considered an independent contractor, or vice versa.

Attorneys Jason Smolen and Dan Ruttenberg advise whether the relationship is one of employer-employee will depend on several factors. These include how much supervision, direction and control you have over the services.

The employer-employee relationship and its factors

The courts have found that no single factor or group of factors conclusively define an employer-employee relationship. Rather, all factors are reviewed to determine

the degree of supervision, direction and control exercised over the services. Generally, an employer controls what will be done, i.e. the manner, means and results.

An employer-employee relationship may exist if you:

- Choose when, where and how they perform services
- Provide facilities, equipment, tools and supplies
- Directly supervise the services
- Set the hours of work
- Require exclusive services (an individual cannot work for your competitors while working for you)
- Set the rate of pay
- Require attendance at meetings and/or training sessions
- Ask for oral or written reports
- Reserve the right to review and approve the work product
- Evaluate job performance
- Require prior permission for absences
- Have the right to hire and fire

How an individual is compensated is another indicator of the worker’s status.

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Independent Contractors

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Employees typically are paid a salary, an hourly rate of pay or a draw against future commissions with no requirement for repayment of unearned commissions. Employees may also receive certain fringe benefits, including an allowance or reimbursement for business or travel expenses.

The nature of the services performed is also key to deciding if a worker is an employee or an independent contractor. Unskilled or casual workers are usually employees because their labor is often supervised. However, even professionals such as doctors and lawyers, who have much freedom to perform their duties, may be employees if they are subject to significant control.

Control

The courts have also found that workers may be employees and that an employment relationship may exist if the employer controls important aspects of the services performed, other than results and means. For example, a referral agency usually does not directly supervise the individuals it refers for assignments. It could be their employer, if it controls

important aspects of the services, such as:

- Client contact
- Billing and collection from clients
- The individual's wages

The independent contractor relationship and its factors

Independent contractors are free from supervision, direction, and/or control in the performance of their duties. It is understood to mean that they are in business for themselves, offering their services to the general public.

Signs of independent contractor status include a person who:

- Has an established business
- Advertises in electronic and/or print media
- Buys advertising
- Uses business cards, stationery and billheads
- Carries insurance
- Keeps a place of business and invests in facilities, equipment and supplies
- Pays their own expenses
- Assumes risk for profit or loss
- Sets their own schedule
- Sets or negotiates their own pay rate
- Offers services to other businesses

(competitive or non-competitive)

- Is free to refuse work offers
- May choose to hire help

The distinctions between employees and independent contractors are vast and extremely complicated. Claims under this area of law require experience and an excellent understanding of the minute details that can make or break a case. For example, an employer-employee relationship may exist, regardless of how the hiring party describes it. If you give a worker a 1099 form rather than a W-2 form, they may still be an employee. People who work for you may qualify as employees under the law, even if you have the person sign a statement claiming to be an independent contractor or they waive any rights as an employee.

For reasons such as this, it is imperative to hire a professional in the field by contacting an experienced attorney. Contact Jason Smolen at jdsmolen@smolenplevy.com or Dan Ruttenberg at dhrruttenberg@smolenplevy.com to be informed and ensure that your legal rights are protected.

What Estate Planning Strategies are Available for Non-U.S. Citizens?

Are you, or is your spouse, a non-U.S. citizen? If so, several traditional estate planning techniques won't be available to you. However, if you're a U.S. resident, but not a citizen, the IRS treats you similarly to a U.S. citizen.

Estate planning attorneys Jason Smolen and Dan Ruttenberg say, if you're considered a resident, you're subject to federal gift and estate taxes on your worldwide assets, but you also enjoy the benefits of the temporary \$11.4 million exemption and the "permanent" \$15,000 annual exclusion. And you can double the annual exclusion to \$30,000 through gift-splitting with your spouse, so long as your spouse is a U.S. citizen or resident.

Special rules apply to the marital deduction, however.

Understanding residency

Residency is a complicated subject. IRS regulations define a U.S. resident for federal estate tax purposes as someone who had his or her domicile in the United States at the time of death. One acquires a domicile in a place by living there, even briefly, with a present intention of making that place a permanent home.

Whether you have your domicile in the United States depends on an analysis of several factors, including the relative time you spend in the United States and abroad, the locations and relative values

of your residences and business interests, visa status, community ties, and the location of family members.

Estate tax law for nonresident aliens

If you're a nonresident alien — that is, if you're neither a U.S. citizen nor a U.S. resident — there's good news and bad news in regard to estate tax law. The good news is that you're subject to U.S. gift and estate taxes only on property that's "situated" in the United States. Also, you can take advantage of the \$15,000 annual exclusion (although you can't split gifts with your spouse).

The bad news is that your estate tax

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In the Media

A healthy Shih Tzu dog is euthanized to fulfill its late owner's will. Now the question on everyone's mind is: is it legal for a pet owner to determine their pet should be put down because they won't be around to care for them? Principal Jason Smolen is featured in *People Magazine*, and on WUSA9's *Off Script* and WTOP to weigh in on whether that last wish is really legal – and how to handle estate planning for your pets.

If you're an owner who is selling your business, but have never sold a business before, you may have some questions about what professional advisors you need on your team. For any successful business sale transaction, you need a Mergers & Acquisitions attorney. On the ExitReadiness Podcast, SmolenPlevy Business Attorney Scott Taylor discusses the role and responsibilities of a M&A attorney in a sale transaction.

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Establish a trust — A trust structure ensures your assets end up with your chosen beneficiaries. A living trust will help you avoid the time-consuming and costly process of probate, while also giving you the freedom to determine the how, and when, you want your assets distributed. For a living trust, you might need to think about a professional third-party trustee to make it fair for everyone — the spouse, children, etc.

Select appropriate fiduciaries – Among the most important decisions you can make are who will serve as a trustee, guardian, executor, attorney-in-fact, or any other trusted position needed under your circumstances. As illustrated above, many fights develop over who has control and are they acting in the best interests of the beneficiary or themselves. Are they trusted and respected by the successor beneficiaries? You must carefully consider who will run the show, if you can't.

Talk with an estate planning attorney — Each family is different and has its own set of complications, but an experienced estate planning attorney in your state will help guide you through completing a plan and achieving your goals. You might also need to consider hiring your own lawyer because, if you have the same lawyer as your spouse and you are planning your estate, it can create a conflict of interest.

Estate planning does more than simply divvy up a person's belongings. It sends a powerful message to everyone in the family: "All of you are loved, all of you are important, and this is how we stay connected for generations to come."

Contact Jason Smolen at jdsmolen@smolenplevy.com or Dan Ruttenberg at dh Ruttenberg@smolenplevy.com if you have any questions on estate planning.

What Estate Planning Strategies are Available for Non-U.S. Citizens?

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exemption drops from \$11.4 million to a miniscule \$60,000, so substantial U.S. property holdings can result in a big estate tax bill. Taxable property includes U.S. real estate as well as tangible personal property (such as cars, boats and artwork) located in the United States.

Determining the location of intangible property — such as stocks, bonds, partnership interests or other equity or debt interests — is more complicated. For example, if a nonresident alien makes a gift of stock in a U.S. corporation, the gift

is exempt from U.S. gift tax. But a bequest of that same stock at death is subject to estate tax. On the other hand, a gift of cash on deposit in a U.S. bank is subject to gift tax, while a bequest of the same cash would be exempt from estate tax.

Your estate planning advisor can help you determine which property is situated in the United States and explore strategies for minimizing your tax exposure. For instance, it may be possible to avoid U.S. estate taxes by setting up a foreign corporation to hold U.S. property.

Create a solid plan

Your status as either a U.S. resident or a nonresident alien will affect the estate planning strategies available to you. Your top goal should be to create an estate plan that will minimize estate tax and allow you to pass more on to your loved ones.

Contact Jason Smolen at jdsmolen@smolenplevy.com or Dan Ruttenberg at dh Ruttenberg@smolenplevy.com for more information on estate planning for non-U.S. citizens.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.