

# SMOLENPLEVY

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## Report From Counsel

Insights and Developments in the Law

Fall 2021

### *What Happens When a Will is Out of Date?*

When people write their last will and testament, they may be under the impression that everything is finished once the will has been witnessed and signed. However, many people find out the hard way that failing to keep your will up to date can be almost as bad as having no will at all. Here are some of the biggest potential problems that can arise when you have an out of date will:



Jason  
Smolen



Daniel  
Ruttenberg

you have a named executor for your estate (along with several potential backups, just in case). The executor is responsible for carrying out your last will and testament and will represent your estate in court for any legal challenges. If you are no longer on good terms with your named executor, or if they are no longer able to fill the role, that could cause issues when it is time to distribute your estate.

#### **You may have an incorrect set of beneficiaries**

It is unlikely that your relationships look the same as they did ten years ago. You may meet new people or fall out with old friends or family members. "Failing to account for updating your beneficiaries could result in granting an inheritance to someone you have not spoken to in years," adds Principal Jason Smolen. In contrast, you may have forgotten to add in someone you have grown close to – unintentionally cutting them out of any inheritance you might want them to receive.

#### **Your named executor may no longer be suitable**

An important part of any well-constructed estate plan is to ensure

#### **Your will may grant someone property you no longer have**

It is not just relationships that change over time. People's personal assets can change drastically over a few years, including selling off valuable property. Principal Dan Ruttenberg explains, "A problem can arise if your will grants someone property you no longer own, effectively depriving your heir of their inheritance." Moreover, by bestowing ownership of property that is not yours, you could create problems for whoever currently does own the property if your heir then tries to contest the legitimacy of their ownership.

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### *SmolenPlevy in the Media*

U.S. News & World Report recognizes SmolenPlevy Principals Jason Smolen, Alan Plevy, Kyung (Kathryn) Dickerson, and Daniel Ruttenberg as 2022 Best Lawyers in the 28th edition of The Best Lawyers In America.

AARP features SmolenPlevy Principal Jason Smolen in an article discussing 5 crucial estate planning mistakes to avoid. Read more: <https://loom.ly/IAp2wzA>

### *SmolenPlevy In the Community*

SmolenPlevy is proud to announce that Principal Kyung (Kathryn) Dickerson has been named to The Judicial Inquiry and Review Commission (JIRC) by Virginia Governor Ralph Northam.

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## *When to Consider an Order of Protection*

If you fear violence from someone in your family or household member, an order of protection can be an important tool. An order of protection, also known as a restraining order, is a judicial order that restricts someone from approaching specific people or places or forces them to refrain from a particular behavior. While not necessary, orders of protection can help protect you from abuse or reprisal by someone in your family or household member, allowing you to go without fear of intimidation.

An order of protection is a court order binding your spouse, family member, or household member telling them to stay away from you, your home, your workplace, your school, and/or your children. It may also restrict them from contacting you or your children, whether through phone calls, emails, texts, or other forms of communication.

Founding Principal Alan Plevy adds, “If someone violates a court order, you can call the police which could result in an arrest and an issuance of an additional protective order. These cases are taken very seriously by the courts.”

To get an order of protection, you must first make a showing to a judge or magistrate that you have been the victim of physical or emotional abuse at the hands of a family member or member of your household. The events must have occurred recently. Once that happens, the judge can issue a temporary order of protection that lasts until the next court hearing. The judge can also issue a permanent protective order, typically lasting up to two years. The consequences of violating



*Alan Plevy*

a temporary order of protection are the same as violating a final order of protection – the possibility of jail time, fines, or both.



*Kyung (Kathryn)  
Dickerson*

Protective orders have potential benefits beyond keeping abusive persons away. “At child custody or visitation hearings, the court tends to strongly consider any evidence of abuse,

including any outstanding protective orders,” explains Principal Kyung (Kathryn) Dickerson.

Contact Alan Plevy at [ablevy@smolenplevy.com](mailto:ablevy@smolenplevy.com) or Kyung (Kathryn) Dickerson at [kindickerson@smolenplevy.com](mailto:kindickerson@smolenplevy.com) for more information.

## *Creating an Education Legacy Using a Family Education Trust*

For many people, leaving a legacy for their children, grandchildren, and future generations is an important goal of the estate plan. Providing for their educational needs is a great way to ensure financial security for their future. A 529 plan can be a highly effective tool for funding tuition and other educational expenses on a tax-advantaged basis. “When the 529 plan’s owner, which is typically a parent or grandparent, passes away, there’s no guarantee that subsequent owners will continue to use it to fulfill the original owner’s vision,” explains Principal Dan Ruttenberg.

A carefully designed trust may be the best solution to create a family education fund that lives on for

generations. But education trusts can also have significant drawbacks. Principal Jason Smolen adds, “Unlike 529 plans where the earnings are tax-exempt if used for qualified education expenses, education trusts are subject to some of the highest federal income tax rates in the tax code.”

One strategy for gaining the best of both worlds is to establish a family education trust that invests in one or more 529 plans.

### **Plan basics**

529 plans are state-sponsored investment accounts that permit parents, grandparents and other family members to make substantial cash contributions. Contributions

are nondeductible, but the funds grow tax-free and earnings may be withdrawn tax-free for federal income tax purposes, provided they’re used for qualified education expenses. Qualified expenses include tuition, fees, books, supplies, equipment, and some room and board at most accredited colleges and universities as well as certain vocational schools. Contributions to 529 plans are removed from your taxable estate and shielded from gift taxes by your lifetime gift and estate tax exemption or by annual exclusions.

In addition to the risk that a subsequent owner will use the funds for non-

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## *Bringing in Children from a Previous Marriage*

Nearly 80% of all people choose to remarry after their first marriage ends. When they do this, though, they often bring their children from that marriage with them. However, bringing in a child from a previous marriage is more complicated than most people realize. Here is what you need to know if you, or your spouse, are planning to bring in a child from a previous marriage:

### **You can use your prenuptial agreement to address some inheritance issues**

Even before you marry, you can sign a prenuptial agreement to deal with some inheritance issues related to children from a previous marriage. Though far from the same as a formal adoption or guardianship, you can name your spouse's child as an heir in your prenup. This will ensure they are not left out of an inheritance.

### **Your spouse's child does not automatically become your child**

When you marry your spouse, their children do not automatically become your children, from a legal perspective. You will still need to go through the formal adoption process to legally become their parent. "Formal adoption is an important step not only for inheritance purposes, but also so they can get access to insurance, visitation rights, and other benefits normally only afforded to immediate family," says Principal Kyung (Kathryn) Dickerson. A formal adoption will involve any surviving natural parents.

### **You may need to consider the rights of the other parent**

One potential complication that can arise is the child's other parent, assuming they are still alive. This is because a child's parents retain legal rights over their child, even if they don't have custody over them. You may need

to obtain their legal consent before you can adopt your new spouse's child, which can raise a number of potential problems.

### **You will need to update your estate plan**

If you have an estate plan already, you may need to update it to account for any new children your spouse brings in from their previous marriage. Principal Alan Plevy explains, "This can mean updating your will to ensure they will receive an inheritance, but it can also mean updating your life insurance policy, retirement benefits, and other aspects of your estate plan that require named beneficiaries." This way, your children will not be left out if you suddenly pass away.

### **You will need to plan for the possibility of tragedy**

While bringing a new child into your family is supposed to be a happy occasion, there is always the risk that the worst will come to pass, and you will die while your child is still young. Not only do you need to ensure they will receive an inheritance, but you will need to make sure they are properly cared for. Thankfully, you can put measures into place in your estate plan to ensure they will have someone to look after them if you pass away, along with a trust fund or similar measures to ensure their financial needs will be taken care of.

## *Creating an Education Legacy*

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educational purposes, the disadvantages of 529 plans include relatively limited investment choices and an inability to invest assets other than cash.

### **Holding a 529 plan in a trust**

Establishing a trust to hold one or more 529 plans provides several significant benefits:

- It allows you to maintain tax-advantaged education funds indefinitely (depending on applicable state law) to benefit future generations and keeps the funds out of the hands of those who would use them for other purposes.
- It allows you to establish guidelines on which family members are eligible for educational assistance, direct how the funds will be used or distributed in the event they're

no longer needed for educational purposes, and appoint trustees and successor trustees to oversee the trust.

- It can accept non-cash contributions and hold a variety of investments and assets outside 529 plans.

A trust may also use funds held outside of 529 plans for purposes other than education, such as paying medical expenses or nonqualified living expenses.

### **Plan carefully**

If you're interested in setting up a family education trust to hold 529 plans and other investments, contact us. We can help you design a trust that maximizes educational benefits, minimizes taxes and offers the flexibility you need to shape your educational legacy.



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# *The Benefits and Drawbacks of C-Corps*

C-Corporations, also known as C-Corps, are the most common form of corporation in the United States, albeit one that many people do not understand. When organized correctly, they offer several potential benefits to their business. When done improperly, though, they may become potentially costly. Here are the potential benefits and drawbacks of C-Corps:

## **The Benefits of C-Corps**

- C-Corps, like all corporations, offer protection from legal and financial liability. This means that a C-Corp's shareholders, directors, and executives are not usually responsible for its debts or legal problems.
- C-Corps have no restrictions on who may own their shares, unlike S-Corps which limits the number of shareholders and require that its shareholders be US Citizens or permanent residents.
- C-Corps have a flexible structure that makes them useful for growing businesses, even ones that are relatively new. They are not limited to one class of stock so offer a greater variety of ownership options.
- C-Corps can own other companies, including LLCs or other C-Corps. This allows them to create subsidiaries that can further mitigate their legal and financial risks.
- C-Corps can carry losses forwards

and backwards and have the widest availability of deductions.

- May accumulate needed reserves without individual taxation.

## **The Drawbacks of C-Corps**

- C-Corps are subject to corporate income tax. This leads to the phenomenon of "double taxation," where a C-Corp's income is first taxed as corporate income, and then taxed again as capital gains when it is distributed as dividends to shareholders.
- C-Corps have strict legal require-

ments to maintain their status. This includes holding regular meetings for shareholders and boards of directors, maintaining their own books and accounts, and ensuring company finances are not intermingled with the finances of the company's ownership.

- A C-Corp that fails to maintain these requirements may find a court "pierces the corporate veil," meaning that a company's shareholders, executives, or directors could be held individually liable for the corporation's liabilities.

## *What Happens When a Will is Out of Date?*

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### **You may have property that is not disposed of**

On the other side of the coin, you may have obtained property since the last time you updated your will. If that property is not granted to a specific heir, one of two things can happen. First, if you have a residuary clause, it will be given to your residuary heir or heirs. Otherwise, it will fall into intestacy, meaning it must be divided up by the court following the state intestacy statute.

### **You may not have plans for dependents**

Since you last wrote your will, you may have new dependents that rely on you and it's essential to include them in your estate plan. Your last will and

testament can create provisions for any family members who depend on you for their care. Typically, this means children, but it may also include elderly relatives in need of constant care or family members with special needs. If you do not have provisions to care for these family members, your loved ones may be stuck sorting out their care in court. Were your children young when your will was prepared? Would you provide for them differently now that they are older?

For more information, contact Jason Smolen at [jdsmolen@smolenplevy.com](mailto:jdsmolen@smolenplevy.com) or Dan Ruttenberg at [dhruttenberg@smolenplevy.com](mailto:dhruttenberg@smolenplevy.com).

*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.*