New Jersey Law Journal

VOL. CLXXXVIII– NO4 – INDEX 311 APRIL 23, 2007 ESTABLISHED 1878

IN PRACTICE

ESTATE PLANNING

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Build a Better Will

How to avoid Anna Nicole Smith's estate planning mistakes

Florida Probate Judge Larry Seidlin ordered the release of Anna Nicole Smith's will in an effort to ascertain where she wanted to be buried. Smith's will, however, left more questions than answers about who inherits her potentially significant estate and where she desired to be buried. While the high-stakes legal drama that ensnared the Smith case was unusual, the underlying issues are those that can stir up heated litigation in even the most mundane estates.

The Smith case demonstrates the importance of properly drafting and periodically updating one's will. The most obvious flaw in Smith's will is that she did not provide for contingent beneficiaries in the event that her primary beneficiary predeceased her. Smith's will left all of her assets to her son in trust. However, the trust did not specify how the assets should be distributed if Smith's son had predeceased her or died during the term of the trust. The problem is that her son (as remote as it seemed at that time) did in fact predecease her and the will did not provide for an alternate distribution of her assets.

In addition, the will specifically disinherits afterborn children, thereby excluding Smith's infant daughter (born in 2006) as a beneficiary under her will. Not only did Smith (or her attorney) fail to contemplate the possibility of afterborn children, Smith (or her attorney) also failed to consider who would take her assets should she have no surviving beneficiaries. Since a contingent beneficiary provision was not included in the trust and since Smith's afterborn daughter was excluded from the will, it raises serious doubt as to who will take under Smith's will and will likely lead to a long and contentious litigation.

In New Jersey, if a will does not dispose of all of a decedent's assets, such as the case here, the intestacy statutes would apply. Intestacy statutes provide for the inflexible distribution of a decedent's assets based on a fixed distribution schedule. One of the issues in the Smith case is whether intestacy statutes give a disinherited individual (or class) the right to receive an intestate share, notwithstanding the contrary intent of the testator.

A review of New Jersey law on this issue reveals some uncertainty. New Jersey common law, established long before the current intestacy statutes were in effect, prescribes that words of disinheritance in a will do not affect an intestate taker's right to receive under intestacy law. Instead of focusing on a testator's intent, New Jersey intestacy law dictated how a decedent's assets were distributed if the decedent's will did not entirely dispose of his other estate assets.

In stark contrast to the idea of disregarding the testator's intent when determining if a disinherited individual has a right to take under intestacy law, the current New Jersey intestacy statutes include a provision that breathes life into a testator's intent. N.J.S.A. 3B:5-2(b) specifically allows a testator to "expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession."

Interestingly, in this case, had Smith not specifically excluded afterborn children in her will, under New Jersey law, her infant daughter would have been a beneficiary of Smith's estate. This is because the New Jersey pretermitted children statute, N.J.S.A. 3B:5-16, provides for certain distributions to be made to an afterborn child.

However, similar to the New Jersey intestacy statutes, the New Jersey pretermitted children statute gives priority to a testator's intent. Accordingly, if "it appears from the will that the omission was intentional," then the afterborn child will receive nothing under the pretermitted children statute. A testator's simple recital of disinheritance of afterborn children arguably is sufficient to meet the standard of omission under the New Jersey pretermitted children statute. Whether that same standard of omission applies to the New Jersey intestacy statutes is unclear.

While it appears that Smith's infant

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daughter would be precluded from taking under the New Jersey intestacy statutes, no case law has cited to this relatively recent version of the statute. As a result, there are no guidelines on what is needed to expressly exclude an individual from receiving an intestate share, i.e., whether general language of disinheritance is sufficient or if a testator must expressly exclude an individual as an intestate taker. While it is not entirely clear who the ultimate beneficiaries would be under New Jersey law, it is clear that these issues could have been avoided in any jurisdiction if the will had a contingent beneficiary provision, which would have set forth the order of who should take in the event that Smith's primary beneficiary predeceased her.

Aside from failing to provide for contingent beneficiaries, listed below are additional traps for the unwary found in Smith's will.

Keep wills current with changes in life. When a significant event occurs in life (i.e., marriage, birth of a new child, death of a family member, divorce, etc.), a will, as well as other estate planning documents, should be updated to remain consistent with how an individual intends to distribute his assets upon death. In Smith's case, while it is possible that she intended for her daughter to receive none of her assets, it is more likely that she simply did not take the time to update her will.

Update domicile provisions in your will. A will should also be updated if an individual moves. Smith had a California will with California law controlling, but lived and established residency in the Bahamas. This could have created unnecessary tax problems for Smith if California had a state estate tax. Particularly in larger estates, a former state may argue that the inclusion of a state law provision shows that you never intended to permanently change your domicile. This can be very costly to your heirs, for example, if you move from New Jersey, which has an estate tax, to Florida, which has no estate tax.

Appoint a guardian for minor children. Like Smith, if an individual has minor children, it is critical that a guardian be appointed to care for them in the event that the individual and the spouse are survived by children who have not reached the age of majority. To avoid a court-appointed guardian, it is equally important to appoint successor guardians in the event that an appointed guardian predeceases the testator or otherwise cannot serve.

Update the tax clause in a will. Smith's will contained boiler plate tax payment language that was not updated since 2001. Since she was not married, the impact of those clauses will not likely adversely impact the ultimate beneficiaries of her will. However, had she been legally married at the time of her death, failing to update those tax provisions could have created an unnecessary state-level estate tax on the first spouse's death. It is important that the tax payment provisions in a will are reviewed with tax advisors every two or three years to ensure that they still accomplish one's estate planning goals.

Consider burial arrangements. Smith's final resting place was a hotly contested issue. Although this type of provision is generally not included in one's will, it is important that an individual gives thought to his burial arrangements and convey those wishes to his family members. This can be done either verbally or in a writing placed with the will.

All of these potential pitfalls can be avoided by carefully considering these issues and periodically reviewing and updating one's will every few years. ■