Wi$e Up Teleconference Call
May 31, 2005
Estate Planning
Speaker #2 Remarks

S. Miller

Thank you, Beth. Now, let me have Dorothy Witherspoon, a member of the Wi$e Up team in Kansas City, introduce our second speaker. Dorothy --

D. Witherspoon

Thanks, Sarah. I’m pleased to introduce Suzanne Gellman, a consumer economics specialist with the University of Missouri Extension. Suzanne has been providing financial and legal education to the citizens of Missouri and people in the St. Louis metropolitan area for more than ten years. She coordinates the women’s financial education series in her community that has served over 600 participants. Suzanne also coordinates and presents educational seminars, develops curricula and does consulting on various financial topics such as credit, identity theft, estate planning, insurance and various legal topics. She has her BS and MS degrees in consumer economics from the University of Missouri Columbia. She has a law degree from the St. Louis University School of Law, and she is a member of the Missouri Bar and the Bar Association of Metropolitan St. Louis. Suzanne is also a Gen Xer and serves as a mentor in the Wi$e Up program from [Women’s Bureau] Kansas City Region VII. Welcome.
Thank you for having me. Beth did a wonderful job. I want to build on what she talked about. She referred to the importance of the will and the joint ownership and I’ll pick up on those.

The way I like to start people who are my age group thinking about this is if you don’t have estate planning documents, especially if you don’t have a will or trust, what happens? Well, when a person dies without a will or a trust, she dies what’s called intestate. What that means is that property owned in your name alone will be distributed according to the laws of the state where you reside. So you still have an estate plan even if you don’t have a will or trust. It’s just your state will decide for you, and you may not like the way they do it. It differs from state to state. I might give some Missouri examples but you need to check and see what the laws are and what will happen in your state. Sometimes, it may surprise you.

If you have children, what this means is that the probate court will decide, if you don’t have a will or trust, what happens to your underage children. The courts will decide who handles the money left to your children until they are 18 or 21, depending on the laws of your state. It also means that it will cost more of your children’s
inheritance for all the court oversight required when there is no will or trust.

So many people say, “I can’t afford a will or a trust.” Well, your children can’t afford for you not to have one because it will cost them a lot more out of what you leave behind than what it would cost you to take care of these things ahead of time.

Another problem if you don’t have a will or trust, the children may get the money—they generally will get the money as soon as they turn 18 or 21—and most parents wouldn’t want their children to have all the money, depending on how much it is, but if there are insurance and other assets, retirement, it could mount up. So anything that’s left after taking care of the children until they reach the age of majority they get, and most parents would want them to wait a bit longer before they get that money, knowing what we might have done when we were 21 or 18.

You would appoint a guardian, the person who will take care of your child, and the conservator who is going to take care of their financial affairs. These don’t have to be the same person. That’s up to you whether you’d want the same person to do both. Sometimes people don’t.
In Missouri, if there is a spouse and children, only if the children are from the current marriage and no children from a prior marriage, the spouse gets the first $20,000, and the rest is split 50/50 with the children. Now, most people want their spouse to have all the money to care for their children. In addition, you face the reality that children may have access to all that 50% upon [turning] 18 or 21.

This is another important piece. Even if you don’t have children, you still may want to have a will. We all have stuff that’s important to us. We don’t necessarily think we have a lot of money, but you may have an employer who is providing one or two times your salary without you putting out any excess money to pay for the insurance. You may have other assets that you may not realize, and some of those I’ll go into in a minute as well.

In my case, in Missouri, if you’re not married, your assets go in equal parts to your parents and your siblings. In my case, I had a stepparent who was not very nice to me growing up. And when I found out about this and wasn’t married, [I] didn’t want her benefiting from anything I had to leave behind, even if it didn’t seem like a lot. So I ran out, as soon as I sat through my estate
planning class in law school and found this out, I ran out and got a will.

Another thing was my parents don’t need anything from me, but I have a sister who does, so I wanted to make sure I directed anything I did have to my sister. That wouldn’t have happened if the state made the decision of where my assets would go. That’s some of the perils and pitfalls of not having a trust or a will.

I also get the question often, “Do I really need a will or trust if I have everything owned jointly and if I have beneficiaries listed on my life insurance and anything that allows the beneficiary designation?”

So I wanted to talk about what joint ownership was and what happens if you only have joint ownership and rely on that instead of relying on other legal tools you can use in estate planning.

With joint tenancy with rights of survivorship--joint property when you own something jointly--it automatically passes by title at death to that other person – the surviving tenant or the surviving owner of the joint property. It does not go through your probate estate. Even if you put provisions in your will or trust about that property,
they don’t apply. If it’s owned jointly, if the joint owner survives you or you survive them, it all goes to that person. So provisions in a will or trust are not effective if the joint tenant survives.

Some pitfalls of owning things jointly that people just don’t think about – for one thing, there is no creditor protection from co-tenants’ creditors. So if you have a sibling or a parent on your account with you and they have financial problems or creditors, those creditors can go after that joint account. The only potential protection is there may be marital protection. For example, in Missouri we have something called tenancy in the entirety, which means each spouse owns 100% of any an account, so it can protect those joint accounts from a spouse. If only one spouse is dead, it can provide creditor protection.

This is not true if there are no marital protections, and those are usually the only ones, although again I’m only licensed in Missouri, so you need to check. There is no marital protection from a co-tenant disgruntled spouse. For example, I see a lot of times where a parent will put their children on an account with them so they can write checks, so it goes through joint ownership directly to that child. If that child ends up going through a divorce, that disgruntled spouse can claim half of that property, if it’s
jointly owned, as part of the property to be divided in the divorce.

So that can create problems people don’t think about. They just think they’re putting their child on it. And if it’s a house, it may require the child’s spouse’s signature in order to sell that property.

Other issues with joint ownership, co-tenants may need to sign documents. Co-tenants, including minors, have present rights to the property. In essence, when you put someone on as a joint account owner, you’ve made a gift of 50% of that account, and they have immediate rights to that property and they can go and withdraw money. We hope they won’t, but it is an option, they own 50%. I’m not going to talk about gift tax, but there can be gift tax repercussions depending on the amount in the account and whether it exceeds the yearly allowance for the amount you’re given free of gift tax.

Also, probate is not necessarily avoided if both co-tenants die together or upon the death of the last co-tenant. Obviously, if they don’t have a will, it’s going to go intestate and through probate. Assets to be passed outside of the estate plan, if you put a provision in a will or trust, it’s not going to apply to joint accounts.
Another issue we see is the inadvertent disinherittance of children or grandchildren. For example, sometimes a parent will put a child that’s in town – just one of their children--on the account, but they have three or four. In this case, all the money goes to the one child, and it’s up to that child to decide whether they want to distribute the money to the other heirs of the estate. Again, depending on the amount in the account, there could be gift taxes that are incurred when those children try to give money to siblings or other family members that were the parents’ wishes that they receive it. So that method may not be the best, although there are options to put terminology in, for example, bank accounts or other accounts that allow for all the children to be named and, if they’re not living, for their children to get it.

Also, if that’s the way people want to estate plan and do everything jointly or with beneficiary deeds, there are many times we see that there is an asset that someone forgot to jointly title or that occurs after death. For example, you never want to think about it, but if someone dies in an accident or in malpractice or from other injuries, there may be a lawsuit that’s able to be brought on behalf of the estate of the person, and that’s not joint ownership. So if there is no will or trust, the state is going to decide how that money gets divided and where it goes. There can be money that comes
into a person’s estate after they die that has to be dealt with, and that’s another reason to make sure you have a will or trust.

Better options than joint ownership that can protect you from family members, creditors, not give ownership to family members, not even have to deal with the possibility of having other people have rights in your property, are things like beneficiary deeds which is available in some states but not all, and that would be, for example, transfer of a home. It transfers it to a beneficiary, but they don’t have any ownership in the home while you’re alive. Things like pay-on-death, transfer-on-death designations on different accounts will allow the money to go directly to who you specify, but it gives them no ownership while you’re alive, which is really what most people want. You don’t want to give others ownership unless they’re potentially a spouse.

You can also give permission on many bank accounts to sign checks without providing ownership, which is sometimes what older parents may be looking for from children, is them to be able to pay bills if they’re incapacitated or having a problem.

Another important piece is a power of attorney for financial matters. This is often the best way I prefer people to go if they
want people to be able to sign checks or handle their financial affairs if they can’t is by having a power of attorney, not by having them jointly own your account.

Those are some of the pitfalls and perils I see in thinking about owning everything jointly and not worrying about having a will or trust. There can still be a lot of things that can go wrong and it’s not really the best way to approach things.

Another important estate planning tool I want to talk about is the healthcare directive. Beth already talked about it so I don’t want to go into it too deeply, but I want to mention that it’s been referred to as a living will. In some states, a living will only applies if someone is terminal -- so if you’re dying within a short period of time. I prefer to refer to them as advanced directives, and that’s a document that kicks in whether you’re terminal or comatose but you may live an indefinite period of time.

So an advanced directive allows you to state, if you become terminally ill or comatose, that you do or do not want any extraordinary, death-delaying procedures. You can decide either way. You can decide procedures you want administered and those you don’t. Versus a durable power of attorney for healthcare
[which] authorizes your attorney-in-fact or someone to make healthcare decisions for you in the event you were unable to do so yourself due to incapacity. It allows your attorney-in-fact to enforce your medical directive, and we’ve seen many situations where not everything that comes up was covered in a medical directive, so it allows the attorney the flexibility to make decisions hopefully you would have made for yourself but were not covered in your healthcare directive.

If your power of attorney for healthcare has not been updated in the last year, you need to make sure you have the HIPAA addendum that allows your power of attorney, your attorney-in-fact, to have permission to view your healthcare documents. There is a privacy authorization form because of HIPAA. What we’re seeing is if someone has a healthcare directive or durable power of attorney that was developed two, three, four years ago, it may not have provisions that allow the power of attorney to move around HIPAA and get all the medical records. So what I had recently was someone who was in the hospital. They had a durable power of attorney for healthcare but did not have the privacy authorization, and the hospital would not let them look at the medical records. So even if you have one, if you haven’t had it
updated in the last year, you need to get one of these medical authorization forms.

Other things. These documents are revocable at any time, unlike a will, where you can only have one original, with a healthcare directive or healthcare power of attorney, you can have multiple originals. But if you want to change your mind, you need to get them all back and tear them up. That’s how you change your mind.

J. Walstedt Can I just break in? The clock is ticking, and I know you can’t stay with us for questions and answers. I was wondering if it would be possible to wrap it up to make sure we get time in there for Larry and questions and answers.

S. Gellman I just have one more comment, which is this. Make sure you discuss your wishes with your family. As you’ve seen with the Terry Schiavo case, it is especially important to let your family know what your wishes are, and especially to know whether the person you give the power of attorney for healthcare to, that they’re in agreement with what your wishes are, that they have the same attitude. I’ve seen too many cases where the children were the power of attorney and didn’t want what the parent wanted, and
guess who trumped. You want to discuss all these kinds of things with your family.