

Trusts and Estates Newsletter

Lessons We Can Learn from Anna Nicole Smith

While Access Hollywood and Entertainment Tonight might not be waiting for the filing of your will, there may be others in your life, such as ex-spouses, step-children, and other relatives whom you would prefer not knowing how you want to dispose of your property.

The untimely and tragic death of Anna Nicole Smith at the age of thirty-nine should serve as a lesson for us all. Because of a series of circumstances in Anna Nicole's life, her estate was left in disarray and family members and loved ones fought over every detail, from burial to paternity to inheritance. If Anna Nicole had approached her estate planning differently and created a plan that took her particular circumstances into account, no doubt the immediate aftermath of her death would have been less chaotic and the headlines would have been reduced.

While the average individual might not have similar sensational and complicating circumstances, we nonetheless can learn much from Anna Nicole's untimely death and her seemingly inadequate will.

- If you believe there may be family disagreement over your burial or cremation desires, put them in writing in your will.

Anna Nicole Smith was reportedly estranged from her mother, not married at the time of her death, and silent as to who was the father of her daughter. Her will did not mention burial plans, and the various interested parties all give their opinions about what Anna Nicole would have wanted. With no specific statement from Anna Nicole, the court was left to determine her desires by hearing from others, who may or may not have put their own wishes and needs above those of Anna Nicole. A statement by Anna Nicole in her will would have done much to settle the matter.

Each individual has the right to have his or her remains disposed of as he or she desires, and may indicate such in a statement in the will. Specific burial or cremation plans in a will demonstrate your last wishes and will control, as long you were competent and not subject to undue influence when the will was signed.

For many people it may not be necessary to mention burial plans in a will. Practically speaking, in most cases, the will is not even read until after someone is already buried (or cremated). But, if you believe there is a chance that your immediate family might disagree with your desires, your will should include such a statement. For example, relatives may not agree with your desire to be cremated, or parents may be upset at your desire to be buried next to a longtime companion, rather than in the family plot. Such language provides direct evidence of your actual intent and is extremely helpful in settling a dispute.

- Use a revocable trust for privacy.

Often times a will leaves property to a separate revocable or "living" trust. While this type of estate plan is often prepared for estate tax purposes, revocable trusts can also be used solely for purposes of privacy.

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Any will is a public record once it is filed with the court. For example, as soon as Anna Nicole's will was presented to the court, everyone had access to it and its provisions were detailed on TV shows and the internet almost instantaneously. While Access Hollywood and Entertainment Tonight might not be waiting for the filing of your will, there may be others in your life, such as ex-spouses, step-children, and other relatives whom you would prefer not knowing how you want to dispose of your property.

If Anna Nicole had left her property to a separate revocable trust, only that fact would have been public record. The contents of the trust would still have been private. In fact, in the ordinary course, the trust might never even have to be filed with the court or become a public record.

So remember, if you desire privacy for any reason, a revocable trust should be used as part of your estate plan.

Estate planning should be thought of as an ongoing process. While a good estate plan should be drafted to allow for flexibility and plan for contingencies...it is simply impossible to draft an estate plan to take into account all of life's possible changes.

■ **Think long and hard before disinheriting children or spouses.**

It surprised many people that Anna Nicole's will contained a statement that she intentionally disinherited not only future spouses, but also future children. In Massachusetts (as in most states) you cannot completely disinherit a spouse without a prenuptial agreement. In addition, in Massachusetts the disinheritance of a child cannot be the result of accident or mistake. Depending on the law in the jurisdiction that applies to Anna Nicole's will, her statement disinheriting her future child, may or may not be held to be valid. However, the court will certainly need to take into account that when she signed her will, it was years before her daughter was born.

When creating an estate plan, if circumstances exist where a child is to be disinherited, an unequivocal statement should appear in the will so that there are no doubts about your intentions. Even so, be aware that such a statement could cause litigation from the disinherited child and/or his or her family.

■ **Name a guardian for your minor children in your will.**

Every parent has the right to name the person he or she believes would be best to serve as the guardian of his or her child in the

event of his or her death. In Massachusetts it is presumed that this named guardian would be in the best interests of the child, unless someone seeks to rebut that presumption. In addition, guardians can be named for children who are not yet born at the time the will is signed.

Anna Nicole specifically named a guardian for her son in her will, but did not name a guardian for any after born child. Therefore, in the days immediately following Anna Nicole's death, there was much disagreement about who should be her daughter's guardian. Ultimately the court appointed an independent third-party.

Similarly, in order to avoid disagreements among multiple relatives who would like to take care of your child, and to minimize court involvement and expense, the best course is to name the guardian of your minor child in your will.

■ **Plan for contingencies.**

Anna Nicole's will left everything to her son, to be held in trust under the will for his benefit. Her son, however, predeceased his mother and the will did not provide for any contingent (or alternate) beneficiaries. While most parents believe it is unlikely they will survive their children, and most would rather not consider such a circumstance, the best course is to provide for every contingency, no matter how remote.

In addition, even if you only have one child and believe it is highly unlikely you would ever have more children, it is best to provide for your child through the use of a class name—for example, make provisions for "my children", rather than referring to the individual child by name. Then, if you do have more children, the after born or after adopted child will be included. There is no downside to leaving property to a child in this manner because if you do not have more children, your one child will still receive all of your property just as you had originally intended.

It is important to keep in mind that it is becoming increasingly more likely for women to give birth to children later in life, or for men or women to adopt children later in life. By using class names, you will not only be including these after born or after adopted children, but also saving money as you will not have to pay your attorney to update the plan to include the additional child.

■ **Review your estate plan every three to five years or when major life changes occur.**

Estate planning should be thought of as an ongoing process. While a good estate plan should be drafted to allow for flexibility and plan for contingencies, as described above, it is simply impossible to draft an estate plan to take into account all of life's possible changes. Financial fortunes rise and fall, relationship and laws change. Any of these requires a review of the estate plan by a qualified attorney, and possibly an update of the documents. As circumstances in your life change, your estate plan should reflect those circumstances. ■

The Special Needs Trust—Putting Your Mind at Ease

Parents of physically or mentally challenged children often ask, "What will happen to my child after I die?" If you, or someone you know or love, is in this situation, you may want to consider a Special Needs Trust (also known as a Supplemental Needs Trust).

Government benefits, such as MassHealth (Medicaid) or Supplemental Security Income (SSI), usually provide important benefits, such as medical insurance, services and cash benefits, as well as other long-term support for persons with disabilities. However, if a disabled person has too much income or too many assets, he or she can lose these all-important benefits. A common way that a disabled person might receive assets that would cause him or her to lose benefits is through an inheritance.

Some individuals who are aware of this problem, leave assets to another person (for example, another child) to take care of the disabled child. However, there are no guarantees that these assets will be used as intended. In addition, the child who receives the assets might become divorced, be sued or die, all of which could divert the assets from the disabled beneficiary. A Special Needs Trust, designed specially to provide for a physically or mentally disabled beneficiary, can ensure that the disabled person can benefit from an inheritance without being disqualified from receiving government aid.

Although government aid is valuable, these benefits for disabled persons are meant to provide only the basics, such as food, clothing and shelter. Often cash benefits are limited and there is not enough money left to pay for anything over and above these "basic" needs. There may be much more you would like to provide for your disabled loved one that could improve the quality of his or her life. In fact, you may be already supplying these extra things from your own assets and income. A Special Needs Trust can continue to provide these "extras" after you are gone.

While many people think of trusts as only for the wealthy or necessary for estate tax planning, this is simply not true. Trusts are vehicles to hold money and give instructions for how the money is to be used in any variety of situations. As such, trusts are very useful in situations involving disabled individuals. The Special Needs Trust will ensure that the assets are used as intended, for the benefit of the disabled person, and that the disabled person will also continue to receive government benefits.

In a Special Needs Trust, a person, known as the Trustee, holds and invests the assets and makes payments for the beneficiary (the disabled person). The distributions from the Special Needs Trust will be used only to provide those goods or services for the disabled beneficiary that will supplement, but not replace, the basic level of food, clothing and shelter provided by the government benefits.

There are two types of Special Needs Trusts: a trust set up by an individual to hold his or her assets for the benefit of a disabled

person (known as a Third Party Trust); and a trust set up by or for the disabled person with his own assets, most often received through an inheritance or a lawsuit settlement (known as a Self-Settled Trust).

Self-Settled Trusts will be "countable" as the disabled individual's own asset, and consequently disqualify him or her from government benefits, unless the Trust qualifies as one of three specifically allowable types under federal law, called "(d)(4)(A) Trusts." The requirements for the "(d)(4)(A) Trust" are that the disabled person must be under the age of sixty-five when the Trust is created, the Trust must be for the "sole benefit" of the disabled person, and the Trust is not created by the disabled person, but rather by his or her parent, grandparent, legal guardian or the court. Finally, the trust must pay any assets remaining in the trust upon the disabled person's death to the state that provided the assistance, in order to reimburse the state for the value of the benefits provided. This "payback" provision is a major disadvantage to a Self-Settled Special Needs Trust, as there may then be no assets left to pass to the disabled person's family or loved ones. Thus, the main benefit of the "(d)(4)(A) Trust" is to provide the disabled person with a better quality of life and to pay for "special needs" not otherwise provided by the government benefits.

Although federal law does not allow a disabled person who sets up a trust to qualify for government benefits unless the trust includes the "payback" provisions, a third-party, such as a parent or grandparent, can set up a Special Needs Trust with his or her own assets and those assets will not be "countable". The trust must be drafted so that the disabled person has no control over or access to the assets. Usually, the Trustee is given broad discretion as to how much, when and for what purpose a payment may be made for the benefit of the disabled individual. In addition, the Trustee should be directed to make payments only for the "supplemental" or "special" needs of the disabled beneficiary. Although a Special Needs Trust should not give money directly to the disabled person, payments can be made to third-party providers or to purchase goods and services, such as insurance and premium payments, rehabilitation, transportation, special foods or dietary needs, hobbies and recreation, vacations, entertainment, personal care providers, and items to add pleasure and provide a better quality of life. When the disabled beneficiary passes away, the remaining assets can go to other family members or loved ones as is directed in the trust instrument.

Parents and grandparents with a disabled love one should consider a Special Needs Trust as part of their overall estate planning; especially if the disabled person will have long-term medical and support needs. It is never too early to put these plans in place to provide you with the peace of mind to know that your loved one will be provided for and to protect assets for the disabled individual, and possibly for your other children or family members. ■

What You Should Know About a Declaration of Homestead

A declaration of homestead is the first line of defense against any creditor who seeks to satisfy a debt by going after your assets, of which your primary residence is likely one of the largest. For this reason, each homeowner who is eligible should file a declaration of homestead on his or her principal residence. A homestead generally exempts the first \$500,000 of equity in the principal residence against most debts arising after the declaration is filed with the registry of deeds.

However, under Massachusetts law the exact scope of the protection provided by the homestead is unclear in many situations. Moreover, seemingly innocuous actions can revoke an existing homestead declaration.

The Basics

Massachusetts allows two types of homestead declarations, one for homeowners under age 62 and the other for homeowners who are age 62 and older or who are disabled. Unlike the some states, such as Florida, where homestead protection is automatic, in order to obtain the benefit of a homestead in Massachusetts, homeowners must record a declaration of homestead at the Registry of Deeds in the county in which the home is located. A homestead declaration may only be filed for a primary residence, and a person can only have one primary residence. Summer or vacation homes cannot be protected by a homestead declaration.

If the property is jointly owned by a married couple, both of whom are under the age of 62 and not disabled, only one of the owners may file a homestead declaration, which will protect the first \$500,000 in equity in the home for the benefit of the family. For the purposes of a homestead, the family is defined as a married couple and children, including adult children residing in the home.

For homeowners who are age 62 and over or who are disabled, the homestead declaration (also known as a declaration of elderly homestead) is not for the benefit of the family. Rather, the homestead protects the first \$500,000 of equity in that owner's interest in the home. Therefore, if each joint homeowner is age 62 or older, each owner should file his or her own homestead in order to protect his or her equity in the home.

For homeowners under age 62 who have already filed a homestead, a new declaration of elderly homestead should be filed upon turning 62. In addition, any other owner who is then under age 62 should consider filing his or her own homestead at that time.

Ownership Issues

Partial Interests. Partial ownership interests in a primary residence may also be protected by a homestead. For example, if an individual lives in a three-family home that she and her brother inherited from their parents, and she lives on the first floor and rents out the top two floors, a homestead can be declared on her one-half ownership interest in the property. However, it is uncertain whether the homestead will protect a one-half interest in the entire property, or only a one-half interest in the portion used as the principal residence.

Adjacent lots. What if a principal residence has an extra lot that that could potentially be sold for additional housing? Would the homestead protect the entire parcel, or only the portion on which the residence home is located? Although Massachusetts law is uncertain, most likely the entire parcel would be protected if it has not been subdivided.

Ownership by a Trust. Massachusetts law provides that only individuals can file a homestead declaration. Consequently, if a principal residence is owned by a trust (or some other entity), a homestead cannot be declared. However, a recent federal bankruptcy court case questions this position. Until there is a state law resolution of this issue, the best course of action is not to own a residence in a trust if you desire homestead protection.

Types of Debts Protected

Generally, the homestead declaration does not provide protection against debts that exist prior to the date the declaration is recorded. It also does not provide protection from tax liabilities (real estate and income) or back child support regardless of when such debts are incurred.

An open issue is whether the homestead protects against claims filed *after* the declaration is recorded, but which relate to an incident that occurred *before* the declaration was recorded. For example, if you are involved in a car accident and afterwards record a homestead declaration, but subsequent to the recording the other party to the accident sues you, it is uncertain if the homestead is effective in this situation.

What if you record a homestead immediately prior to filing for bankruptcy? Federal bankruptcy courts in Massachusetts generally hold these declarations to be effective—even as to preexisting debts. However, the case law in this area is still evolving and not entirely consistent. Therefore, prudence dictates filing a homestead declaration as early as possible to minimize challenge in court by creditors who may seek to attack the homestead.

Special Situations and Traps for the Unwary

Conveyance of homestead property. As a general rule, any conveyance made after the filing of a homestead declaration revokes the homestead. For example, if you convey a remainder interest in your residence to your children while retaining a life estate, the conveyance of the remainder interest may terminate the existing homestead on your home. A new homestead declaration should be filed after the conveyance in order to obtain protection going forward.

Every homeowner should declare a homestead on his or her principal residence—which may need to be updated from time to time.

Refinancing. What if you refinance the mortgage on your home or take out an additional loan on your home—would this terminate your existing homestead? Unfortunately, the law in Massachusetts is uncertain, leading many practitioners to be concerned that refinancing will be treated in the same manner as a conveyance. As a result, cautious homeowners should file a new homestead after refinancing or taking out a home equity loan or line of credit. However, pre-existing liabilities should first be evaluated because they might not be protected by the new homestead.

What if your lender required you to subordinate your existing homestead to your new bank debt when you refinanced your current mortgage or took out a home equity loan? Would this implicitly acknowledge that the existing homestead continues to be good? Perhaps, but many practitioners still recommend filing a new homestead rather than relying on the old one.

The good news is that legislation has been proposed in Massachusetts to address many of the ambiguities discussed in this article. For example, the proposed legislation would allow a preexisting homestead to continue in effect after a refinancing.

Conclusion

Every homeowner should declare a homestead on his or her primary residence for the benefit of his or her family. However, because of the many complexities and uncertainties associated with current law, it is worthwhile to review with an attorney whether the homestead protection should be updated from time to time. Hopefully, the proposed legislation will be passed, as the current law is rife with many traps and ambiguities that could cause unsuspecting homeowners to lose the very protection the legislature intended to provide. ■



MirickOConnell.com



Mirick O'Connell
100 Front Street
Worcester, MA 01608-1477

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The Mirick O'Connell REPORT
Trusts and Estates Newsletter
Summer 2007

100 Front Street
Worcester, MA 01608-1477
phone: 508.791.8500
fax: 508.791.8502

1700 West Park Drive
Westborough, MA 01581-3941
phone: 508.898.1501
fax: 508.898.1502

18 Tremont Street
Boston, MA 02108-2301
phone: 617.261.2417
fax: 617.261.2418

For more information on Mirick O'Connell's Trusts and Estates Group, or if you need any assistance with your estate planning needs, please feel free to contact any one of our Trusts and Estates attorneys:

Tracy A. Craig

e: tacraig@modl.com
p: 508.929.1632

Robert J. Martin

e: rjmartin@modl.com
p: 508.929.1620

Janet Wilson Moore

e: jwmoore@modl.com
p: 508.929.1646

Andrew B. O'Donnell

e: abodonnell@modl.com
p: 508.929.1636



MirickOConnell.com

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