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BROOKS & BROOKS, LLP

Estate Planning with Certainty

INTENDED BENEFICIARIES

If you are going to give it away after death, be sure it is in your estate plan documents.

A recent New York case, Greene v. Greene, 928 A.D. 3d 838 (2012) points out a problem that we see all too often. What happens is that a decedent's fiduciary (trustee or executor) advises that the decedent intended to give some specific piece of property to an individual and had communicated this direction to the fiduciary verbally, or wrote a short note about the gift. The note may have even been notarized.

The problem: Although it may have been clear that the decedent wanted to make a special gift out of his/her trust or estate to some individual, the method chosen by the decedent does not qualify to make the gift.

If the decedent's estate plan relied upon a Will, the only way such a gift could legally be honored is if the Will itself contained a provision that allowed for a separate "memorandum" signed and dated by the decedent, which identifies the object to be given and the recipient of the gift. With a proper "memorandum clause," the legal effect is to have any such item, or items, pass to the executor for the executor to then distribute according to the memorandum. As far as the court is concerned, the executor is the beneficiary and it has to look no further. The executor is then free to re-gift the property to the individual or individuals named in the memorandum.

If the decedent is utilizing a trust as the chief estate plan tool, a similar "memorandum clause" could be inserted in the trust documents, which would give the trustee the same direction and allow him or her to re-gift those specific items to the individuals named in the memorandum.

In the Greene case the plaintiff was Mr. Greene's son and the defendant was Mr. Greene's surviving wife, the son's stepmother. At issue were certain EE and HH federal bonds owned jointly by the decedent and the stepmother. What follows is a bit of a mystery.

The decedent sent a letter to his son and instructed him not to open the letter until he had died. When the son finally opened the letter, it contained a direction to rename some of the bonds in the son's name and some in the son's daughter name. An interesting fact was that the letter was also "witnessed" by the stepmother. By this action, it would appear that she knew what the decedent had intended for the bonds.

Brooks & Brooks, LLP
207 Court Street
Little Valley, NY
14755
Phone: 716-938-9133
Fax: 716-938-6155

www.brookslaw.biz

A Private Client Law Firm

Teddar S. Brooks, Esq.
tsbrooks @brookslaw.biz
Kameron Brooks, Esq.
kbrooks @brookslaw.biz

Free Workshops

August 14, 2012

Hampton Inn, Jamestown
with Thomas Stafford
6:30 to 8:30 p.m.

September 18, 2012

Fredonia White Inn
with Luke Buehler
6:30 to 8:30 p.m.

September 27, 2012

Myers Steak and Seafood
Salamanca
6:30 to 8:30 p.m.

Naturally, a lawsuit ensued over ownership of the bonds and sadly for the son, the Court dismissed his action, concluding that the decedent's letter "did not constitute a valid inter vivos (living) gift or valid testamentary disposition." This meant that the decedent had not made a gift during his life and the letter was not a valid substitute for a Will to allow the gift after death.

The Greene Court stated that to make a valid inter vivos (living) gift, three things must be present, 1) the donor must intend to make an irrevocable present transfer of ownership, 2) there must be delivery of the gift, either by physical delivery or constructive or symbolic delivery, and 3) there must be acceptance by the donee. Numbers 2) and 3) are where problems usually occur.

In one case we were involved with years ago, it was reported to us that the decedent had given some of his furniture to the executor's son, which the son accepted; however, they realized that the decedent needed to use the furniture while he lived in his home, so it stayed in the house until the decedent died. During the estate proceedings thereafter, the executor's son wanted to have the furniture, but he could not make a legal claim to it. There was no provable "physical delivery." In the Greene case, in order to have the bonds properly gifted to the son, the decedent would have had to sign a transfer form and give the bonds and form to the son for him to re-register them.

In a different New York case in 2012, Matter of Eisenberg, the Surrogate Judge explained that the application of this "strict standard" (the three items above) grows out of the inherent susceptibility of these transactions to fraud or mistake, particularly after the death of the alleged giver. In the Court's view, because many gifts are sought to be shown by oral evidence after the donor's death, it is necessary for the public good to require clear and satisfactory evidence of the fact to prevent fraud and perjury.

So what is the take away? Apparently it is this… **if you are going to give it away, follow the rules.** If you want to give that favorite old car to that one relative who would really appreciate it, but the relative can't move it into his or her garage now, then do this: sign the title or bill of sale to the person and then enter into an agreement, signed by both of you, acknowledging delivery of that car to that person and an agreement on your part to allow him or her to house it in your garage until such time as he or she has space to house it. Please remember that to establish a legally a binding gift before death, you must establish intent to give ownership, delivery of the item and acceptance by the donee, and verbal communications will not suffice, unless there are independent witnesses to the conversation… and they are willing to testify.