ARE YOU MISSING THE MARK?

Twenty Common Mistakes, Misconceptions, Missteps and Missed Opportunities in Estate Planning

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From the Author

During my 25 years of helping clients design their estate plans, I have identified what I consider to be 20 of the most common (and often significant) mistakes that people make when they put together their estate plan. As an estate planning attorney I believe my number one priority is to educate my clients -- about the issues their particular situation may present and also about the options available to address those issues.

People do not intentionally make the mistakes I write about in this book. The mistakes occur because those who make them may not fully understand or appreciate the risks or issues confronting them, and/or may not be aware of the available planning options.

My goal is to help you identify mistakes you may have made in designing your current estate plan, or, if you are embarking on your first estate plan, to help you avoid these mistakes altogether. I hope that at least one or two of the issues I highlight becomes an opportunity for you to improve your estate plan to ensure that your personal wishes and legacy are fulfilled.

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Mistake #1

PROCRASTINATION

The Mistake:
I rarely meet a new estate planning client who does not regret attending to the task earlier in life. There is no shortage of reasons to procrastinate. “Life is busy,” the client tells me. “The planning requires some difficult decisions.” “My spouse and I do not agree on certain critical issues.” “I don’t plan to die anytime soon.” “I don’t want to spend the money at this time.” The list goes on and on.

The Solution:
Theodore Roosevelt said it best: “In a moment of decision, the best thing you can do is the right thing to do, the next best thing is the wrong thing, and the worst thing you can do is nothing.” It couldn’t be truer for estate planning.

The most difficult estate plan to design is your first one. Once you have it in place, it is much easier to review and update it periodically to make sure it reflects your current goals and intentions. You owe it not only to yourself but, even more importantly, to your family. Some of my most motivated clients are children who have just had the unpleasant experience of settling a parent’s estate that was unplanned or poorly planned. They all deliver a consistent message: “I will not do that to my children!”

Estate planning need not consume a vast amount of your time. We have questionnaires and other organizational tools to help you prepare for your initial meeting, and if you are too busy to do your homework in advance, we can even work through it at the first meeting. There may be a few homework decisions for you to resolve thereafter, but nothing that will take much time.

Even if you do not feel 100% confident in every decision you made in your plan, it is far better than deferring the decisions and getting nothing done. Let an experienced estate planner, who has seen a range of complex family issues, serve as a resource in working through your situation.

None of us is guaranteed tomorrow. Among the most challenging estate plans I prepare are those where the client, having procrastinated, is trying to put something together while battling a terminal illness or the onset of incapacity. For such clients, the cost of preparing a solid estate plan is the last thing on their mind – they realize how much greater is the cost of not planning.

Mistake #2

"WITH THIS BEEFED-UP FED TAX EXEMPTION, WHO NEEDS AN ESTATE PLAN?"

The Mistake:
The current federal estate tax exemption (the amount each of us can pass to the next generation without incurring an estate or gift tax) is north of $11 million. This has wrongly led many people to believe they do not need to create an estate plan because their net worth is far below the current exemption amount.

So what's the catch? For one thing, the increased exemption is scheduled to sunset or expire on January 1, 2026. And just as President Trump significantly increased the exemption near the beginning of his term, the next administration might reduce it. In fact, President Biden has indicated that a top goal of his administration is to increase the estate tax on the wealthy.

Moreover, this exemption only applies for federal purposes. So while many states have adopted the federal exemption for state estate tax purposes, others (such as my home state of Minnesota) have a separate, lower exemption for state estate taxes. Minnesota, for example, currently has a $3 million exemption, and will impose its estate tax at rates ranging from 13-16% on assets in excess of this amount.

The Solution:
Regardless of the size of your taxable estate, your estate plan should be designed to take maximum advantage of the federal and state estate tax structure in place at the time of your death. Once this type of plan is implemented, you no longer have to closely monitor tax law changes to see if any updates to your plan are necessary. While you may want to consider additional planning options if your taxable estate exceeds the applicable federal and/or state exemption amounts, your core estate plan will ensure that you at least take full advantage of the exemptions available to you.

Tax planning is certainly an important part of the estate planning process, but it's not the sole reason to develop a plan. During my introductory meetings, I generally focus on three main areas of planning: estate tax planning, personal succession planning, and incapacity and probate avoidance. So even if you have determined you do not need to engage in any estate tax planning, you still need to plan for the other two critical areas. By ignoring the potential issues of succession, incapacity and probate administration, you could be exposing your family to a significant amount of heartache, unnecessary work and several thousand dollars of needless expenses.

Mistake #3

"ALL ESTATE PLANS ARE CREATED EQUAL"

The Mistake:
Many people assume all estate plans are comparable, and they select their estate planning attorney based on price. I am as financially conservative as the next person and certainly understand that costs must be taken into account when making estate planning decisions. But I believe most of us have learned that simply going with the cheapest option for anything will generally lead to disappointment.

When I am in the market for goods or services, I try to identify the highest quality that fits within the budget I have set. To make the choice that's right for me, I need to do some research and educate myself well enough to assess the relative quality of the available options. If only more clients used this approach when selecting their estate planning attorney!

The Solution:
When clients discuss estimated estate planning fees with me, they often mention they have talked to another lawyer whose estimated fees were lower. But is the plan offered by that attorney truly comparable with the one I propose to draft?

Simply put, not all estate plans are created equal. For example, to draft the most common type of core estate plan based on a revocable trust, my firm uses a sophisticated drafting software that allows me to custom design estate planning documents very efficiently. Many of my competitors use estate planning forms distributed through the state bar association. It helps them draft their plans faster than I can, but it produces what I consider cookie cutter estate plans.

The plans I draft are highly personalized and incorporate much more planning than the "form" documents allow. Once my prospective clients see examples of my drafting process, most of them realize that a lower-priced plan by another attorney is about as comparable with mine as apples are with oranges. They also generally understand it makes sense to pay a little more for an estate plan that will do its job when the time comes rather than opting for a bargain now and inviting unwanted ambiguities, issues and needless expense for their loved ones down the road.

Mistake #4

“PLANNING FOR PROBATE CAN WAIT”

The Mistake:
Most families will regret not taking appropriate steps to avoid (or at least minimize) probate administration and expenses. Probate is the legal process certain assets must pass through in order to transfer title to your beneficiary. Though there is nothing inherently wrong with this process, there are good reasons to steer clear of it.

First, it is a lengthy process (typically a year or more), which may restrict what can be done with certain of the probate assets for its duration. Second, any lengthy legal process is bound to involve something none of my clients like -- potentially significant legal fees. Finally, the process is public, which means that all of your probate asset information (including descriptions of the assets, their value, as well the recipient’s identity) is available to anyone who requests it from the probate court. It has become common practice for services to “mine” this information and sell it to individuals and businesses who are very eager to contact the recipients of the inheritance with offers to help them manage or invest their new-found wealth.

The Solution:
Contrary to a common misconception, simply having a will does not rule out probate. The only estate plan that does is one based on a valid revocable trust with the asset titled in the name of the trust.

Relying on joint ownership may in some cases avert probate at the first spouse’s death but not at the second death. More importantly, it may waste very valuable estate tax exemptions at the first spouse’s death (see chapter 18) and forfeit your ability to direct the ultimate disposition of the asset (as discussed in chapter 8). Pay-on-death designations may also help avoid probate in certain situations, but such designations also come with trade-offs. There are appropriate uses for these techniques, but they should be identified during the estate planning process and only used sparingly.

Mistake #5

OVERLOOKING A POTENTIAL INCAPACITY

The Mistake:
In the course of my career I have witnessed a steady increase in the number of clients dealing with varying degrees of incapacity. And yet, absorbed as clients become with the question of who will handle their affairs and direct the distribution of their assets at the time of their death, they give little or no thought or effort to who will manage their affairs if they become incapacitated.

A lack of this type of planning often leaves the family to initiate a guardianship or conservatorship proceeding to obtain legal custody of the person and their financial matters. It can be a very traumatic event for a family, as it is usually contentious (between both the family and the incapacitated individual, as well as among family members who are more or less inclined to take the “financial keys” away from mom or dad).

The Solution:
A plan based on a revocable trust gives you an opportunity to nominate successor trustees in the event of your death or incapacity. It allows you to set up the evaluation process for your capacity in case it comes into question. I prefer to create an incapacity panel composed of family and loved ones who consult with the medical professionals, instead of leaving the decision solely up to the doctors.

The trust will also name the individual(s) and/or institution that will replace you as trustee in the event of your incapacity. This process only involves replacing the incapacitated person in their role of trustee, not as the beneficiary of the trust. The goal is to take the incapacitated individual out of the role where they could make a bad financial decision or be taken advantage of by a predator preying on their reduced capacity.

If incapacity afflicts any of us, we will likely not understand or acknowledge that we should no longer be managing our financial affairs. But with a proper plan implemented while we are at full capacity, at least the succession can be handled as gracefully and privately as possible.

Mistake #6

TREATING CHILDREN EQUALLY RATHER THAN FAIRLY

The Mistake:
For many parents the question of how to distribute their assets at the second parent's death is an easy one - the assets are simply divided equally among their children.
In some circumstances, however, the answer to this question becomes much more complicated:

- If one child has worked in the family business for several years, that child may have played an important role in driving the value of the business. The parents may feel that child should receive a larger share of the value he or she helped create, especially if that child has been working for less than market compensation.
- One child may have greater needs than his or her siblings, possibly because of a physical or mental disability.
- Because of career or family decisions, some children may have very different earning capacities that parents may want to address.
- One child may volunteer to care for an aging parent, often with negative financial consequences for that child.
- Some children possibly received additional financial assistance or advances from the parents that may need to be addressed in the estate plan.

The Solution:
My clients often confess they feel obliged to treat their children *equally*. My view is that they should strive to treat their children *fairly*. Fairness demands that parents take into account the kinds of situations mentioned above, or other unique circumstances affecting their family. "Equal" can be "fair" but only when not dictated by a sense of obligation.

A child who has helped grow the family business could be given a larger share of the parents' estate through an estate plan that clearly explains the rationale for the larger share. Parents who do not like the idea of unequal shares may consider recognizing the child's contribution by transferring equity in the business (or other assets) as a gift during the parents' lives.

Mistake #7

BYPASSING TRUSTS

The Mistake:
Clients with adult children often propose an outright distribution of assets to their children at their death, especially if they feel their children are responsible. Similarly, clients with minor children want to design an estate plan that provides access to assets once these children become adults. The obvious risk in this approach is that the children will make poor financial decisions and blow the inheritance.

There are other, less obvious risks. I've lost count of the number of inheritances I have seen cut in half by the divorce of a child who naively invested their inheritance in a jointly owned account or asset, or otherwise commingled the inheritance with marital property. Assets that have been left outright to the children, or have been withdrawn by them from their trusts, can also be accessed by the children's creditors.

The Solution:
I am a strong proponent of passing assets on to children and grandchildren in trust. Most of my clients with younger children understand this concept and expect this type of asset transfer. While trusts can certainly be used to protect certain children from themselves, I recommend them as a way to protect the children from the prospect of a divorcing spouse, creditors and other predators in their lives. A properly structured estate plan can create trusts that will shield the inherited assets from these risks.

At a minimum, the parents' estate plan can be structured in such way that the children can decide later (at appropriate ages determined by the parents) whether they appreciate the protection provided by the trusts or whether they would prefer to withdraw the assets and terminate the trust structure.

Mistake #8

"AFTER I'M GONE, MY SPOUSE WILL NOT REMARRY"

The Mistake:
Most couples I work with have the general goal of making sure their assets at the time of death are available to take care of their surviving spouse. What they typically want to happen after they both have died is for any remaining assets to pass to their children.

But there is one outcome they often fail to anticipate: if assets are left outright to a surviving spouse (or in the wrong kind of trust), nothing can prevent that spouse from leaving assets, at their later death, to a second husband or wife. In fact, under many states' laws, a surviving spouse is entitled to a percentage of his or her deceased spouse's assets regardless of the estate plan. Not surprisingly, if, having remarried, the surviving spouse dies before their new spouse, assets passing to the new spouse will rarely find their way back to the original couple's children. Instead, in most cases the new spouse will pass those assets on to his or her children – an outcome none of my clients would want.

The Solution:
The easy solution is to leave assets to a surviving spouse in a QTIP Trust (Qualified Terminable Interest Property Trust). The trust grants the surviving spouse access to the trust funds for his or her needs, but it allows the couple to decide today that whatever assets are left at the surviving spouse's death will pass to their children. If the surviving spouse remarries, the QTIP Trust assets are still available for that spouse's needs but will prevent the unintended disinheritance of the couple's children down the road.

Mistake #9

IGNORING POTENTIAL ISSUES IN A BLENDED FAMILY

The Mistake:
Roughly half of my new clients are in a blended family, which I define as a married couple where at least one person has children from a prior marriage or relationship. In their existing estate plans or in the new ones they envision, the assets at the first death typically are distributed to the surviving spouse.

Providing for the surviving spouse is a commendable goal. The potential misstep may occur when the remaining assets are to be distributed at the second death.

For example, assume Tom and Mary were recently married and each of them has two children from prior relationships. Tom's estate plan provides that if Mary survives him, his assets are to be distributed to her. Depending upon Mary's estate plan and/or how she titled her assets, at her later death any of Tom's remaining assets (as well as any of her own) could be directed to her two children, and Tom's two children would receive nothing. If that was the intent, then the plan worked. But if Tom's goal was to first provide for Mary, and then direct any of his separate assets remaining at her later death to his children, the plan did not carry out Tom's intent.

What if Tom and Mary should decide that at the second death any remaining assets would be divided equally among the four children? The problem with this "solution" is that nothing prevents the surviving spouse from changing his or her estate plan in the future to direct the assets only to his or her children. And if the surviving spouse remarries, a new estate plan or even state law could direct some or all of his/her assets remaining at death to the new spouse.

The Solution:
It's crucial to establish and document clearly the parties' intent. If the primary goal is to provide assets for the surviving spouse, I prefer to do this through a trust that becomes irrevocable at the first death. If the surviving spouse needs financial assistance, the trustee can provide it during the surviving spouse's remaining life. However, at the surviving spouse's death the trust would direct the assets to the children of the first spouse or to all of the children, depending upon the parties' intent. Since the trust becomes irrevocable, its provisions cannot be changed after death.

I also discuss with my clients the issue of who should serve as successor trustee. It may be advisable to name someone other than the surviving spouse as trustee (or at least co-trustee with the surviving spouse) to ensure the irrevocable trust's assets are distributed to the surviving spouse only in appropriate circumstances. Again, it all depends on the parties' goals.

Mistake #10

NO PLAN FOR THE FAMILY RECREATIONAL PROPERTY

The Mistake:
Time spent together at a family recreational property – a lake cabin, a condo in the mountains or a warm weather retreat – is often the stuff of the fondest memories. But failing to plan for these properties after the parents' deaths can sometimes tear families apart.

Most parents assume that after they are gone the children will continue spending quality time together at these properties for generations to come. Unfortunately, they do not appreciate the potential issues and problems the properties may present. How is the property going to be owned? Who will cover the ongoing costs (maintenance, insurance, taxes, etc.)? Who determines how and when the property will be used?

These issues are exacerbated if the children have disparate incomes (some may be able to afford the annual upkeep on the property; others may not). Depending on where they live, some may easily be able to access the property on weekends, while others may only be able to use it during an annual vacation. Too often when I raise these issues with clients, their initial response is that the children will work it out. I can tell you from my experience – they rarely do.

The Solution:
First, we need to address the issue of ownership. The property can be put into an entity, such as an LLC or trust, during the parents' lives. What happens to ownership after the parents' deaths? Sometimes all of the children are interested in owning the property, so each receives an equal share. If some of the children do not have an interest in the property, they could receive other assets equal to an interest in the property (to maintain fairness). If one of the children decides later to exit the ownership of the property, the plan should spell out the ways to determine the value and the general terms of the buy-out. If the other children are to buy them out, the plan should outline how this is to occur.

Second, how are the ongoing cost of ownership to be funded? Many of my clients direct a specific sum of money to the trust or other ownership entity intended to cover the carrying costs for a period of time, allowing the children to adjust to shared ownership without the immediate financial burden. Others expect those children who want to participate in ongoing ownership of the property to provide the necessary funding.

Finally, some mechanism should be in place to govern the usage and related issues. As the family unit grows with succeeding generations, it is unrealistic to expect everyone to agree on how and when the property is to be used. We could create a family charter for the property, which contains proposals on how each family member's use of the property is determined. This charter can also address other issues, such as how decisions are to be made regarding modifications to the property, purchases of personal assets to be used at the property, rules regarding guests and use by non-family members, and any other issues that may be unique to that particular property.

Mistake #11

FAILING TO USE A PERSONAL PROPERTY MEMORANDUM

The Mistake:
Not making the effort to identify any items of personal property you may own that could have sentimental or other value to the people in your life, and taking steps to ensure that such items are distributed to the appropriate people, can cause unintended strife within the family.

The Solution:
Let me begin on a personal note. When I was growing up I spent countless days hunting and fishing with my grandfather. After he died I learned that in his will he directed that his well-used and weathered Browning 12 gauge shotgun be given to me. Periodically I take Grandpa's old Browning out to clean it, and fond memories of days in the field with him come back as though it was yesterday. There is no amount of money my Grandpa could have left me that would match the value I place on having his favorite shotgun.

My clients are surprised when they hear that most of the disputes I have mediated between siblings during an estate administration involve personal property, not financial assets. Both wills and revocable trusts should give you the opportunity to specify who is to receive specific items of personal property. Jewelry, family heirlooms, collections, and any other items of personal property that may have sentimental value to a child, grandchild, friend or other individual are items that can be directed to be given to a particular person.

The most common response I get from clients when I recommend they complete a personal property memorandum is either that they don't have anything of sentimental value, or that the children will work it out among themselves. My advice: talk to your children and specifically ask them if there are any items of personal property which are meaningful to them. You may be surprised to hear your children do in fact have a sentimental attachment to something you own. And even if your children indicate there are no items to which they feel special attachment, at least you have given them an opportunity to have their say.

Mistake #12

MAKING POOR DECISIONS REGARDING FIDUCIARY APPOINTMENTS

The Mistake:
Too many people make their decision regarding who or what to appoint as fiduciaries (guardian, personal representative, successor trustee, attorney-in-fact, health care agent) without giving the decision sufficient thought. For example, parents may select a particular child because they are the oldest or live nearby. Other parents want to nominate all their children to serve jointly because they do not want anyone to feel slighted.

Fiduciary roles are extremely important, since they involve the sometimes very difficult task of seeing that your wishes are carried out. They can require certain skills/abilities your child may not possess. Our firm has handled a steadily increasing number of litigation cases that involve one sibling suing another in his or her fiduciary capacity. I know such difficult situations are the last thing the parents would have wanted to result from their estate plan.

The Solution:
I am not suggesting a child should never be appointed to serve a fiduciary role. I do recommend, however, that you give serious consideration to your selection of any fiduciary, putting the right person or institution in the appropriate role. Whoever you choose should be consulted in advance to ensure they are willing and able to successfully fulfill the obligation.

Depending on the complexity of your estate, the administration process can be very time-consuming. Does the fiduciary you have appointed have the time and energy to handle the job? Do they have the organizational skills required to administer a complex estate? Do they have the backbone to stand up to special requests or challenges to carry out your specific wishes? Do they have good judgment to make discretionary distributions you would feel appropriate?

Many of my clients do not have children that are good candidates to serve these roles. Instead, they may consider siblings or trusted friends. Still others turn to institutional trustees, which for many are the right solution. There may be additional fees involved, but it can be a very small price to pay to ensure your estate and trust are properly administered, and you can avoid the risk of pitting family members against one another.

It is also very important to provide more than one successor trustee. You may have the perfect choice today, but when it comes time to serve, that person may have predeceased you, have health issues or other problems that prevent them from accepting your nomination to serve (or may have to be replaced if he or she has already started to serve). If, after considering the demands of the job, you believe you have individuals that are up to the task of serving as your initial successors, it may still be advisable to nominate an institution as a co-successor or at least as a back-up solution.

Mistake #13

NEGLECTING DIGITAL ASSETS

The Mistake:
With the continual development of technology, our lives are increasingly interlinked with digital assets -- the information or property that is in a digital format. They can include email accounts, social networking sites (Facebook, Twitter, Instagram, etc.), digital collections (music, photographs, and videos), financial accounts (credit cards, debit cards, PayPal and online banking), and online incentive programs (airlines, credit cards, hotels, etc.). Very few people have taken steps in their estate plan to manage these assets in the event of their incapacity or death. Based on my experience in assisting clients as they administer family estates, I've found that failure to plan for these assets may result in significant additional investment of both time and resources by the surviving family members (as well as the potential loss of valuable benefits).

The Solution
Planning for digital assets requires attention in two main areas. The first is more practical in nature: how are you managing these accounts today? You should maintain a list of your digital assets and their credentials (including usernames, passwords, etc.) in a secure format that can be easily accessed for updates and additions. Some of my clients use password management applications; others maintain an encrypted list on their home computer; and some still resort to the old-fashioned handwritten list kept in a secure location. Leaving a road map like this helps your family determine the extent of your digital assets and how to gain access to each of them.

The second area of planning involves giving legal authority to a trusted successor (typically, your successor trustee) to access the assets in the event of your incapacity or death. I prefer to specifically grant this as a separate power to your personal representative or successor trustee in your will or trust. It is much more efficient and effective than requiring someone to work through the administrators of the various accounts.

Mistake #14

KEEPING THE FAMILY OUT OF THE ESTATE PLAN DISCUSSIONS

The Mistake:
One of the most difficult questions I am asked by children after their parents' deaths is why the parents made certain estate planning decisions. Why did they select a certain person to serve as personal representative or trustee? Why a particular person was or was not included in the estate plan? How did the parents decide on the way their remaining assets would be divided? Even in cases where I know the answers to these questions, my responses generally do not satisfy the children, invariably leading to additional questions that fall outside the scope of what I had discussed with the parents.

The Solution:
Have a discussion with your family to share the key parts of your estate plan. We like to create a one-page overview chart of our client's estate plan that can be used for this purpose. It summarizes all of the people/institutions appointed to serve the roles in the estate plan and explains how the assets are distributed. I encourage our clients to schedule a family meeting for the purpose of sharing this overview. It intentionally does not list any values or numbers on it (other than perhaps the value of specific or charitable gifts), because many of our clients are not comfortable sharing this information with their children. I often host these meetings in our office and help our clients explain the estate plan to their children.

Most children are not comfortable raising estate planning questions or concerns with their parents because they do not want to be perceived as expecting an inheritance or being greedy. But I assure you that your children do have questions and concerns. They have heard horror stories from friends who had to deal with a mess caused by their deceased parents' inadequate planning; they would like to know that you care enough about them to avoid the same mistake. They may want to ask you why you chose a particular child or other person to serve a specific role. The meeting gives you an opportunity to explain not only what you did but also why. Your children may not agree with all of your decisions, but at least they will have had an opportunity to discuss it with you. They almost always thank me afterwards for encouraging their parents to share this information with them.

Mistake #15

LEAVING YOUR WISHES UNWRITTEN

The Mistake:
Estate plans appoint individuals and/or institutions to serve the key roles of personal representative/executor and successor trustee (collectively referred to as "fiduciaries"). The plans also provide certain instructions on how assets are to be distributed or held in trust for the trust beneficiaries. If they are held in trust, the trust typically gives the trustee discretion to make distributions to the beneficiaries. Some trusts limit the extent of this discretion (i.e., only to an ascertainable standard such as "health, education, maintenance and support"), while others provide for distributions solely at the trustee's discretion. There is nothing inherently wrong with either approach, but trustees often struggle to determine whether a requested distribution was something the settlor intended.

The Solution:
I recommend that all of my clients create and maintain what I call a Letter of Wishes. This is not a legal document, and it's not a part of your will or trust. As the name implies, it is a letter from you to your fiduciaries, offering your insight and current thoughts on the trust and your beneficiaries.

For example, assume your trust instructs the trustee to make distributions to your children for their health, education, maintenance and support. In your Letter of Wishes you may want to tell the trustee that your daughter is very conservative financially, so that if she requests a distribution, she likely has a legitimate need for the funds. Conversely, you may also want to give the trustee a heads-up that your son is bit of a spendthrift, or has a gambling issue, or any other information the trustee may find relevant in weighing the decision to make a discretionary distribution to him.

This is typically a document you keep in a format that allows for periodic updates as life changes. One of my primary goals for my successor trustees is to have them ask what I would want done in any given situation. If I have provided a detailed, current Letter of Wishes, the odds of my intent being carried out increase greatly.

Mistake #16

FAILING TO IMPLEMENT A COMPREHENSIVE HEALTH CARE SUCCESSION PLAN

The Mistake:
I continue to be surprised by the number of people I meet who have done little or no planning for their health care decisions. All of us intend to make our own health care decisions for as long as we are able to do so. But there may well come a time when, for physical or mental reasons, we are not in a position to make informed decisions on this subject. Failing to plan for such eventuality can cause significant turmoil in your family and jeopardize the chances of your care being carried out according to your personal wishes.

The Solution:
Few decisions in the estate planning process are as important as planning for our health care treatment in case we are not able to make those decisions for ourselves. Executing a living will or a health care directive may be part of this process, but there is much more work to do. At a minimum, you want to appoint a succession of individuals who will make your health care decisions if you are unable.

Your nominees must receive clear directions on what you want done in a variety of situations. That includes a terminal condition directive: it states that in the event of a terminal condition, and with no reasonable chance of regaining any meaningful quality of life (as determined by a medical professional), the individual wants to be kept comfortable but does not want to receive life-prolonging treatments.

I provide an optional health care planning tool that allows my clients to record their thoughts and wishes concerning a variety of health care issues they may potentially encounter. You need to put your health care agents in the position to simply carry out your wishes and not try to guess what they are.

I also strongly recommend clients discuss their directives with their family, so that loved ones clearly understand not only what you want but why. For several clients I have hosted family meetings to discuss this very important and personal planning topic.

Mistake #17

ASSET TITLES AND OWNERSHIP AND BENEFICIARY DESIGNATIONS AT ODDS WITH THE ESTATE PLAN

The Mistake:
One of the most misunderstood aspects of estate planning is the relationship of the underlying estate plan to how an asset is titled or a beneficiary is designated for retirement plans or life insurance. Beneficiary designations in those plans and policies or asset titling can lead to a drastically different outcome than what is provided in the estate plan.

If you own an asset with your spouse as joint tenants with rights of survivorship, at the first death that asset will transfer by operation of law to the surviving spouse (regardless of what your will or trust may have directed with regard to that asset). Since it is now owned by your spouse, he or she is free to direct that asset during life or through their estate plan at death in any manner they wish. Similarly, if you have an asset with a pay-on-death designation or a qualified plan asset (such as an IRA or 401(k) plan) designated to go directly to an individual, that designation will cause the asset to bypass your estate plan and go directly to the death beneficiary.

The Solution:
You need to work with your estate planning attorney and financial advisor to ensure that the titles to your assets and beneficiary designations on retirement plans and life insurance are properly coordinated with your estate plan.

If, for example, you create a revocable trust-based estate plan, keep in mind that a trust can only control assets that are in the trust. That means you will want to retitle assets into the name of the trust (or at a minimum have a will that directs assets through probate to the trust).

The final step in my estate planning process is to review all of my clients' assets to ensure that the title to those assets, as well as any beneficiary designations, are coordinated with the new estate plan so that each asset ends up where my clients wished. Asset titles and beneficiary designations should be reviewed periodically to make sure newly acquired or converted assets, retirement plans, and life insurance are titled and designated appropriately.

Mistake #18

MISSING OUT ON FEDERAL AND STATE ESTATE TAX BENEFITS THROUGH INCORRECT ASSET TITLING

The Mistake:
For federal estate and gift tax purposes, each person has an estate tax exemption which shelters a certain amount of lifetime gifts or transfers at death from federal estate and gift tax. Historically, in order to claim this exemption you needed to have assets titled in your individual name or the name of your revocable trust. If you did not, you were not able to claim any portion of your federal exemption and it was wasted.

As part of The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, for federal estate and gift tax purposes, if you are married at the time of your death and you did not utilize or claim your entire exemption, the unused portion can carry over to your surviving spouse by filing an election with a timely filed Federal Estate Tax Return (Form 706). We call this relatively new concept “portability.”

While this has softened the blow caused by incorrectly titled assets for federal estate and gift tax, it does not necessarily offer similar relief for state estate tax purposes. Some states, such as my home state of Minnesota, have not adopted the federal rule of portability. If a married Minnesota resident does not have assets titled in his or her individual name or revocable trust at the time of death, no portion of that person’s Minnesota exemption will be used and it will not carry over to the surviving spouse. Depending on the value of the assets in the estate, this can be an extremely costly mistake.

The Solution:
Unfortunately, many people make this mistake because they have been advised to put assets in joint tenancy to avoid probate at the first death, or to add a pay-on-death designation to certain assets for the same reason. While this may avoid probate in certain cases, it often comes at the expense of increased state estate tax.

It is critical that you work with your estate planner and financial advisor to ensure that your assets are owned and titled in a manner that allows you to take full advantage of the estate and gift tax benefits available to you.

Mistake #19

TRUSTS THAT LACK A TRUST PROTECTOR

The Mistake:
A Trust Protector is an individual or institution that is nominated in a trust to potentially exercise certain powers affecting the trust or its beneficiaries. Most estate planning trusts are revocable, meaning they can be changed to react to changing circumstances during the settlor's lifetime. These trusts, however, generally become irrevocable at the settlor's death. Once a trust has become irrevocable, it is difficult to modify (often requiring a court proceeding to request a judge's approval of the proposed change). If the trust has appropriate Trust Protector provisions, many potential revisions to a trust can be made much more quickly and efficiently than pursuing judicial approval. Yet many trusts I review do not contain Trust Protector provisions, thereby foregoing one of the most efficient avenues to address potential future trust issues.

The Solution:
Unless my client specifically instructs me not to include Trust Protector provisions in their trust, I incorporate them in all trusts I draft, even if they are not required to be used. Assume you have created a trust for your children that either allows the children to withdraw assets or exercise control over the assets at a certain age. After your death, one of the children has an issue (creditors, chemical dependency, gambling, divorce) and he or she is approaching the age when they assume control of the trust and can withdraw from it. If nothing is done, there is a high likelihood that, at a minimum, the assets are going to be wasted, or, much worse, used in such a way as to do harm to your child. This is the ideal situation for a Trust Protector to step in and modify the trust to protect your child and the assets.

Mistake #20

IGNORING POTENTIAL INCOME TAX ISSUES IN GIFTING

The Mistake:
Many people miss out on a very important income tax benefit when gifting appreciated assets to their children. Section 1014(a) of the Internal Revenue Code provides that at death the tax basis of an asset is adjusted to its fair market value at the time of death. Accordingly, if an asset has appreciated during the time it was held by the owner, the tax basis will get "stepped up" at the owner's death so the person inheriting the asset will also get the stepped-up basis. As a result, the prior appreciation disappears for tax purposes.

When you gift an asset during your lifetime, your tax basis in the asset carries over to the recipient of the gift. If the recipient sells the asset they will recognize gain measured as the difference between your tax basis and the selling price. It should also be noted Section 1014(a) can result in a "step down" in the tax basis of an asset if the fair market value at the date of death is less than the current tax basis.

The Solution:
Make sure that prior to making any lifetime gifts you consider not only the estate tax consequences of the gift, but also potential future income tax consequences. When appropriate, lifetime gifting is a very effective estate tax management tool. But in determining which assets to gift you need to review the respective tax bases of the assets in order to gift the most advantageous assets. Generally speaking, it is better to gift assets whose tax basis exceeds the current fair market value in order to avoid a step down in basis at death. If there are no depreciated assets available to gift, at least try to select assets that have the least amount of built-in gain.

It is also important to note that with the current increased federal estate tax exemption, it may make more sense to hold assets until death if your taxable estate is projected to remain under the exemption amount. If you are a resident of a state like Minnesota that has a reduced exemption amount, you need to weigh the benefit of avoiding a potential state estate tax of 13-16% against the cost of a potential capital gain tax on the lost stepped-up basis.

THE DIFFERENCE WE CAN MAKE

Strategic planning is something everyone does. Whether our ambitions are large or small, we follow the same basic process: we visualize the goal to achieve; we construct the objectives that mark critical milestones along the way; and we create action plans to make the journey.

There is, however, a less familiar dimension of planning, where bringing tomorrow into focus involves anticipating life stages and events which, by definition, are not at all routine to consider. Transferring assets to the next generation can involve sensitive issues. Making a loved one's medical and financial decisions naturally creates apprehension. Overcoming the natural inclination to defer this kind of planning is only the first step. What's also needed is the recognition that estate plans are not "one-and-done" projects that can be checked off the list once they are put in place. On the contrary, they require continued tending and revision to address unanticipated life changes to avoid any of the mistakes I have outlined in this book.

An Ongoing Relationship

This knowledge has taught me and the other Monroe Moxness Berg estate planning attorneys to practice law patiently. It means taking the time to identify our client's potential future challenges now rather than having to work around them later, in crisis mode. But it also means periodically revisiting the plans we help our clients create to address what we could not have foreseen.

Our estate planning practice, therefore, rests upon establishing lasting long-term relationships based on mutual trust. That's why our first task is to learn as much as we can about you, your family, your goals, your uncertainties and even fears. The planning process that follows is as much about our guidance as it is about our collaboration with you. Of necessity, this collaboration is likely to be ongoing – not because we want to find new opportunities to bill you but because your life evolves, and we feel it's our responsibility as your trusted advisor to help you navigate the unpredictable turns that may pose a challenge to your plans.

The formalities and technicalities associated with a trust, conservatorship or tax strategy can be formidable. But they give us the means of capturing what's really at stake. Our consistent, non-negotiable motivation – the heart of every matter – is taking care of someone, whether that is enabling possibilities or ensuring an easier way.

Personalized Approach
If planning for life was simply about arriving at the transaction finish line, you could be less selective about whom you trust to get there. But enabling the future is not about stringing together templates – it's realizing a vision that's personal to you.

As you may have noted in perusing this book, in our practice we tend to avoid using preconfigured one-size-fits-all planning documents or tools. Instead, we use sophisticated drafting software that allows us to tailor estate plans precisely to the client's situation and needs in a way that is more nuanced and meaningful than any ready-made template can achieve. The insights we gain daily in the course of practicing estate planning law become a kind of "continued education" for us, helping us develop and refine the tools at our disposal.

We firmly believe your legal advisors should bring the team bandwidth, specialized expertise and multidisciplinary experience to present you with a broadest possible range of options. Since we deal with multi-dimensional human situations and complex human beings, we cannot afford to be one-dimensional. Beyond professional skills, we bring understanding and empathy to our collaboration with clients. We need them to deal successfully with disagreements and conflicts that so often arise in the course of this delicate process. Granted, we may not be family therapists and may not always eliminate all grievances or resentments. But often, we are the only ones in the room to whom all the parties are willing to listen.

Our ultimate goal is always to create plans for life that help our clients not just look confidently into the future, but make a lasting and meaningful imprint on it.

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