AVOID THESE MISTAKES IN YOUR ESTATE PLANNING

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Avoiding the most common mistakes made in estate planning could save you and your family thousands of dollars and many headaches. Here are some of the most common problems the authors have observed in the last 25 years.

1. Procrastination. Failing to prepare any documents for the management and transfer of your assets during incapacity or death is obviously a serious mistake. Everyone will die. Many will suffer long term incapacity. Having documents in place specifying who is in charge and what they are to do is important. Otherwise, disputes can arise and needless time, energy and money are wasted seeking Court guidance and authority. The same result can occur if documents become outdated and are not updated periodically.

2. Insufficient Documents with Disability. At a minimum, the following documents should be available during incapacity: a financial durable power of attorney, a medical durable power of attorney and a Living Will statement. A Living Trust is also typical. Otherwise, inconvenience or Court involvement is likely.

3. Out of Date Documents. Estate Planning documents should be reviewed whenever there are significant changes in individual circumstances or the law. Have there been recent deaths, births, divorces, estrangements, development of special needs, graduations, marriages or the like in your family that require changes to your estate plan? Have your assets changed significantly? Did you move or buy other real estate? The federal estate and gift tax exemption changed to $5,000,000 for 2011 and 2012. Michigan recently adopted a new Code impacting the design and use of all trusts. More changes are inevitable. At a minimum, estate plans should be reviewed every 3 to 4 years.

4. Joint Ownership with Children. Assets owned jointly automatically pass to the survivor on the first death, without Probate. Avoiding Probate can save time, expense and publicity. However, any joint owners can withdraw cash assets. Sometimes children improperly access or spend joint assets. Jointly owned property can sometimes be subject to the claims of the creditors of any joint owner. If children are sued or divorce, joint assets with parents are at risk. Finally, joint ownership of land and stock requires the signature of all owners to sell, including a son's wife with real estate. Sometimes children are unavailable or refuse to sign. A popular alternative to joint ownership with children is use of a Living Trust.

5. "Quit Claim" Deeds. Using a "quit claim" deed as a solitary estate planning document is insufficient. This document fails to properly provide for the distribution of other assets. Powers of attorney are needed to handle property and medical decisions during incapacity. Quit claim deeds that are recorded are immediate gifts, which may have negative property, income or gift tax consequences. Quit claim deeds that are not to be recorded until after death may be misplaced, resulting in probate or an unintended distribution. Assets not covered by the deed and owned by a decedent in his or her own name would be subject to Probate.

6. No Funding. Many people fail to fund assets into their Living Trust. A Living Trust is like a legal bucket, holding your assets for distribution to heirs at your death. Generally, when a Living Trust is used, it should be the owner and beneficiary of the creator's assets during his or her life. These assets are not subject to Probate Court supervision at death. Assets held in the individual's own name would be subject to Probate upon death or incapacity, even if a Living Trust is in place. Qualified retirement plan, annuity and insurance assets require special funding

arrangements. Failure to fund a Living Trust is one of the most common mistakes made with an otherwise well prepared estate plan.

7. Inadequate Documents. Some individuals try to prepare their own estate plan. The results are often inadequate or invalid documents. Important items are often missed. Do you tune up your own car, prescribe your own medications or prepare your own tax return? Using an experienced estate planning attorney is always recommended.

8. Miscellaneous Mistakes. A number of additional mistakes merit at least a passing note. These include:

   A. Failing to provide a "final taker" if all the named heirs are deceased.

   B. Failing to provide for charitable gifts.

   C. Failing to specify a successor person in charge of the estate or to make medical decisions if the individual named fails to serve.

   D. Failing to consider institutional trustees or personal representatives where no individuals are qualified.

   E. Failing to specify the presumed order of death in case of simultaneous death between husband and wife.

   F. Failing to have sufficient life insurance to pay debts, to cover administrative or burial expenses, to replace lost income, to pay for children's education, to fund a business buy-out, etc.

   G. Failing to "protect" the estate with long-term health care insurance to cover health care costs beyond what Medicare and Medicaid provide.

   H. Failing to document buy-sell arrangements for businesses, hunting camps or other shared ownership assets, to assure that full value is timely received by your heirs.

9. Mistakes with Taxable Estates. Several mistakes are unique to potentially taxable estates. These include such items as:

   A. Failing to make annual gifts up to the maximum tax-free giving amount per donee each year ($13,000 for 2011, increased for COLA thereafter).

   B. Failing to obtain a full estate tax exclusion for husband and wife, which can currently shelter up to $10,000,000. Two Living Trusts should be used to obtain these exclusions, although the executor of a deceased spouse may transfer the unused exemption of a decedent to the surviving spouse, starting in 2011. Holding all assets in joint name between husband and wife could result in only one exclusion.

   C. Failing to sign a pour over Last Will and Testament where a Living Trust is used.

   D. Failing to use a proper credit shelter or a marital trust because the terms are inadequate.

   E. Failing to include a tax allocation clause, which should specify how taxes or administrative expenses are shared between heirs.

   F. Failing to coordinate asset ownership and beneficiary designations with the overall estate plan.

G. Failing to transfer assets to heirs through discounted or leveraged techniques during lifetime.

H. Failing to use a special irrevocable life insurance trust to transfer insurance to heirs without the proceeds being included in the insured's estate. Life insurance can be subject to the estate tax, although it is typically not subject to the income tax.

There are many other details that need to be carefully considered when preparing an estate plan. These depend on the unique circumstances of each family and require competent counsel and proper documentation. The above article simply lists some of the most common mistakes that the authors have observed over the years.

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