HELP CLIENTS AVOID 10 COMMON ESTATE PLANNING MISTAKES

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Mistake No. 1: Failing to develop an estate plan. Many people believe that only the uber-rich need to have an estate plan. Others find it morbid to think about and plan for their death. Whatever the reason, it is important for nearly everyone to have an estate plan. If you don't direct to whom and how your assets will be distributed at your death, your state statute will control. Often, this is not in line with how you want your assets divided and distributed. Formalizing your wishes may also save your children and family some heartache after you are gone and may help prevent inter-family arguments, which could end up costing more in legal fees.

Mistake No. 2: Failing to create a complete list of assets and family information, and failing to keep adequate records. A complete list of your assets and an approximation of their value will aid in crafting an appropriate estate plan that takes into account potential estate tax exposure and other issues that arise in estates of your size.

Oftentimes, people undervalue their estates. For instance, a common misconception is that life insurance proceeds and retirement plan proceeds are not taxable. In fact, life insurance proceeds (if the policy is owned by the insured) and retirement plan proceeds are both includable in your gross estate for estate tax purposes. This can result in an unrealistic estimate of your estate tax liability and a failure to properly address tax-reduction strategies that may be implemented during life and at death. The possible by-product is burden and stress on your beneficiaries that may have been preventable.

In addition, upon your death, your heirs and their advisers will rely on your records to locate bank accounts, tax returns, deeds, and other important documents needed for the settlement of your estate. Most people access some or all of their financial accounts online, so it is also imperative to keep usernames and passwords in a safe place so that theseaccounts can be accessed easily after your death.

Mistake No. 3: Failing to confirm or update beneficiary designations. Life insurance proceeds and retirement plans can comprise a large portion of a person's wealth. Life insurance, IRAs, pensions, and other employee benefits do not pass under your will or trust but are governed by beneficiary designation. Therefore, it is important to confirm that the beneficiary designations reflect your wishes and are consistent with your other estate planning documents.

An oversight of not changing the designation after a divorce can result in an ex-spouse inheriting a windfall because his or her name was not removed as the primary beneficiary of a retirement plan. It can also result in a child being disinherited because he or she was born after the completion of the beneficiary designation form and not added at a later date.

Furthermore, certain beneficiary designations may preclude the possibility of "stretching" minimum distributions from qualified plans or IRAs over the lifetime of a beneficiary—in fact, naming your estate as the beneficiary of a qualified plan may require a payout over five years and result in unintended income tax consequences. Moreover, your estate planning attorney can suggest the appropriate beneficiaries to add flexibility to your estate plan to take advantage of estate tax exemptions, if needed, at your death.

Mistake No. 4: Failing to name appropriate fiduciaries. In general terms, the executor will administer your estate after your death, the trustee will be the gatekeeper of your assets and may make decisions regarding the distribution of your assets to your beneficiaries, and the guardian will be the caregiver for your minor children. Each role has separate and distinct responsibilities, and you must carefully consider whom to name in each capacity. It is common for people to simply name someone because they feel obligated or they want to avoid offending anyone. However, you should appoint people or institutions who are highly competent, possess the relevant knowledge, and understand your values.

Acting as a fiduciary is oftentimes consuming and complex. As your life and circumstances change, your views of who would be best in each capacity may change. An essential aspect of creating and updating your estate plan is regularly reviewing the individuals and institutions you have appointed in fiduciary roles to take on these responsibilities after you are gone.

Mistake No. 5: Failing to correctly title assets. Similar to missteps in designating beneficiaries, incorrect or haphazard titling of your assets can have unintentional and sometimes disastrous outcomes. For example, many people do not realize that jointly held property passes from one owner to the other automatically upon the first owner's death. Therefore, inadvertently, an inequitable amount of property may pass to a joint tenant if he or she is also named as a beneficiary in your will. Similarly, it is often overlooked that a transfer of real property into your name with another as joint tenants during your lifetime is irrevocable.

Conversely, many benefits can be achieved by appropriately titling assets. Certain ownership arrangements will avoid probate on your assets at your death. This is particularly important to consider when you own out-of-state real property and want to avoid double probate. In addition, assets can be titled to minimize estate taxes. As part of the estate planning process, your assets can be titled to take advantage of any state estate tax exemptions and federal estate tax exemptions that are available, thereby reducing estate taxes payable while benefitting your intended beneficiaries.

Mistake No. 6: Failing to consider incapacity. When most people consider estate planning, they automatically think of death. However, in addition to covering the distribution of your assets, your estate plan should set forth who will make decisions for you if you are incapable of making them yourself.

It is prudent to execute a durable power of attorney to name someone to make financial decisions for you in the event you are incapacitated. You should also consider executing an appointment of health care representative or medical power of attorney under which you name an agent to make medical decisions for you in the event that you cannot speak for yourself. As part of this process, you should also consider whether you would like to sign a living will, or a similar document, setting forth your choices regarding medical care and end-of-life decisions.

Mistake No. 7: Failing to structure gifts and inheritances appropriately. Estate plans are not one-size-fits-all. Your estate plan should not be cookie-cutter, but rather designed to take into account your beneficiaries' needs and circumstances. The documents should be tailored to specify not only who receives your assets after your death, but how they receive them. Once your estate planning attorney understands your personal family situation, your values, and your intentions, he or she can recommend a structure that benefits you and your beneficiaries.

In some situations, a gift or bequest to a discretionary trust may be preferable to an outright disposition. For example, if you have minor children, you may wish to provide that their inheritances be held for their benefit and managed on their behalf until they reach a certain age. Or, if one of your beneficiaries is handicapped or has special needs, you can direct that his or her inheritance be held in a trust that permits the trustee to make distributions for supplemental care and to improve the quality of the beneficiary's life without precluding any governmental assistance he or she may receive. If desired, a trust can be drafted to provide ongoing creditor and divorce protection of the beneficiary's inheritance.

Mistake No. 8: Failing to consider, fund, and properly administer an irrevocable life insurance trust. As noted earlier, life insurance proceeds will be includable in your estate if you own the policy at the time of your death. If the value of your estate (including the life insurance proceeds) exceeds the applicable estate tax exemption amounts, it may be prudent to create an irrevocable life insurance trust to hold the policy, thereby sheltering the proceeds from estate taxes at your death.

Although an irrevocable life insurance trust can be a powerful tool to reduce or eviscerate estate taxes, it is imperative that it is funded and administered correctly. One common pitfall, which may result in the inclusion of the proceeds of the policy in your estate, is the failure to properly name the irrevocable life insurance trust as both the owner and the beneficiary of the life insurance policy. Similarly, to guard against unintended gift issues and estate inclusion, care must be taken to ensure the proper payment of premiums on the policy owned by the trust, the filing of any necessary gift tax returns, and the provision of Crummey notification letters to the beneficiaries of the trust.

Mistake No. 9: Failing to consider gifting techniques during life. It is not uncommon for an older person to ask for estate planning advice. Although some techniques can be employed at older ages, in most cases better results (for example, lower estate taxes) could have been achieved if a gifting program had been implemented earlier.

During 2017, each person can make annual exclusion gifts of $14,000 per year ($28,000 if the donor is married) to any number of people. In addition, federal law currently exempts from gift tax the first $5.49 million of taxable gifts you make that do not qualify for the annual exclusion. In addition, your estate planning attorney can suggest many more gifting strategies based on the value of your estate and your goals. Gifting property during your life will remove both the gift and any future appreciation on the gift from your estate for estate tax purposes. Therefore, establishing an annual gifting plan and adhering to it can be very powerful in reducing the future estate taxes due on your estate.

Mistake No. 10: Failing to review and update your estate plan. It is tempting to prepare an estate plan and put it on a shelf and forget about it. However, because of changes in the law, changes in your family circumstances, and changes in your viewpoints, estate plans should be reviewed periodically.

You should review and update your estate plan:

- when there are significant changes in federal or state estate tax laws;
- if you get married;
- if you have children;
- if you divorce;
- if your financial situation changes; and
- in any event, every three to five years.

Developing an understanding of your client’s circumstances, needs, concerns, and wishes—and helping them avoid these and other estate planning mistakes—will enable your clients to make better personal, financial, and legal decisions. In the process, you will not only bring real value to the client relationship, but you will increase your clients’ trust in and loyalty to you, as well as reinforce your role as a trusted adviser.