

Trusts & Estates Notes

A Series of Articles on Legal Issues Regarding Estate Planning and Estate Administration

Tips to Avoid Common Estate Planning Mistakes

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1. Complete Your Foundational Estate Plan

The failure to complete a foundational estate plan (revocable trusts, Wills, financial powers of attorney, health care directives and asset transfer documents) is the single biggest mistake people make. Planning is required to deal with sudden unanticipated tragedies. We are not invincible. Don't delay in completing your estate plan.

The consequences of the failure to plan often include:

- State intestacy laws controlling the process (e.g., court supervised probate) and the distribution scheme (e.g., outright distributions when trusts would be preferable, court supervised guardianships for children until age 18, outright distribution to children over age 18);
- Court supervised conservatorship proceedings in the case of a disability during lifetime; and
- The inability to take advantage of transfer tax (gift, estate and generation-skipping) planning opportunities.

2. Don't Make Mistakes After You Have Signed Your Foundational Estate Planning Documents

Once foundational estate planning documents have been signed there is still work to be done to make the plan and the planning documents fully functional.

The most common mistakes people and their advisers make after documents are signed are:

- Failing to title all appropriate assets properly in the names of the trustees of the trust (often referred to as funding the trust);
- Failing to coordinate retirement plans (e.g., IRAs, 401(k)) and life insurance policy beneficiary designations with the dispositive provisions of the estate plan;
- Failing to fully understand the difference between separate property and community property and to appropriately segregate one type from the other to avoid commingling issues; and
- Failing to review and keep the foundational estate planning documents current. Thorough reviews with an estate planning attorney should occur every 3 – 5 years.

3. Be Careful About How You Take Title to Assets

Too often, after a foundational estate plan is in place, clients acquire assets or take actions without discussion with their estate planning attorney that are inconsistent with their estate plan or that have unintended consequences. For example:

- Taking title in joint tenancy with a spouse may result in an undesirable distribution and adverse income and estate tax consequences;

- Taking title in joint tenancy with a child or any other person may result in immediate but unintended estate, gift and real property tax consequences;
- Holding title “as trustees” without proper reference to the trust may result in significant additional legal expense to clear title to property;
- After taking title out of the trust at the request of a lender when refinancing real property, failing to have the property deeded back into the trust; and
- Making loans to children without charging IRS mandated minimum interest rates or failing to document such loans so that they are later characterized as a gift with potential adverse transfer tax consequences.

4. Don't Make Any Gifts Without Obtaining Proper Legal and Tax Advice

There are many tax and non-tax factors that need to be considered before any type of gift should be made. See our article entitled “*Factors to Consider Before Making Gifts.*” Income, gift, estate and real property tax issues need to be evaluated before any gift is made. Frequently formal appraisals will be required. With proper advice gifts can be structured to minimize the various tax consequences and make certain all required reporting and tax returns are prepared and filed in the most appropriate manner. For married couples, the character of the property (e.g., community property or separate property) to be gifted and whether approvals will be required (e.g., lender consent) must be taken into consideration.

5. Mistakes To Avoid After the Death of a Spouse

It is always a difficult, emotional time for the survivor after the death of a spouse. It is helpful if family or friends are involved to assist the survivor so that the following mistakes, which often require significant time and expense to correct, are not made:

- Failing to take the necessary post-death estate administration steps (identification and valuation of assets and liabilities, payment of debts, taxes and estate administration expenses, and division and distribution of the assets and liabilities in accordance with the provisions of the trust). This can result in significant adverse estate tax consequence if not corrected during the survivor's lifetime.
- If two or more trusts are created after the death of a spouse, the failure of the survivor to keep the assets allocated to each such trust segregated properly. As a result, accountings and re-adjustments to title must be undertaken which may raise tax issues that would not otherwise be an issue.

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