The Ten Most Common Estate Planning Mistakes (and How to Avoid Them)

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MISTAKE #1: NOT HAVING A WILL OR TRUST OR DOING IT WRONG

A. Who will inherit your estate if you don’t have a will or a trust?
   -- California’s law of intestate succession may not yield the desired result
   -- Your estate may end up going to persons you did not want as beneficiaries

B. Will your estate be subject to probate?
   -- Brief explanation of probate & why to avoid it (see page 8 on the Cost of Probate)
   -- How to avoid probate: living trusts, beneficiary designations, joint tenancy with right of survivorship

C. The dangers of holographic wills (i.e., a will written in the testator’s handwriting)
   -- Incomplete or incorrect disposition of assets
   -- Ambiguities
   -- Typically, no contingent beneficiaries or "residue" clause
   -- Failure to name executor or waive bond requirement
   -- Math errors

MISTAKE #2: OUT-OF-DATE WILLS OR TRUSTS

A. Problems with out-of-date wills
   -- Omitted spouse or children (failure to change will after remarriage)
   -- Named executor is deceased or incapacitated or no longer a good choice
   -- Specific gifts of property that you no longer own
   -- One or more of your named beneficiaries is deceased
   -- Failure to nominate guardians for minor children, or nomination of guardians who are no longer the best choice
   -- Failure to respond to tax law changes

B. If you have an “A-B” trust, is that still what you want and need, given new tax law?
   Many trusts done for married couples before 2010 contained “A-B” trust provisions, designed to minimize or eliminate estate taxes. Now, with the individual exemption from estate tax increased to $11,180,000 for 2018, there may be no tax reasons to maintain an “A-B” trust, and it could have tax disadvantages for the surviving spouse.

C. Avoid these mistakes!
-- Make a will or trust and review it periodically: make sure that your will or trust still says what you think it says, and that this is still what you want
-- Update your will or trust any time there are changes in your family (births, deaths, marriages, divorces, serious health or substance abuse problems), or changes in your finances, or major changes in tax laws that affect your estate plan
-- Don't "do-it-yourself" unless you really know what you're doing (even then, consider having an estate planning attorney review it)

MISTAKE #3: IMPROPERLY FUNDED LIVING TRUSTS

A. If you have a Revocable Living Trust, make sure it is properly funded!
   -- Assets should be held in your name as trustee of your trust -- anything not in the trust (except assets having designated beneficiaries) may end up going through probate, causing added delays and unnecessary expense. [See Cost of Probate.]
   -- Sometimes real estate may be taken out of the trust as part of refinancing, and it may not get put back into trust after the loan refinancing process is completed.
   -- If your living trust is not properly funded, that could result in a probate of part of your estate, restricting the family’s access to certain assets and causing delays, extra hassle, and needless expense.

B. Don’t put IRAs or other tax-deferred retirement accounts into your trust.
   -- Use the beneficiary designations on the account to direct the remaining balance.

C. See page 9: “Checklist for Existing Revocable Living Trusts”

MISTAKE #4: IMPROPER BENEFICIARY DESIGNATIONS

A. Assets that allow for designated beneficiaries:
   -- life insurance
   -- annuities
   -- IRAs, 401(k) or 403(b) accounts, TSAs, other tax-deferred retirement accounts
   -- U.S. Savings Bonds
   -- P.O.D. (“pay-on-death”) or T.O.D. (“transfer on death”) accounts
   -- Revocable Transfer on Death Deeds
   Normally, such assets are not held in a living trust, as the beneficiary designations will determine who will receive the asset.

B. Naming “my estate” or “the estate” as beneficiary
   -- This subjects a non-probate asset to probate, creating needless added expense, hassle, and delays [see “Cost of Probate” at page 8]
   -- This can be even a bigger problem if you have no will or your will is not current
   ALWAYS name a designated beneficiary; NEVER name “the estate”.

B. Designated beneficiary is deceased & no contingent beneficiary is named
   -- This can result in an unintended probate if the asset value is large enough.
   ALWAYS designate a primary beneficiary and secondary or contingent beneficiaries.
C. **Designated beneficiary is a minor child or children**
   -- Court-appointed guardian may be required
   -- Assets pass to the child outright at age of majority (18) – the beneficiary may lack the maturity to handle an inheritance responsibly
   CONSIDER designating a CUTMA custodian or the trustee of a trust for the minor.

D. **A person on SSI disability or Medi-Cal is named as a direct beneficiary**
   -- This can cause the disabled beneficiary to lose their SSI or Medi-Cal benefits.
   CONSIDER establishing a Special Needs Trust as beneficiary for the disabled person.

E. **Beneficiaries with special circumstances**
   -- Are any of your intended beneficiaries dealing with problems such as drug or alcohol abuse, gambling, compulsive spending, incarceration, a troubled marriage, bankruptcy, tax liens, or other circumstances that could result in dissipation of an inheritance?
   It may be wiser to establish a trust fund with an independent trustee to manage it.
   Don’t be shy about asking if there are any such problems for potential beneficiaries.

F. **Failure to coordinate beneficiary designations and bequests to charity**
   -- Large IRAs (or other tax-deferred retirement accounts) could be subject to both income taxes and possibly estate taxes—taxes that can be eliminated if a qualified charity is named as remainder beneficiary; if you have designated any charities as beneficiaries of your will or trust, but your IRA designates non-charitable beneficiaries, you might want to consider reversing this arrangement to minimize or eliminate income taxes on the distributions.

Review your beneficiary designations -- make sure they will work the way that you want!
If you need assistance, consult with a qualified estate planner. Keep a copy of your beneficiary designations on various assets where your executor or successor trustee can easily find them.

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**MISTAKE #5: NAMING THE WRONG EXECUTOR OR TRUSTEE**

A. **What is an Executor?**
   -- An Executor is the person nominated in your will to administer your probate estate

B. **What is a Trustee?**
   -- A Trustee is the person who will administer a living trust estate

C. **Factors to consider in selecting and naming an executor or successor trustee:**
   -- Personal characteristics: honesty, integrity, patience, good interpersonal skills
   -- Financial management and record-keeping capabilities
   -- Time availability
   -- Geographical proximity (how far away does the executor/trustee live?)
   -- Willingness to serve
   -- Relationship with intended beneficiaries
   -- Age and health of the executor/successor trustee
-- Conflict of interests (is the individual also a beneficiary or business associate?)
-- You can name co-executors/co-trustees, but how well do they get along?
-- Don’t automatically assume that your oldest child is the best choice for trustee.

D. What if your intended beneficiaries don’t get along with one another?
Consider designating a licensed professional fiduciary or a bank or trust company as your executor or successor trustee to minimize conflicts and provide professional administration of your estate or trust.

Help your Executor or Successor Trustee:

• Don't name someone as executor or successor trustee without asking them first
• Tell them the location of your will or trust, safe deposit box & key, important papers
  [See “Questions You Should Answer” – page 6 of outline.]
• Review your will or trust periodically to make sure your named executor or successor trustee is still the best choice for the job.

MISTAKE #6: IMPROPER USE OF JOINT TENANCY

A. Adding an adult child or other person as a Joint Tenant for ease of transfer
-- Possible gift tax implications if the gifted asset is worth more than $15,000
-- Exposure to the other person's liabilities
-- There is a risk of having the other person abscond with your property
-- The surviving joint tenant may be subject to gift tax if they want to redistribute those assets to others.

B. Spouses using Joint Tenancy titling instead of Community Property*
-- Loss of full step-up in cost basis at first spouse's death (only the deceased joint tenant’s interest receives a cost basis step-up, not the entire property)
*Note: Since 7/1/2001, California allows spouses to hold title to real estate as “Community Property with Right of Survivorship”

C. Joint tenancy property cannot be willed if the joint tenant survives you – the surviving joint tenant gets it all, even if your will says something different.

D. Consider using Power of Attorney access instead of Joint Tenancy.
Power of attorney access stops when the original owner dies; the agent does not have post-death access to your account.

NOTE: The death of a joint tenant on title to real property requires the filing of an “Affidavit of Death of Joint Tenant” form with the county recorder in the county where the property is located, along with certain other required county forms.
Also, since 1/1/2016, California has authorized the use of a Revocable “Transfer on Death” Deed, although this law “sunsets” after 5 years. Because the Deed is revocable, it does not constitute a gift until the original owner dies, and the beneficiary will receive a stepped-up cost basis in the property.
MISTAKE #7: GIFTING MISTAKES

A. **Transfer of Real Property in order to avoid probate.**

Sadly, this strategy may work to avoid probate, but it can result in other problems. Property gifted during the owner’s lifetime will result in a loss of the step-up in cost basis for the transferee, and may result in significant capital gain tax upon sale. If the property was a rental that was subject to depreciation, the entire proceeds from sale could be subject to a capital gain tax. Such a transfer will likely constitute a taxable gift, which requires an appraisal and the preparation and filing of a gift tax return. Failure to do so could result in tax penalties.

If the property transferred is subject to a mortgage, once the lender learns of the transfer, they can call the mortgage loan due and possibly foreclose on the property.

B. **Buying a vehicle for an adult child.**

Unless the value of the gifted vehicle is less than $15,000 (the annual exclusion amount for gift tax), the excess value constitutes a taxable gift, and a gift tax return should be filed.

C. **Making “loans” that are not documented by promissory notes.**

Is the “loan” to be repaid, or should it be deemed an advance against the borrower’s share of your estate? Do you keep track of such “loans” and any repayments?

MISTAKE #8: OUT OF DATE OR INCOMPLETE HEALTH CARE DIRECTIVES

A. **Any health care directive dated prior to 1992 is expired and should be updated.**

B. **Are your designated agents still willing and able to act on your behalf?**

C. **Does your health care directive include phone numbers and addresses for the people you named as your agents?**

-- Too many health care directives list agents, but then give no contact information for those agents. How will doctors or hospital staff contact your agent(s)?

D. **If you have made funeral or mortuary arrangements, have you told your agents?**

If your prefer cremation, have you left instructions about what to do with your ashes?

MISTAKE #8: LACK OF LIQUIDITY FOR THE ESTATE

A. **Insufficient or nonexistent liquid assets can create a cash flow crunch**

-- Medical/funeral expenses & ongoing bills must be paid

-- Income taxes and/or property taxes may be owed

-- Estate taxes (if any) are due and payable in cash 9 months after death
B. Life insurance may be inadequate or nonexistent
   -- Is the death benefit enough to pay the estate taxes, debts, and other expenses?
   -- Will it provide an adequate income for surviving spouse and children?
   -- If you have a family business, will it be adequate to keep the business going?
   -- Review your life insurance needs and coverage with a qualified advisor

C. Illiquid assets may have to be sold quickly, often for less than full value
   -- Real estate, cars, boats, motor homes, trailers, art, collectibles, etc.

* Be sure to give your successor trustee/executor access to your cash accounts in the event of your death or disability – some liquidity will be essential for them to do their job!
Don’t designate “P.O.D” beneficiaries on all your bank accounts and leave no money for your successor trustee/executor to use for estate administration expenses!

MISTAKE #10: BUSINESS OWNER MISTAKES

A. No plan for business continuation
   -- No written buy-sell agreement -- who takes over when you're gone?
   -- No "key person" life insurance to fund a buyout, if needed
   -- Possible disproportionate distributions to your heirs if some are actively involved in the business and other are not – how to treat people fairly?

B. Deducting life insurance premiums without knowing the implications
   -- Deducting the premium cost makes the death benefit fully taxable as ordinary income at the death of the insured; better not to deduct premiums.

C. Missed opportunities for lifetime gifting at discounted values
   -- Lack of marketability and minority interest discounts can be advantageous.

Be sure to maintain good records. Keep your will or trust, deeds, life insurance policies, investment statements, and other important papers where they can be found readily in the event of your death. Don't make it hard on your loved ones! See attached list of questions you should answer for your executor or successor trustee – if anything on that list applies to you, now is the time to have a chat with the person who will be responsible for administering your estate!

REMEMBER:
THE BIGGEST MISTAKE OF ALL IS TO DO NOTHING!
QUESTIONS YOU SHOULD ANSWER FOR YOUR DESIGNATED EXECUTOR OR SUCCESSOR TRUSTEE

Your Executor/Successor Trustee needs to know answers to the following questions (as many as apply in your case):

• Where do you keep your will or trust documents?
  • Do you have any special directions regarding how your assets are to be distributed (especially tangible personal property like jewelry, art, books, collectibles, furniture, etc.)?
  • What sort of assets do you have? (Real estate, stocks, bonds, mutual funds, life insurance, annuities, U.S. savings bonds, bank accounts, partnerships, a business?)
  • (If you have a living trust . . .) Are all of your assets properly titled in trust name?
  • Do any of your intended beneficiaries owe you money? If so, how should this be handled? Will this be considered a part of that person’s share of the estate, or what?
  • Will there be enough cash available to deal with foreseeable expenses and taxes?
  • If there will be estate taxes due and payable, what assets will be used to pay for this?
  • Is there any life insurance? If so, who is the beneficiary? Where is the policy?
  • Are there other assets that will pay death benefits (like annuities or pension benefits)? If so, how do I claim these?
• Who are the designated beneficiaries on IRAs, annuities, and other such assets?
• What are your debts/liabilities (and contingent liabilities) and how will these be paid?
• Will there be any ongoing support obligations for dependents?
• Where are your important papers kept? (deeds, vehicle “pink slips”, savings bonds, stock certificates, investment and bank account statements, insurance policies, pension information, etc.)
• Do you have a safe or safe deposit box? If so, where is it located, and where is the key/combination kept?
• If there is an operating business involved, what is the plan for business continuation or transfer of ownership upon your death? Where are the business records kept? Who will be in charge of the business if you are incapacitated or deceased?
• What are the names, addresses and phone numbers of all your beneficiaries?
• What are the names, addresses and phone numbers of your accountant, attorney, investment advisor, insurance agent?
• Do you have a cemetery plot or prepaid mortuary arrangements? If so, where is that information kept? If you don’t have prepaid arrangements, how will this be paid for in the event of your death?
• If you keep your financial records on a computer, please give details and password.
• If you have an alarm system on your home, what is the deactivation procedure?
• Are there any special circumstances involving your beneficiaries that I should know about? (problem relationships, troubled marriages, substance abuse problems, physical or mental disability, financial irresponsibility, threatened lawsuits, etc.)
• If you have pets, who will take care of them if you are incapacitated or deceased?
THE COST OF PROBATE

The fees paid to the executor and to the estate's attorney in California for their services in handling a probated estate are set by law (see California Probate Code Sections 10800 through 10814), and represent a portion of the value of the assets that go through probate. These "statutory fees" range from 4% of the first $100,000 of assets that go through probate down to 1/2%, or a "reasonable amount to be determined by the court" for probate estates in excess of $25,000,000. [Note that estates valued below $150,000 are normally exempt from full probate proceedings; assets are typically transferred by affidavit.]

The percentages set forth in the California Probate Code are as follows:

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<th>Statutory Fee</th>
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These fees work out to the following amounts paid to both the executor and the attorney for the estate:

These fees are based upon the gross value of the assets that go through probate as shown on the estate inventory, plus the income (dividends, rents, interest) collected during probate, plus any gains from the sale of estate assets, less any losses upon the sale of estate assets. Either the executor or the attorney can waive all or a part of their statutory fee. If taken, the fee is taxable income to the recipient. If there is more than one executor or attorney, the fee is divided accordingly.

Extraordinary fees (i.e., fees payable in addition to the above statutory fees) may include tax work, litigation, expenses for running the decedent's business, and any unusual matters. The statutory and court-approved extraordinary fees are paid by the estate at the conclusion of probate and upon a court order.

In addition to these fees, there are separate fees for the probate court filing fees (which can range from several hundred dollars to several thousand dollars, depending on the size of the estate), a legal notice publication fee, appraisal fees, and fees for certified copies of court documents.
CHECKLIST FOR EXISTING REVOCABLE LIVING TRUSTS

• Have all asset transfers into the trust been completed?
  -- grant deeds to transfer real estate into your trust?
  -- bank and credit union accounts titled in the name of the trust?
  -- securities accounts, stocks, bonds, limited partnerships titled in the name of the trust?
    (except IRAs or other tax-deferred retirement accounts – those don’t go in the trust)
  -- tangible personal property (other than vehicles) transferred into the name of the trust?
  -- promissory notes and/or deeds of trust assigned to the trust?
  -- As new assets are acquired, are you taking title in the name of the trust?
  -- Have your business interests been assigned to the trust?

• Are your beneficiary designations on life insurance, annuities and pension plans (IRAs, Keoghs, 403(b) plans, 401(k) plans, etc.) consistent with your overall estate plan? Did you know that you can name the living trust as the contingent beneficiary (but not the owner)?

• Does your insurance on trust assets (real estate, personal property) reflect trust ownership?

• Does your trust include estate tax savings provisions if you and your spouse have a combined estate worth more than the amount that is exempt from estate tax? (Check current law)

• Does your trust (and power of attorney, if effective upon incapacity) include provisions that allow incapacity to be determined by persons you know and trust instead of by the courts?

• Have you named someone who is still a minor (under 18) as an outright or contingent beneficiary when you would rather see that gift deferred until a later age?

• If you are married, have you placed your jointly owned assets in community property title to take full advantage of the income tax benefits in the event of one spouse’s death?

• Has anything changed that might require an amendment to the trust? (Births, deaths, disabilities, marriages, divorces, estrangements, inheritances or other changes in finances?)

• Is your chosen successor trustee still available and able and willing to serve?

• Do you have properly drawn and current Durable Powers of Attorney:
  -- for asset management in the event of incapacity?
  -- for health care in the event you need (or don’t want) artificial life support?
    Have you given copies of such documents to those you named as your agent and alternate agents? (Or did you let them know where these documents are kept?)

• If you have an old “living will”/Durable Power of Attorney for Health Care/Directive to Physicians, does that document automatically expire after a term of years? (The law changed in 1992 and you now can make out a new Advance Health Care Directive with no expiration date)

• Do you have a “pour-over will” that leaves everything to the trust just in case there’s something that didn’t get transferred to the trust during your lifetime? If you have minor children, does your will name guardians for those minor children? Are the guardians you’ve named still the best choice?

• Does your trust need to be updated to accommodate tax law changes?