AVOID THE 10 GREATEST GAFFES IN ESTATE AND RETIREMENT PLANNING:
A PRIMER

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Our topic is the 10 Greatest Gaffes in Estate and Retirement Planning. To keep the list of gaffes to only 10, we've grouped the gaffes (and sub-divided some of them) but you'll see that there are many ways an estate plan can go wrong.

To avoid a negative presentation, following each gaffe, we've enumerated some of the potential issues, and then listed some positive steps you can think about and take to avoid or correct the gaffes.

This list, while detailed and full of information, barely scratches the surface of information needed to manage and coordinate the laws of: gifting during lifetime and at death, charitable gifting, insurance, retirement planning, banking, Medicaid planning, domestic relations and last, but never least, taxes (income, gift and estate taxes) all of which must be considered simultaneously.

The information provided in this outline is not intended to be specific legal advice or to be followed without individualized, professional guidance and assistance.

The over-arching message of this program that you must deal with planning and distribution issues, must deal with them openly and honestly, and must deal with them with one or more professionals (attorneys, accountants, financial planners, insurance agents) to learn about the full range of options which might be best for you and your family and then implement the options.

We hope our program and materials are helpful.

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THE GAFFES, POTENTIAL ISSUES AND POSSIBLE REMEDIES:

The first, and biggest gaffe in estate planning is: not having a plan

Potential Issues:

Your property may not pass to whom you want and when you want. Your property may pass to minor and/or incapacitated persons and/or adult children with potentially overreaching spouses or partners or creditors.

You might not be taking full advantage of estate, gift and income tax protections (federal and/or NYS taxes).

You might not be taking full advantage of creditor protections for your intended beneficiaries.

There will be no one to make your health care decisions or obtain health care information if and when you are not competent.

There will be no one to assist you with your financial activities (for example: paying bills, selling your residence, making investments, etc. etc.) if you are too busy to do so, you don't want to be bothered to do so, or not competent to do so.

Possible remedies:

Consult an estate tax planning professional to discuss, create and implement a plan which might include: a Will, one or more lifetime or testamentary trusts, power of attorney and advance health care directives.

The balance of this Primer focuses on particular potential issues and possible remedies.

(1) Failing to deal with your future incapacity.

Potential Issues:

Health care management if you cannot make your own decisions.

Financial management of your assets if you are (i) incapacitated or (ii) merely unavailable or (iii) too busy to do your own management.

The financial costs of incapacity: No one to pay bills, deal with Medicare or Long Term Care Insurance claims, hire people to help you as and if needed. You might need a court-appointed guardian of your person and/or your property.

Possible Remedies:

Consider executing a health care proxy and living will to appoint a decision-maker. Consider executing a HIPAA Release so someone can obtain your medical information (perhaps to file health and/or LTC Insurance claims without being named decision maker).

Consider executing a power of attorney (with or without a statutory gifts rider) to appoint someone who can manage your assets, pay your bills, and do financial and tax planning for you.

Consider organ donation.

Talk to a professional about the potential costs of health care. Medicare does not pay for institutional custodial care. Planning might involve Medicaid impoverishment planning. Or purchasing long term care insurance. Or self-insuring for health care, but purchasing life insurance to provide for your beneficiaries.

(2) Failing to provide adequate instructions about your funeral, burial and interment plans.

Possible Remedies:

Consider writing instructions to assist your loved ones, particularly if you have specific plans for donation of organs, disposal of your body (such as cremation), choice of clergy, funeral, burial, obituary information, and/or a celebration of life party.

Don't forget to name someone who will be in charge and then give the instructions to the responsible party so he knows what to do.

Also don't forget to make sure the responsible party can afford to advance the funds, or you must provide for immediate access to assets sufficient to pay the bills.

(3) Failing to plan for distribution of your assets.

Potential Issues:

Hiding your head in the sand is not a plan.

Your assets which name a beneficiary or which are co-owned will pass to the co-owner or beneficiary by operation of law when you die. If you have a Will, then your solely-owned assets will pass under your Will.

If you do not make a Will (or make and implement some plan, then your solely-owned assets (which do not name a beneficiary) will pass according to the laws of intestacy of the State of New York. Under the rules of intestacy, you don't get to name your beneficiaries and control distribution after your death. You don't get to make charitable bequests. You don't get to pick the person who will settle your affairs (meaning the person who will gather your personal information and assets, pay your debts and bills and make distribution according to the laws of intestacy).

Owning all assets jointly with another person and naming a beneficiary on all assets is also not a plan.

First, not all assets can be owned jointly or name a beneficiary. Second, owning assets jointly could lead to loss of control and/or creditor problems if your joint owner has creditor issues. Third, naming a beneficiary of an account removes the possibility of planning to protect the beneficiary and/or her assets from the beneficiary's own bad decision-making and her creditors.

Possible Remedies:

Consider your assets; and

Consider your family members/intended beneficiaries (their ages, financial acumen, spendthrift issues, debts, governmental benefits which might be affected by an inheritance; and

Consider the NYS statutory plan; and

Consider your charitable intentions; and

Consider the estate, gift and income tax ramifications of your plan.

Then deal with it. See a professional about appropriate legal documents.

(4) Failing to draft and sign documents.

Potential Issues:

There are numerous types of plans and documents which might benefit a particular client - some combination of which might be appropriate for you. Having said that everyone needs a plan, everyone doesn't need the same plan.

Abdicating on decision making by leaving all of your assets to one child and asking her to divide it among her siblings as she sees best after your death has tax implications and can create enormous animosity among your children.

Possible Remedies:

Depending upon your financial and family needs, you might need a Will (with or without trusts), a trust for management of your assets (revocable or irrevocable), a lifetime trust for management of your beneficiary's assets, a transfer of real property (with or without retaining a life estate), a trust for your spouse, a trust for your beneficiaries, a lifetime insurance trust, a health care proxy, living will, power of attorney (with or without a statutory gifts rider).

Direct who gets what assets (how you want to divide your personal property and your financial assets). Who will appreciate what. Name the responsible parties (executor, trustees)

(5) Failing to take other necessary steps to implement an estate plan.

Potential Issues:

Naming beneficiaries in a way which runs counter to your Will or lifetime trust.

Naming beneficiaries in a way which does not pass a beneficiary's share down to his children if a named beneficiary dies before the testator dies.

Failing to name appropriate beneficiaries of retirement plan accounts.

Failing to deal with the needs of beneficiaries who are minors or spendthrifts.

Failing to update beneficiary designations

Failing to transfer assets to a lifetime trust if the goal is to avoid probate of a Will.

(6) Failing to review and update documents.

Potential Issues and Possible Remedies:

A plan and documents should be reviewed upon the happening of a major life event or every five years. The plan and documents might not need to change, but should be re-evaluated upon the happening of:

Birth of a child or grandchild,
Death of a family member,

Marital difficulties (of the testator or of a beneficiary),
Impending divorce (of the testator or of a beneficiary),
Impending retirement,
Starting a new job or business,
Illness (of the testator or a beneficiary).

(7) Failing to gift wisely and appropriately.
The giver of a gift is called a donor. The recipient of a gift is called a donee.

Potential Issues:

Consider the life style you want to maintain before making gifts.

Gifting assets with a low cost basis can have income tax ramifications for the donee.

Consider your donees before gifting
- Can your donee manage money?
- Does your donee have creditors?
- Might your donee have marital issues?
- Does your donee have special needs/disabilities?
- Is, or might, your donee be receiving governmental assistance?

Possible Remedies:

Consider gifting to an irrevocable lifetime trust or naming a UTMA custodian.

Consider cost basis when making gifts.

For donors with taxable estates
- Consider annual gifting up to the exclusion amount
- Consider gifting to pay for unreimbursed medical expenses and/or tuition expenses (payments must be made directly to the educational institution or the provider of medical service).

Consider gifting to trusts (for example but not limited to: GRATs, personal residence trusts, ILITs, IIOTS, Supplemental Needs Trusts)

(8) Failing to seek professional advice and assistance

Potential Issues:

Downloading documents from the internet.

Documents on the internet can be outdated.

Documents might not be appropriate for you in your state. Each state has its own substantive laws about Wills and transfers of assets. Each state has its own laws about how documents are to be signed.

Documents on line can be generic documents not customized for you and your issues.

Estate planning laws are different from state to state. Federal estate tax laws are national, but there are state estate tax laws also which must be considered.

Taking advice from friends, hairdressers, and neighbors. Your fact situation is different from everyone else's.

Listening to or reading articles by a nationally-known expert. The expert is speaking generally and not relying on the law in your state or on your fact situation.

Possible Remedies:

Talk to professionals: attorneys (who concentrate in estate planning), accountants, financial planners (perhaps fee based or perhaps transactional or perhaps just for a planning consultation), insurance agents (getting information and options on life, health and long term care insurance).

(9) Failing to provide sufficient liquidity to settle your estate and make distributions.

Potential Issues:

Your estate might be taxable or have debts or expenses of administration.

Your estate might include a residence which doesn't sell quickly or which needs repairs and the estate needs money to maintain and/or repair the residence prior to sale.

If most (or the most substantial) assets pass to named beneficiaries outside of your Will, then there will probably not be sufficient liquidity to pay the debts, expenses of administration and/or taxes. This (i) could be a burden on your beneficiaries or (ii) could force an early unprofitable sale or (iii) force a beneficiary to sell a non-liquid asset at a loss, or (iv) pay interest and penalties on income and/or estate taxes pending liquidation.

Possible Remedies:

Leave sufficient assets to pass through your probate estate (under your Will) so there will be a kitty to pay your bills, your estate's bills, your estate taxes, and manage the assets which cannot (or should not) be sold quickly.

Purchase life insurance which is payable to your estate to provide liquidity to pay your unpaid bills and the estate's bills including maintaining the property until it can be sold.

(10) Failing to deal with your retirement plans.

Potential Issues:

There are income tax consequences to distributing “qualified” accounts:

There can be income tax benefits to naming one beneficiary over another.

There are consequences to naming a minor to receive any asset passing by operation of law. The consequences must be dealt with on the beneficiary-designation form; your Will only governs assets passing under the Will.

There are different consequences to naming an estate or a trust to receive qualified accounts.

There are different consequences depending upon whether the beneficiary is a spouse or a non-spouse and the age of the beneficiary.

Possible Remedies:

Consider the ages of your beneficiaries.

Consider your beneficiaries ability to handle outright distributions from retirement accounts.

Consider the benefits (and issues) involved with naming a charity as beneficiary of a retirement account to receive annual required minimum distributions and/or the balance at your death.

Again, we hope our information and materials are helpful.

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