Seven Common Gaffes in Estate Planning and What To Do

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Wednesday, July 12, 2023

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What Is Estate Planning and To Whom to Turn for Help

- "Estate Planning" involves both life *and* death
  - Most common documents:
    - Power of Attorney – allows someone else to manage your property and financial matters while you're alive
    - Health Care Proxy – allows someone else to make health care decisions for you while you're alive (if you are unable to make them yourself)
    - Last Will and Testament ("Will")
    - Beneficiary Designations
    - Trust(s) – revocable and/or irrevocable
- Seek legal advice, and choose your legal professional wisely:
    - Estate Planning attorneys are generally concerned with what happens *after death*
    - Elder Law attorneys are generally concerned with both preserving income and assets in anticipation of needing long-term care *while alive* <u>and</u> with what happens *after death*
    - Both are concerned with maximizing assets available for beneficiaries

#1: Not Having An Estate Plan (or Having an Incomplete or Insufficient Plan)

- No estate plan whatsoever?
  - The state in which you live will dictate who gets what
- Incomplete estate plan?
  - Possible guardianship
  - Possible distribution of your assets after death in a way you would not want
  - Possible negative tax consequences to your beneficiaries
  - Possible loss of assets that could have been protected for your beneficiaries
- *"Dovetailing"* – everything should work together

#2: Not Actually Implementing Your Estate Plan

- Most often, this is seen when someone
  - (1) fails to fund their living trust, and/or
  - (2) fails to designate beneficiaries on certain accounts

- So you set up a living trust (which is a trust you establish while you're alive). Now what?
  - What have you put into the trust?

- Pay attention to beneficiary designations
  - Retirement accounts, in particular
  - Contingent beneficiaries

#3: Not Understanding How Assets Pass Upon Death

- A Will *only* controls assets that are owned individually and without a designated beneficiary
  - Joint Tenants with Rights of Survivorship ("JTWROS"): Upon the first joint tenant to die, the other owner is automatically the sole owner
  - Tenants-in-Common: Each tenant's share is part of their Estate that must go through probate or, if no Will, administration

- Trust assets are controlled by the terms of the Trust

- Beneficiary designations control their respective assets

#4: Not Understanding How Probate Works and Whether Avoiding Probate is Preferable

- Probate: a proceeding in Court through which the petitioner asks the Court (1) to deem a decedent's Will valid and controlling, and (2) to appoint someone to take control (usually the "executor")
  - Probate can be complicated and take a lot of time and money
  - Having a Will does not mean that heirs at law are excluded from the initial process – it's the <u>opposite</u>
  - Heirs at law must be identified, if possible, and given opportunity to participate (and object…)
  - Must probate in all states where the decedent owned real property (called "ancillary probate")
  - Legal fees could be costly
  - Trusts established in a Will require ongoing Court involvement

- Trusts avoid probate
  - Administration often faster, at least in the beginning
  - Trustee can easily manage trust assets after creator's death

#4: Not Understanding How Probate Works: Reasons to Avoid Probate

- Property in more than one state
- Distant heirs at law
- Disinheriting heirs at law
- Estate plan includes trusts
  - Minor beneficiaries
  - Disabled beneficiaries
  - Estate tax planning
- If Medicaid recipient
  - Medicaid has a claim against a Medicaid recipient's probate estate, so want to avoid probate

What assets do <u>not</u> have to go through probate (generally)?

- Assets with joint owners with rights of survivorship, beneficiaries designated, or in trusts

#5: Not Having Proper Beneficiary Designations on Your Retirement Account(s)

- Generally, it is <u>not</u> advisable for retirement accounts to wind up in someone's probate estate
- Retirement accounts without beneficiary designations (or without contingent beneficiaries) become part of the decedent's probate estate
- If the retirement account becomes part of the estate:
  - Estate administration can become more complicated
  - Estate income tax returns can before more complicated
  - Timeframes by which the account must be distributed can be <u>much</u> shorter than if the retirement account was inherited directly by a beneficiary
    - The time for tax-free growth can be significantly compressed…
- Sometimes, the retirement plan or custodian has default provisions if a beneficiary is not named, and sometimes that's not what the decedent would have wanted

#6: Not Planning for Long-Term Care (Because Long-Term Care Can Wipe Out an Estate)

Basic tenets of Elder Law:

- Everyone may fall ill some day, and those who fall ill may require long-term care
- Protecting assets and income is a common goal
- Planning in advance is important

Costs – on average in Westchester County, New York

- Nursing homes: ~$13,000.00 - ~$18,000.00/month
- Home care aides: ~$30.00/hour
- Assisted living facilities: start around $4,000.00 - $5,000.00/month

Four Ways to Pay for Long-Term Care:

- Private (out of pocket)
- Long-Term Care Insurance (which most people do not have)
- Medicare (very limited)
- Medicaid (means-tested; possible penalties for gifts/transfers)

#6: Not Planning for Long-Term Care: Importance of Planning in Advance

- Long-Term Care Insurance typically gets more expensive as one gets older

- Medicaid has look-back periods – in other words, what happened to one's assets during a certain number of years before the application is submitted?
  - If assets were given away / transferred during that time, Medicaid can impose a penalty period during which Medicaid will not pay
  - Gifts include uncompensated/undercompensated transfers and changing beneficial interests
  - Nursing home care: look-back period is five (5) years
  - Home care: none right now, but expected to be two and one-half (2.5) years – delayed from October 1, 2020, because of the pandemic, and now expected to go into place in 2024

- Even with long-term care insurance, there can still be a shortfall – Medicaid can stop the bleeding
- Medicaid is often an option, even if last minute

- Tools in our arsenal: strategic gifts, trusts, comprehensive Power of Attorney

#7: Not Identifying Basic Estate Planning Issues

You may not know the answer to every question (and that's okay!), but identifying basic estate planning issues can help you ask the right questions *for your particular situation*.

- Is avoiding probate preferable?
- Is a beneficiary incapacitated or a person with special needs or someone receiving public benefits?
- Is a beneficiary a minor or under a certain age?
- Do you have a taxable estate – either at the federal or state level?
  - Who is to pay the estate taxes?
- Do you understand the possible tax implications of your estate plan?
  - Some assets will likely result in taxable income to the beneficiary; some assets do not
- Do you understand the possible tax implications of certain actions, like gifting real property and investments?