

## The Estate Planning Advisor

### Top Ten Estate Planning Mistakes – Part I

By Richard J. Shapiro, J.D.

People often ask, “what are the most common mistakes people make in creating an estate plan?” While I could easily list dozens of frequently made mistakes, I will whittle down my list to the ten most prevalent errors, in no particular order. This column will describe five typical blunders, with the remaining five to be listed in my column in the next issue of the *Senior Gazette*.

1. Placing emphasis on the documents instead of the desired results. Too often clients are focused on the type of document that they “need” – e.g., “I need a trust,” or “I need a will.” Instead, the spotlight should be on determining and clarifying the client’s goals and objectives. The best way to do this is through a counseling process. Once the counseling process is completed, the estate planning attorney can use the appropriate legal documents to meet the client’s planning desires.

2. Owning property in joint tenancy. Joint ownership of property (as typically held by married couples) will often destroy an estate plan. When assets are owned jointly, the property passes to the surviving owner upon the death of the co-owner. While this ownership form is “easy” and has appeal as a probate avoidance technique, joint tenancy exposes the assets to the surviving spouse’s creditors, does nothing to protect the assets if the survivor remarries, and renders the couples’ estate tax planning ineffective.

3. Failure to fund. Whether wills or trusts form the “centerpiece” of an estate plan, the plan needs to be funded with the client’s assets. “Funding” is the process of changing ownership and beneficiary designations to match the estate planning. If a trust remains unfunded, then jointly owned assets, or assets with beneficiary designations (e.g., life insurance and IRA’s) will pass outside of the trust entirely. In the case of individually owned assets, the assets can be funded into the trust after the owner’s death, but only after a “pour over” will is probated. If a married couple uses wills as their primary estate planning vehicle, then to accomplish estate tax planning, all jointly owned property must be “severed” so that a portion of the couple’s total estate (usually about 50%) will pass through each spouse’s estate.

4. Failing to update an estate plan. Too often clients see their estate planning as a transaction – “I did my estate plan” – rather than as a “ongoing” process that requires frequent review and updating. People’s lives change, the laws change and even their attorney’s knowledge and experience should change. If an estate plan grows stale, it is almost certain to lose effectiveness and may lead to unintended and disastrous consequences for the family. As a rule of thumb, an estate plan should be reviewed, at minimum, every five years. In our practice, we consider plan maintenance so essential that we offer an annual updating program.

5. Failing to plan for disability. Too many estate plans give short shrift to lifetime disability planning. Wills, of course, are only effective upon death. Powers of attorney are often used to appoint an agent to assist a principal who becomes disabled; however, powers of attorney are simply a list of powers, and provide no instructions for

the agent. In addition, powers of attorney are sometimes rejected by financial institutions, thereby necessitating a court guardianship proceeding. A better option for disability planning is a revocable living trust in which the Trustmaker designates hand-picked successor Trustees who are obliged to follow the trust instructions and provide for the needs of the disabled Trustmaker and the Trustmaker's designated beneficiaries.

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