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32 COMMON ESTATE PLANNING ERRORS

This report is intended for discussion purposes only. It is not intended to provide specific legal advice. The issues discussed herein are often complex. This report discusses such issues only in general terms, and the suggestions offered herein may or may not be applicable to your individual situation. Tax law and state laws are constantly changing, and although the author has attempted to provide accurate information, there can be no assurances that it is accurate or complete as to a given situation. You are encouraged to seek the services of an attorney with respect to any estate planning issue.

A common estate planning goal of most people is: "I want to be in control of my assets as long as I am alive and able to manage my finances. I want to make things easier for my family if I become unable to take care of my finances. Upon my death I want to leave my assets to only those persons I want, when I want, and in the manner I want. And I want to do all this with the least amount of expense, delay, taxation, and frustration."

Obviously, some people will have to modify this goal, for instance, to provide for a companion, a charity, or to leave nothing to a particular heir. Defining a set of goals is important as many of the errors we often see are the result from trying to achieve one goal without considering the other goals. Working with an estate planning attorney can help you define your goals and analyze the various means of accomplishing them.

Here are 32 of the more common estate planning errors:

1. IS IT LEGAL? There are different legal requirements for the signing of different documents.

WILL: A typed or printed Will in Colorado must be signed by the maker, must have two witnesses, and it is advisable to have all three signatures notarized.

LIVING TRUST: The trustmaker's signature should be notarized, especially if the Living Trust will ever own any real estate.

LIVING WILL: Requires two witnesses, and best if notarized.

POWER OF ATTORNEY FOR HEALTH CARE: Because this document typically grants powers similar to those under a Living Will, it should be exercised with the same formalities.

POWER OF ATTORNEY FOR FINANCIAL PURPOSES: The maker's signature should be notarized, especially if the power of attorney will ever be used for any real estate transactions. A few states, such as Florida and Connecticut, may require two witnesses. The long form power of attorney I draft typically is both witnessed and notarized. (Over-kill is better than under-kill!)

2. WITNESSING: A witness must be at least 18 years of age. Signing the Will and then taking it next door for a neighbor to sign is generally insufficient. Wills have been successfully challenged on this basis. Although the witnesses do not have to read the Will, the Willmaker should at least acknowledge in front of the witnesses that the document is his Will and that he signs it in front of them of his own free accord. Signing requirements are less stringent with a Living Trust as no witnesses are required.

Generally a beneficiary should not serve as a witness because state law might limit their right to inherit under the Will. On Living Wills the witnesses must certify that they are not beneficiaries and not care givers (such as a hospital or nursing home employee.) Failure to adhere to the legal requirements could have unintended consequences.

3. EVEN THOUGH THE WILL IS "LEGAL", DOES IT ACCOMPLISH WHAT YOU WISH TO ACCOMPLISH? Example: "I leave my estate to my surviving children." That sounds good if you only have 3 children and no grandchildren. But if later Child A has 4 children, and A predeceases you, your estate will pass to just Child B and Child C. Did you really intend to disinherit your grandchildren?

Perhaps your Will says "I leave my estate to my descendants." Under State law the term "descendants" includes children, grandchildren, great grandchildren, etc. Thus, in the above example, if all children and grandchildren are living, each descendant receives 1/7 of your estate. Did you really intend to leave only 1/7 to each of Child B and Child C?

It may have been better to say "to my then surviving descendants, per stirpes." That would leave 1/3 to each child, and if Child A were deceased, his 1/3 would pass equally to his 4 children. Does your document/estate plan accomplish what you intend - even if it is "legal"?

4. MYOPIC APPROACH: Those persons who try to do estate planning for themselves often suffer from a "myopic approach." That is, they tend to focus on one issue and fail to consider <u>all</u> the ramifications of the problem and proposed solution. John deeded his home to his children so it would avoid probate on his death. His focus was solely on avoiding probate, which is certainly a worthwhile objective. But what he failed to consider was: 1) He made a taxable gift. A gift tax return is required to be filed. 2) He lost control.

If his children are sued, had a tax lien filed against them, or go through a divorce, he could lose his house. 3) To sell the property, all of his children would have to sign a deed. What if they don't agree? 4) If his daughter dies, her interest will most likely pass to her husband. Does John really want this son-in-law to be his landlord? 5) John lost the $250,000 exemption on the gain on sale during his lifetime. His children would be taxed on the gain when it is sold. 6) The children will not get a step-up-in-basis on John's death; thus their tax bill will be substantially greater than if they had "inherited" the house as a result of John's death. 7) John may have triggered a five year ineligibility for Medicaid should he have to go to a nursing home.

Although avoiding probate may save John's family several thousand dollars, the loss of the $250,000 exemption and step-up-in-basis might cost John (and his family) over $40,000 on the sale of a typical home in the Denver Metro area which has been owned for thirty years. Before you take any action, such as deeding property or adding a child to an account, consider all of the probate, control, gift tax, income tax, estate tax, capital gains tax, Medicaid eligibility, and ultimate disposition aspects of such planning.

The role of the estate planning attorney is to identify problems and to explain alternative solutions, together with the advantages and disadvantages of each.

There are several planning techniques, such as the Living Trust, the Beneficiary Deed, or the retained life estate deed, which would avoid probate yet minimize many of the problems discussed above.

5. FAILURE TO UNDERSTAND HOW YOUR ASSETS WILL PASS ON YOUR DEATH. Many people think their Wills control how their assets will pass upon their death, yet most assets today pass outside of Wills.

For instance, joint tenancy assets pass to the surviving joint tenant, regardless of what the Will says. If there is a surviving named beneficiary (such as on life insurance, annuities, or IRAs), then such assets pass to the surviving named beneficiary. It is only the other assets (sometimes called your "probate estate") that will pass pursuant to your Will.

Joint Tenancy Example: To avoid probate, John put his house in joint tenancy with his daughter. His Will said his assets are to be divided equally among all three of this children. On his death his daughter gets the house plus one-third of the assets passing under the Will. Was that really his intention? Will John's daughter share the house with her siblings? If she dies shortly thereafter, will her husband do likewise? People often act in unexpected ways when money is involved. There are many other problems with putting your home or other assets in joint tenancy with a child discussed below.

Beneficiary Example: Bill named his oldest son as the beneficiary on his life insurance. His Will left his estate equally to his three children. The oldest son gets all of the life insurance and 1/3 of the remainder of the estate.

These problems can be avoided by having a Living Trust to be the focal point of your estate plan. All or at least most assets can be titled in the name of your Living Trust or with the Living Trust as the named beneficiary. That way, your Trust will control how those assets will be distributed, and such assets can be distributed without Probate. If you ever want to change your estate plan, you do it only in one place.

6. FAILURE TO AVOID PROBATE. Probate is the court procedure for proving a Will, paying the bills, and distributing the estate.

Probate can be expensive, time consuming, and frustrating. Probate often runs 2-5% even on small estates, and can take 9 to 24 months. Probate is a matter of public record.

Once probate is opened, anyone can examine your file, even make a copy of your Will and get a list of your family members and their addresses. In other words there is no privacy about your Will or the assets you owned on your death.

Probate gives disgruntled heirs a low-cost opportunity to challenge your Will. A simple letter to a probate judge by a disgruntled heir can tie up probate for a year or more. Furthermore, if you own real estate in other states, your family may have to open probate in each of those states. Probate can be totally avoided by creating a Living Trust during your lifetime and then transferring record title of your assets to your Trust. For simpler estates, other techniques may be more appropriate, including the newly-authorized (in Colorado) beneficiary deed.

7. FAILURE TO PLAN FOR INCAPACITY: Incapacity can happen at any time due to a stroke, an accident, or Alzheimers disease. If you are not able to sign your name, who can legally sign for you? Of course any signer on a joint account can generally sign, but what about securities, real estate, and other assets? Your family may have to go to court to open a conservatorship. If there is any dispute in the family, the court might very well appoint a non-family member to manage your assets. A conservatorship can be expensive, time-consuming, and frustrating. Also, who will make health care decisions for you? Do you want to be kept alive in a coma? A properly-drafted living will, powers of attorney (one for health care decisions and another for financial decisions), and a Living Trust can help avoid the need for those expensive and time-consuming court proceedings called a conservatorship and a guardianship.

8. FAILURE TO MINIMIZE ESTATE TAXES. Your "estate" for estate tax purposes includes everything you own or control, even the death benefit of your life insurance. Currently the estate tax exemption is $5,000,000 (2011). Amounts in excess of the exemption are taxed at 35%, and the tax is due in cash nine months after your death. Is your estate "liquid" or is most of it tied up in real estate, a business, or farm? Consider using life insurance owned by an irrevocable trust to provide the cash to pay the estate tax. By providing liquidity your family will not be required to sell your estate at distressed prices.

So the good news is that if your estate is under the exemption amount, there will be no estate tax on your death. The bad news is that if you die in 2011 and leave $6 million to your children, the estate tax would be $350,000! With proper planning this tax can be significantly reduced or eliminated.

There is an unlimited marital deduction and an unlimited charitable deduction. Moreover, the estate tax exemption amount is scheduled to increase for inflation in 2012. If Congress does not extend the Bush era tax cuts, the estate tax exemption reverts to only $1 million in 2013. For many reasons it is likely than the current exemption is likely to be enacted permanently by Congress. Many professionals suggest that the safest way to plan is to assume that there will be at least a $3.5 million and more likely, a $5 million exemption, and that the amount will continue to be increased for inflation.

There are other numerous estate tax issues that you should discuss with your estate planning attorney, such as:

* Who pays the expenses and estate tax
* Survivorship provisions in your Will or Living Trust.
* Estate tax and expense allocations.
* Leaving assets to a well-to-do child.
* How gifting can affect your exemption amount.

For instance, having a survivorship clause that states "anyone who fails to survive me by 30 days will be deemed to have predeceased me" can be an estate tax disaster for a married couple in the event of a simultaneous death.

9. LEAVING EVERYTHING OUTRIGHT TO YOUR SURVIVING SPOUSE IF THE TWO OF YOU MIGHT HAVE A TAXABLE ESTATE. There is an unlimited marital deduction from estate taxes for the value of assets left to the surviving spouse, provided he or she is a U.S. Citizen. Thus, if you died in 2011 and left $3 million (your half of the assets owned by you and your spouse) to your surviving spouse, there would be no estate tax on your death. But you have lumped all the family wealth into the taxable estate of the survivor. If no estate tax return was filed on your death, and your spouse dies later in 2011, the estate tax on your spouse's $6 million estate would be $350,000.

This estate tax could have been totally avoided if this couple had a properly-drafted Living Trust Estate Plan with estate tax planning in place before the first death. Your Trust can provide for your spouse but in such a way that what you have left for her benefit is not part of her taxable estate. If drafted properly, your spouse can even be the trustee of the Trust. More importantly, any growth in the value of the assets you left in trust for your spouse would also be outside your spouse's taxable estate on your spouse's death. Thus, this type of planning may be better than just relying on an increased exemption by filing an estate tax return on the first death.

Estate Tax planning is very complex, and the topics covered here are very elementary. If you have or are close to having a taxable estate, you should consult with an experienced estate tax planning attorney. This is definitely NOT a do-it-yourself area.

In addition to estate tax issues, there may be a number of other reasons for not leaving everything outright to your surviving spouse, especially if you have children by a prior marriage (see topics below), or are concerned that your spouse may remarry and your children may be disinherited, or concerned about your spouse's ability to manage money.

10. MINOR CHILDREN: If you are providing for minor children or grandchildren, you should NEVER leave them their share outright. Perhaps your document says grandchildren inherit only if their parent is deceased. The problem with leaving an inheritance to a minor is that the court will require the establishment of a conservatorship for his or her benefit at a cost of, perhaps, $2,000 to $5,000 per child. The court will determine who will manage the beneficiary's inheritance (perhaps the child's father, your deceased daughter's ex-husband!).

One way to avoid the expense and frustration of a conservatorship, is to include in your Will a provision that your "executor is permitted to transfer any asset payable to anyone under 21 years of age to anyone selected by the executor, including the executor, as custodian under the Uniform Transfers to Minors Act (UTMA) for the benefit of such minor."

An UTMA account is required to be turned over to the minor at age 21 regardless of how mature they might be. Although you can name who will be the custodian (and successor custodian), you cannot control where it goes on the minors death.

Perhaps your child is no longer a minor, but still not able to properly manage large sums of money? Often, a better way to provide for minors (AND those who financially act like minors!) is not through an UTMA account, but through a sub-trust created under your Living Trust or under your Will. Such a Trust can provide funds to help raise the beneficiary, for college, to buy a home, etc., at the discretion of the trustee (who could be one of your other children). With a Trust, the beneficiary may have no right to demand any money until reaching the specified age.

Without such a properly-drafted Trust, the following problems may develop:

1) The inheritance is required to be turned over to the beneficiary at 21 years of age (even under a UTMA account). This could be the worst age at which to turn over a large sum of money. The Trust can provide that the funds will be turned over to the beneficiary when the beneficiary attains the age you specify, such as 25 years of age (or 50% at 25 and the balance at 30 years of age).

2) If the inheritance is for a grandchild and the parent is deceased, the other parent (your ex-son-in-law?) will most likely be appointed as conservator. With a Living Trust you can designate who will manage the money, perhaps one of your other children.

3) If the grandchild dies before 21 years of age, the inheritance held in an UTMA account or in a conservatorship will most likely pass to the grandchild's surviving parent (your daughter's ex-husband?). Your Trust can provide for this contingency by stating that upon the grandchild's death, such share will pass to your other children (or grandchildren). Many other potential problems can be avoided with a properly drafted Trust to protect such beneficiaries.

The Living Trust I draft typically contains an automatic trust provision as described above for any youthful beneficiary (under 25 years of age) or who is disabled. Many of my clients want to increase that age to 30 or 35 years of age!

11. USING THE WRONG ASSETS TO FUND A GIFT TO CHARITY: Mark wanted to leave $20,000 to his church upon his death, and the rest to his children. Mark's attorney was inexperienced in estate planning, and but for a very reasonable fee drafted Mark's Will as instructed: "$20,000 to my church and the balance equally to my children." Mark's large IRA passed to his children, who had to pay income tax on it.

Had Mark funded the charitable bequest with his IRA, there would have been $20,000 less taxable income to the children, increasing the amount that passed to them after income taxes by, perhaps, $6,000 (at a 30% rate for both federal and state income taxes.) Charities don't care if they receive taxable income, as they don't pay income taxes anyway. Mark saved a few dollars on the drafting side of his estate plan, which later, in effect, cost his children $6,000!

12. ADDING A PERSON TO YOUR CHECKING ACCOUNT: When you simply add someone's name to your account, you are subjecting that account to his or her creditors. You don't have to be a bad person to be sued these days or to be subject to a tax lien. Even if you trust that person, problems can develop.

Example: In the early 1990's, Jill Goodacre, a famous model from Boulder, and who was engaged to and later married Harry Connick, Jr., lost her checking account to her father's creditors. As reported in both Denver newspapers, here is what happened:

She put her father on her checking account (thus creating a joint tenancy account) so he could pay her bills while she was traveling. He had several creditors, however, and one of them filed a lien on the account. The bank was forced to pay the creditor $80,000 of Jill's money. When he was added as a signer, he legally became a co-owner of the account. He had a legal right under Colorado law to withdraw the entire account, and the creditor "steps into the debtor's shoes."

In addition, Jill was deemed to have made a taxable gift to her father at such time as the creditors withdrew money from the account! Don't you just love our tax laws! By the way, the same type of problem could occur if you add a child to your account.

Interestingly, if Jill had had a Living Trust, she could have had her father as a co-trustee with herself. As such, he still could have paid her bills from the account, but his creditors could not have attached the account. He would have been only a trustee and not an actual owner of the account.

13. PUTTING THE HOUSE (OR OTHER ASSETS) IN JOINT TENANCY WITH CHILDREN. Joint tenancy is often recommended for younger couples with smaller estates. Such assets do avoid probate, but on the first death only. There are usually subject to probate on the second death. A Living Trust can help you avoid probate on BOTH deaths!

Joint tenancy with non-spouses (such as children) should generally be avoided. Because such assets pass outside of your Will or Living Trust, they may pass in a manner inconsistent with your Will or Living Trust.

When you put your home (or any other asset) in joint tenancy with your children, it is a lot more than saying "I want you to have this after I am gone." Your children become co-owners of the property with you.

First Problem: Putting your home in joint tenancy with your children is a taxable gift under IRS regulations.

Second problem: If your child has any lawsuits against him, or is going through a divorce, or has a tax lien against him, you may find out that you no longer own it with your child, but with your child's creditors or predators. Those creditors can actually foreclose on (forced the sale of) your home to get at your child's fractional share.

Third problem: When you go to sell their home, you can use your primary residence exemption (up to $250,000 of the gain on the sale of your home) only on your fractional share. Each of your children may have a LARGE long-term capital gains tax bill to be paid that could have been totally avoided if the house had still been titled just in your name.

Fourth Problem: In order to sell your home, your children (and in some cases your children's spouses!) will need to sign the deed. If they don't agree that the house should be sold, you can't sell it!

People often act in unexpected ways when money is involved. The influence by your child's spouse may be particularly strong under such circumstances. If the reason you are putting your home in joint tenancy with your children is solely to avoid probate, there are probably better ways of accomplishing that, such as using a Living Trust or a Beneficiary Deed.

14. FAILURE TO PROVIDE FOR CONTINGENT BENEFICIARIES: Assets with beneficiary designations, such as IRAs, life insurance, and annuities, generally pass on your death to the surviving beneficiaries unless otherwise indicated on the beneficiary form on file with the plan administrator or insurance company.

So if your daughter is deceased, her share will not pass to her children, but to your other children, regardless of what your Will says.

The mistake is not providing for contingent beneficiaries. If the beneficiary predeceases you, do you really know to whom the asset will pass? The beneficiary or account form may control, your Will may control, or the law of intestacy may control. Wouldn't you rather control who gets the money?

Many people will name their Living Trust as the beneficiary of their life insurance and the like because the Trust covers contingencies much better than most beneficiary forms.

Similar problems may also arise in a Will or even a Living Trust. For instance if your Will says: "I leave my residuary estate to my spouse, and if deceased to my son." What if the three of you die in a car accident? Who would you want to receive your estate? If you have no relatives, it will escheat to the State of Colorado!

If your spouse survives you and your son, if only briefly, your estate, your son's estate, and her estate may pass solely to her relatives. Although a surviving spouse can always change his or her Will, consider adding a provision like this to your Will: "If I have no surviving spouse and no descendants, I leave 50% of my estate to my parents, and if both are deceased to my siblings; and 50% to my spouse's parents, and if both deceased to her siblings." Custom drafting is often needed, depending on the family situation. Remember to provide for contingent beneficiaries on your IRA and life insurance policies as well. Obviously this issue becomes less important if you have many children and grandchildren, and perhaps more important if you have no children. This type of provision is often included in a Living Trust.

15. NAMING YOUR ESTATE AS A BENEFICIARY: It is usually inadvisable to name your estate as a beneficiary or your life insurance and IRAs and the like. There are at least three reasons why.

First, assets payable to your estate are subject to probate. Second, by naming your estate as beneficiary you subjected those assets to the claims of creditors. You say you don't have any? Maybe not now, but a claim could arise on your death (an auto accident at which you were at fault.) Maybe your final expenses (hospital, nursing home, etc.) will devastate your estate. Furthermore, such claims could delay the distribution of your estate until the claims are settled, which could take years in the event of an auto accident, even if you were insured.

Third, if you name your estate as the beneficiary of your IRA, it may have to be liquidated (and taxes paid) within five years after your death. If you had named your spouse, she can roll it over and defer making distributions until she is 70 ½ and over a longer period of time. If you (or wife then) name the children, they can make withdrawals over their life expectancy (perhaps 40 to 60 years!) They can always pull out more, but they can control the timing (and thus the taxation).

If you have a Living Trust, it might be advisable to name your Trust as beneficiary. In certain circumstances it may even be advisable to name the separate trust shares for each child. In discussing these matters with your estate planning attorney, it is very important to VERIFY your beneficiary designations (or file a new form) and NOT rely of your memory! Your estate planning attorney's beneficiary recommendations may vary, depending upon the type and value of your assets and your family situation, and the exact wording in your living trust.

16. THE DISABLED BENEFICIARY: By "disabled beneficiary", we mean one who is or might become eligible for SSI or Medicaid. If you leave the inheritance outright to a disabled beneficiary, he may be ineligible for public assistance until he spends the inheritance down to the statutory $2,000 limit. The inheritance may be gone in just a few years before the beneficiary would be eligible again for SSI and Medicaid.

If you leave the disabled beneficiary's inheritance to another person (say the disabled child's brother) with the understanding that that person would help the disabled beneficiary, that person may die, get a divorce, or be sued, and that intended inheritance may not be available to the intended beneficiary.

The solution to many of these issues is to leave the disabled child's share in a "Special Needs Trust." Such a Trust can keep the child eligible for public assistance while still providing for those things which Medicaid and SSI will not pay for. The Trust share for a disabled beneficiary can be managed by the selected family member, and can be available for the beneficiary's "supplemental needs" - over and above what Medicaid or SSI would provide.

Such a Trust can provide the disabled beneficiary with a specially-equipped automobile, stereo equipment, computer equipment, vacations, and even compensate family members and others for helping with the care of the disabled beneficiary. Even a small amount of money left to this type of Trust can make a significant difference in the beneficiary's lifestyle over a great many years, and yet still keep them eligible for SSI and Medicaid. Remember, if you have such as Trust in your document, DON'T name the child directly as the beneficiary under any IRAs, life insurance, etc. Name the Trust share for the disabled child's benefit as beneficiary. Your estate planning attorney can help you with the exact wording.

The "Special Needs Trust" is just one of the many subtrusts we often include in our Living Trusts for our clients.

17. FAILURE TO MAKE SPECIAL PROVISIONS FOR THE SPENDTHRIFT CHILD: After you are gone, will your beneficiaries use their inheritance in a constructive manner? Or will they waste it foolishly? How are they today at managing their money? That may give you some idea as to how their inheritance will be spent after you are gone. Will it be available for the education of your grandchildren, or will it all be gone in just a few years? Will it be used for drugs? Will it fall into the hands of his or her spouse?

Many of our clients like the idea of holding an inheritance in trust until the beneficiary reaches a certain age, such as 30 years of age. Others like giving their children 1/3 after they are both gone, with another 1/3 in five years, and the last third five years after that. That gives the beneficiary three chances to blow it!

We have had some clients that are so disillusioned with a child's financial abilities that they have required that the child's share be distributed in monthly payments over 20 years or more. Other clients have required that their children be tested drug or alcohol free monthly for thirty-six months before receiving an inheritance outright.

If an inheritance is being held in trust for a beneficiary, it's important to protect such inheritance from the beneficiary's creditors with a "Spendthrift Clause" similar to this: "The interests of the beneficiaries shall not be transferable by voluntary or involuntary assignment or by operation of law and shall be free from the claims of creditors and from anticipation, attachment, execution, bankruptcy, and other legal process to the fullest extent permissible by law." Remember, as long as an inheritance is being held in trust with such a spendthrift provision, it can be protected from the beneficiary's spending habits, from creditors, and, to some extent, even from divorcing spouses. Also, your Trust can control where the inheritance goes upon the death of the beneficiary.

Many of our clients would prefer to see a deceased child's inheritance go to the deceased child's children, or if none their other children, rather than the deceased child's spouse. Few things are sadder than seeing a parent disinherit a child because of his or her spouse. Such a Trust may be a viable alternative. A properly-drafted Living Trust Estate Plan can include these subtrusts at little or no additional cost, yet still provide the desired protection for your family.

18. FAILURE TO CONSIDER THE HERITAGE TRUST IN LIEU OF OUTRIGHT DISTRIBUTION. Even if your child is responsible and you "trust her", there still might be reasons for leaving her share in trust rather than outright. The Heritage Trust might be the ideal way for her to receive her inheritance. Your daughter can be the sole beneficiary. Your daughter can be the Trustee - that means she is in control of her trust. Income and principal can be available for her needs, and she controls how it will pass upon her death.

Properly structured and administered, the inheritance can be protected from her creditors, protected in the event of a divorce, and not includible in her taxable estate when she dies. If protecting your children, while still leaving them in control, interests you, discuss the "Heritage Trust" with your estate planning attorney.

19. THE DISINHERITED CHILD: Ken's Will left his estate to his two children. But his Will never mentioned Ken's child by a prior marriage and whom Ken had not seen in years. Although you can disinherit your children by specific reference in your estate planning documents, because there was no reference to Ken's first child in the Will, that child may be entitled to a portion of Ken's estate under state law.

Moreover, if the disinherited child contests the Will, he may force the other children to settle for a significant portion of the estate to avoid tying up the estate in probate for potentially a year or more.

Some people will leave a disinherited child one dollar, which shows that they at least acknowledge the child and intend not to leave them anything substantial. We feel it is better to acknowledge their existence, and then state, "that for reasons personal to me, I have not left my son, Joseph, anything in this Will."

Better yet Ken could have used a Living Trust Estate Plan, rather than relying on a Will to pass his assets. With a Will Ken's executor is required to notify all heirs, including persons (such as Joseph) who would inherit property if there were no Will. But with a Living Trust, there is no such requirement. Accordingly, if you plan to disinherit a relative, you should consider using a Living Trust to make your estate plan more bullet proof.

20. FAILURE TO UNDERSTAND HOW DIVORCE MIGHT AFFECT YOUR ESTATE PLAN. The law is quirky in the event of a divorce. A client came to see me saying that he didn't need to change his estate plan because his divorce attorney told him that his wife was automatically written out of his Will by law once the divorce was final. Although that is true, that law may not affect beneficiary designations and joint tenancies.

The client had not changed any of those. Had he died that day, a significant portion of his estate would have passed to his ex-spouse! Don't gamble with your children's inheritance; double check those beneficiary designation forms or file new ones (that may be easier that checking on existing forms.) Double check joint tenancies as well.

Margaret got a divorce but forgot that "her" checking account was originally set up so that both of them could sign. After the divorce she sold her house and put the proceeds in the joint checking account shortly before she died. The entire account passed to her ex-husband upon her death. Had she had a Living Trust and transferred this account to her Trust, the joint tenancy would have been negated.

21. DID YOU REMARRY? Several problems arise when one remarries, most of which can be solved by a prenuptial agreement (discussed below). The first problem we see is that people sometimes feel that there is no need to change their Wills. Let's say your old Will leaves everything to your children. You remarry and still want all your assets to pass to your children.

If you don't update your Will (even with identical terms but SIGNED AFTER the marriage), your new spouse is entitled to an "intestate Share" which might be all or a major portion of your estate, even if you die a week after the wedding. If you have remarried and have not updated your Will, be sure to discuss this with your estate planning attorney.

22. FAILURE TO OBTAIN A PRENUPTIAL AGREEMENT: Many people think a prenuptial agreement is for divorce planning. But a well-drafted prenuptial agreement can also protect your assets from spousal claims upon your death. John married Barbara when they were both retired. He kept his assets titled just in his name because he wanted his assets to pass to his kids on his death, and Barbara wanted her assets to pass to her kids on her death. They did not sign a prenuptial agreement, but did prepare new Wills after they were married acknowledging their new spouse and leaving their respective estates to their respective children. But the law says that without a prenuptial agreement (or other such marital agreement) signed by both parties, you can't disinherit your spouse.

The law grants a surviving spouse a statutory interest (as much as 50% or more) in the "augmented estate" of the first to die, which is a lot more that just the probate estate. This problem can be avoided with a properly-drafted prenuptial agreement.

23. FAILING TO REALIZE THAT YOUR SURVIVING SPOUSE CAN ALWAYS CHANGE HIS OR HER WILL: Jeff and Sara had been married for over 25 years. Each of them had two children by a prior marriage. They wanted to provide for each other first, and then leave the assets equally to all four children.

Although their Wills stated this intention, the survivor could always change his or her Will to leave everything to his or her children. Or if the survivor's Will cannot be found (perhaps destroyed by one of the survivor's children), then all of the assets would pass to the survivor's children. The use of Trusts can help protect children by a prior marriage. In addition, we often use a separate agreement under which each spouse promises not to disinherit the children of the first to die. This agreement can actually give the children of the first to die enforceable rights to inherit from the surviving spouse.

Second marriage planning is often complex and doesn't get the attention it usually deserves, even from some attorneys who specialize in estate planning.

24. FAILURE TO DEFINE DISABILITY: A power of attorney may state, "upon my disability, my agent shall have all the powers defined herein." Similar language might also be found in a Living Trust. But without more, a bank or brokerage firm might very reasonably ask, "How do we know he is disabled? Bring me a court document stating so." Of course, a court order can only be obtained by opening a conservatorship. A conservatorship is the very expense you were trying to avoid by executing the power of attorney (or Living Trust).

Your document should define disability, such as follows: "A person shall be deemed disabled during any period when, in the opinion of the person's attending physician, the person is incapacitated or disabled because of illness, substance abuse, age, or any other cause which results in the person's inability to effectively manage his or her property or financial affairs." In addition, I suggest including something in your documents like this: "I encourage my physicians to be liberal in issuing such certifications for my own protection."

Seniors who are already in failing health and have 100% trust in their agent (their child?), should probably make the document effective immediately without having to provide proof of disability. We often add children as co-trustees with some of our ailing seniors. These aspects should be discussed with your estate planning attorney.

25. PAY ALL MY JUST DEBTS: Many older form documents that can found in "computer Wills" and on the Internet have a provision stating, "my executor shall pay all of my just debts." That sounds noble, so what is wrong with it? At least two problems have surfaced over the years. What about a debt that was discharged in bankruptcy many years ago? At least one court has ruled that such debt, although unenforceable by the creditor because of discharge, is nevertheless a "just debt." I believe that most of my clients would prefer to see that money go to their family rather than some past creditor.

What about a low interest rate mortgage? That is a just debt. Did the maker really intend that such mortgage be paid in full upon his death, or would he have preferred to have his family inherit the asset and benefit from the low interest rate mortgage? I suspect the latter. What about that loan you co-signed for to help your son buy his house?

State law requires that certain debts be paid by the executor anyway, so why use wording that may give creditors more rights than you might want them to have?

26. FAILURE TO INCLUDE A CONTEST CLAUSE: Many Wills and Living Trusts should include a "contest" clause, which looks something like this: "If any beneficiary under this Will in any manner, directly or indirectly, contests or attacks this Will or any of its provisions, any property, share or interest in my estate given to the contesting beneficiary under this Will is revoked and shall be disposed of in the same manner as if the contesting beneficiary had predeceased me without issue."

If you feel it is likely that a particular beneficiary is likely to challenge the Will, specific reference to such beneficiary would be appropriate, including wording like this: "I encourage any court reviewing this clause to (1) eliminate his interest herein, or, at a minimum, (2) charge such child's share with any extra costs incurred by my estate as a result of such child's questioning the validity or administration of my Will."

Although courts will not always enforce such provisions, especially if the contesting party has reasonable grounds, the provision certainly does have a cooling effect on threatened litigation. Other drafting techniques may be appropriate when there is a likelihood of challenge.

Because a Living Trust remains a private document upon your death with no requirement to notify relatives who are not also beneficiaries under your Trust, a Living Trust can also reduce the likelihood of challenge for a number of reasons.

27. LIVING WILL PROVISIONS: The Colorado statutory Living Will form is used by most form books and even by most attorneys, and looks something like this:

> I declare that if at any time my attending physician and one other physician certify in writing that I have an injury, disease, or illness which is not curable or reversible and which, in their judgment, is a terminal condition, and that for seven consecutive days I have been comatose or otherwise unable to make responsible decisions concerning my person, then I direct that life-sustaining procedures shall be withdrawn and withheld.

A few suggestions: (1) include "a persistent vegetative state" with the terminal condition. (2) Delete the seven day waiting period - it's not required by the statute. (3) add: "I do, however, ask that medication be mercifully administered to me to alleviate suffering even though this may shorten my remaining life." and (4) Include a provision like this in power of attorney for health care: "I grant to my Agent the power to enforce, amend, or revoke any Living Will of mine." I find that most clients want their families - and not the hospitals and doctors - to have the final say.

28. FAILURE TO INCLUDE "GIFTING PROVISIONS" IN YOUR POWER OF ATTORNEY: Consider including gifting powers in your power of attorney. These powers could permit your agent to make gifts to reduce estate taxes or to achieve Medicaid eligibility sooner (to pay nursing home costs) and preserve at least some assets in the family.

The IRS has taken the position that if the power of attorney does not specifically authorize gifting (the power to "do anything I can legally do" is NOT sufficient), then the gift is revocable by the principal and will be drawn back into the principal's taxable estate.

Consider language like this: "I authorize my Agent to make gifts (outright, in trust, or otherwise) to any of my descendants, including such agent, and the spouses of all such persons, to the extent such gifts will be eligible for the annual gift exclusion. It is my intention that such gifts shall represent an advancement of any amounts to be received pursuant to my Will or my Living Trust and that any gifts to a person who is not a beneficiary under my estate plan, but who is a beneficiary's spouse, descendant, or spouse of a descendant, shall be chargeable against the share of such beneficiary."

You should also consider adding broader gifting language for estate tax planning or Medicaid planning. To do effective gifting under the power of attorney, your Living Trust should permit your agent to make withdrawals for the purpose of gifting. Discuss this aspect with your estate planning attorney.

29. TRYING TO PLAN AROUND SPECIFIC ASSETS: Unless there are compelling reasons why a specific asset should go to a specific person, we strongly discourage our clients from trying to plan around specific assets.

Example: Bill had three children and wanted to treat them equally. His Will even confirmed this. Several years before he died, he put his home in joint tenancy with his older son, added his daughter as a signer on his savings account, and named his younger son as the beneficiary on his life insurance policy. When he did this, all three assets were about equal in value. But between when he did this and his death, he sold the home, put the proceeds in the savings account, and let the life insurance policy lapse. The savings account, of course, passed on his death to his daughter, and not pursuant to his Will.

By planning around specific assets, he actually disinherited two of his children!

By the way, this problem often surfaces in a Will as well. If an asset is no longer owned, the bequest lapses. Let's say your Will leaves rental home #1 to your son and rental home #2 to your daughter, and the balance equally to both children. If you sell rental home #2, and then die, your son still gets rental home #1 plus he gets a full 50% of your other assets (including the proceeds from the sale of home #2) and your daughter gets the other 50%.

A good attorney will discuss this "ademption" aspect with the client, even if the client insists that "the rentals will never be sold." For instance, in some of our Trusts we provide that the estate will be divided equally, with the son having the right to take house #1 at its appraised value as part of his share, and the daughter having the right to take house #2 as part of her share.

30. FAILURE TO CONSIDER THE ADVANTAGES OF A LIVING TRUST: Many people who have Wills would be better served by have a Living Trust estate plan for a great many reasons. We frequently hear that "Oh, my accountant says I don't need a Living Trust because I don't have a taxable estate." Reducing estate taxes is just one advantage of having a Living Trust, and even then, only for married couples. There are many other advantages of a Living Trust over a simple Will or joint tenancy:

<u>Avoiding probate</u>: Although probate in Colorado is relatively simple when compared to many other states, it may still cost your family 3% to 5% of your estate or more. Cost is not the only reason for avoiding probate. If a creditor sends a bill to your daughter who has been appointed as your executor under your Will, it is a properly presented claim will have to be paid or litigated.

On the other hand, if your daughter were serving as the trustee of your Trust and probate was never opened, the creditor would have to open probate (at considerable expense) to properly present the claim. If the creditor fails to do so within one year of your death, the claim is unenforceable under state law.

<u>Privacy</u>: Everything in your probate file is a matter of public record, including your Will, list of assets, and the names and addresses of your family and beneficiaries. A Living Trust is a private document that no one is entitled to see unless he or she is a beneficiary.

More Difficult to Contest: In probate you have to give notice to disinherited family members and advise them of their right to hire a lawyer and challenge the Will. With a Living Trust, there is no requirement to do so.

Avoid a Conservatorship: If you unable to sign your name due to a stroke or accident, your family may have to go to court and open a "conservatorship" so that someone can manage and liquidate the assets titled just in your name and to pay your bills. Even an uncontested conservatorship may be very expensive ($2,000 to $5,000 in the first year alone is not uncommon) and is very time consuming. Plus, each year the conservator must submit accountings to the court. Assets owned by your Living Trust can be managed by your successor trustee (perhaps your spouse or your child) without the need for a conservatorship.

Out-Of-State Real Estate: If you own real estate (such as house, farm, vacant lot, time-share, or oil & gas interests) in other states, your family may have to open probate in those states as well. That is because the Probate Court in Colorado has no legal jurisdiction over real estate in other states. But if your Living Trust owns that real estate, probate can be avoided in those other states as well, saving your family, perhaps, several thousand dollars.

Your family has enough other things to worry about upon your death. The Living Trust can make things simpler, less expensive, and less frustrating for them. It is not the size of your estate that counts, but the size of your heart.

31. IF YOU HAVE A LIVING TRUST, BE SURE TO "FUND" IT: If you have a Living Trust, be sure to fund it with your assets by changing record title or beneficiary designations. If you don't fund your Trust, you may be negating some of the benefits of having a Living Trust. Funding a Living Trust may involve some important tax issues that you should discuss with your estate planning attorney.

Nevertheless, in Colorado you can still avoid probate if the assets titled in the decedent's name involve no real estate and do not exceed $50,000 in value. For that reason we suggest that you not worry about changing title on your car or other assets with minimal value.

32. ASSUMING THAT IF YOU DO HAVE A LIVING TRUST, IT WILL ACCOMPLISH ALL THE THINGS WE DISCUSSED IN THIS MEMO: We have seen many poorly-drafted Living Trust Estate Plans (and Will-based Estate Plans) drafted by inexperienced attorneys, by financial planners, or CPA's. Some Living Trusts will not even avoid probate, as such Trusts say "Upon my death my Trust shall be distributed to my estate." Many Trusts drafted for married couples don't have estate tax planning provisions.

A Living Trust can be as short or as long as you want to make it. There is no such thing as a "standard living trust." A one-page trust may technically be a Living Trust, but it probably does not do many of the things we have discussed in this report. Assuming that Living Trusts are all basically the same can be a costly error. If you have any doubts, we suggest getting your estate plan reviewed by experienced counsel.

That's the 32 errors we promised you. Here are a few more:

33. FAILURE TO PLAN FOR A PROLONGED NURSING HOME STAY: Consider purchasing long term care insurance. But if you are too old, too poor, or too sick, it may not be available or cost effective.

We have helped many of our clients qualify for Medicaid through various specialized planning techniques, including irrevocable trusts, asset transfers, and personal service contracts. While such planning may be inappropriate for someone who is in good health and in their fifties, it might be vary appropriate for someone in their seventies or eighties. Because people have different assets and different family situations, there are no general rules, except to say that the sooner you plan, the more your family will save. Be sure to consult with an estate planning attorney who is knowledgeable about elder law issues.

34. TRYING TO "DO IT YOURSELF": This memo has already pointed out many of the mistakes you can make by doing it yourself. Here is another example: John borrowed his friend's documents and retyped (or scanned) them, but modified the "Family Trust" provisions to allow his spouse to make distributions not only for her health, education, maintenance and support, but also for her comfort and welfare. John didn't realize it but adding those two words ("comfort and support") destroyed the estate tax planning for his documents, perhaps costing his family the $350,000 if his estate were $6 million and they both died in 2011 and no estate tax return was filed on the first death. Your estate, even if it is small, still represents big bucks to your spouse and children. Use a competent estate planning attorney to make sure that your estate plan and any changes are written correctly.

35. FAILURE TO DO ANYTHING: If you do nothing, Colorado has an estate plan for you, and it may not be what you would want. Not many people would purposely let their state legislature draft their Wills for them, yet that is what you get if you don't plan yourself.

For instance, if there are considerable assets titled just in the husband's name, those assets may be distributed approximately 50% to the surviving spouse and the other half to the children. I find that is rarely what my married clients would want. They want to provide for each other first, and have the children receive their inheritance only after the parents are both gone.

Many married couples erroneously assume that if one spouse dies, all of his or her property will pass to the survivor. Wrong! Colorado law may require that a significant portion pass to the deceased spouse's children, or even his or her parents! At a minimum, you should consider at least having a Will.

Consider also that by having a properly drafted and funded Living Trust, you can avoid a conservatorship if you become disabled, avoid probate on your death, and, for married couples and depending on the size and growth of the estate, save considerable amounts in estate taxes than if you relied on a simple Will or joint tenancy. A Living Trust can make things a lot easier for your family upon your death or if you become unable to manage your own financial affairs.

36. FAILURE TO TAKE ADVANTAGE OF THE FREE PRIVATE CONSULTATION:

The problems discussed above are only a sampling of the estate planning mistakes that are frequently made. Many times we are able to make changes to estate plans to avoid these problems. Other times, it is too late to solve the problem, especially if the person is then disabled or deceased.

We hope these examples of common estate planning mistakes have helped you better appreciate the complexities of estate planning and the role that an experienced estate planning professional can have in creating and updating your estate plan.

As you can see, with proper planning, you can make things easier and less expensive for your family upon your disability and upon your death. A well-drafted Living Trust Estate Plan is worthy of your consideration. That is why we offer a free consultation to review how a Living Trust Estate Plan can benefit your family. We can discuss reviewing your existing documents and what other documents might be needed. We ask that you complete the Estate Planning Work Sheet before you come in and bring it, as well as any other documents you would like me to discuss, to the meeting. You are invited to call our office at 303-488-9888 to arrange for your free, no-obligation consultation.

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