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THE SEVEN MOST COMMON MISTAKES

MADE IN ESTATE PLANNING

(e-book)

By

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About the Author

Dwight Edward Tompkins received his Juris Doctor from Loyola Law School, Loyola Marymount University, Los Angeles, California, and is admitted to the State Bar of California.

Dwight is in private solo practice in Anaheim, California, and his law practice focuses in the areas of Estate Planning, Trusts, Wills, Corporations, Business Law, and Nonprofit law.

He is a member of the Trusts and Estates Section of the California State Bar, and he regularly speaks at Estate Planning Seminars for churches, civic groups, businesses, and other groups.

Dwight is a member of Rotary International and has traveled throughout Mexico and Korea in the past few years working with Rotarians in Mexico and Korea in literacy, health, and educational exchange projects.

An avid backpacker and hiker, Dwight has hiked to the bottom of the Grand Canyon twice, in 2005 and 2007, including a rim-to-rim trip of 23.9 miles with his son and daughter, starting at the North Rim and ending at the South Rim of the canyon.

INTRODUCTION

In the past two decades, I have worked closely with clients in the area of estate planning, which is one of the most rewarding and positive areas of legal practice that an attorney gets to do in his or her career.

As with everything in life, there is right way to do something and the wrong way to the same thing.

There are seven common mistakes which are made by clients when they are not represented by a qualified estate planning lawyer. Avoiding these mistakes will not only save money, but will also ensure that the client's family is taken care of, which is the ultimate goal in estate planning.

MISTAKE #1:

DOING NOTHING – FAILING TO PLAN

A person who dies without a will or trust is said to have died "intestate".

There are very often unintended consequences of the failure to plan. Family members, who the decedent would not have wanted to share in the estate, get a share; and sometimes, a large share.

The estate ends up in Probate Court as public record in the courthouse, with the government deciding who gets what.

There are many excuses given by people who refuse to make a will or a trust ---

- ✓ **I'm not rich enough to have an estate plan**

- ✓ **I'm too young to worry about that now – I'll wait until I'm "old"**

- ✓ **Lawyers are too expensive (I don't have the money right now to pay a lawyer)**

- ✓ **I have to get my affairs in order before I can think about that**

- ✓ **My uncle had a trust, and it was a mess**

The fact is that every adult at any stage in their life can benefit from an estate plan. My clients range in age from their twenties to their nineties.

Most of my clients are average folks: They own their own home (along with the bank), have some money in the bank, and some form of a retirement account. They enjoy the same benefit from a living trust, just as the multi-millionaire client with the 3 corporations, 10 houses, and the large bank accounts.

THE BOTTOM LINE: <u>WEALTH AND AGE HAVE NOTHING TO DO WITH THE NEED TO PLAN YOUR ESTATE</u>!

Attorney's fees are scary to some people because they have had bad experiences in family law, criminal law, or heard stories from friend and families about being "ripped off" by their lawyer.

The fact is that the average living trust estate plan that I prepare is only a few hundred dollars, compared to the thousands of dollars spent by the family in Probate Court without a trust.

Compared to life insurance policies (I pay over $100 a month in premiums for a term life policy), the expense of $600 or so, is very cost effective, because the living trust estate plan will be in effect for years, sometimes decades before it is even amended.

Even the amendments are not that costly: $350 on average. Most of my clients will amend their trust once in their lifetimes. Over 20 years, that amounts to a little over $4 a month for a simple trust and an amendment.

There are some individuals who believe that they have to get their "affairs in order" before coming to see me. This is often because they are embarrassed by their apparent disorganization of assets and accounts.

Everyone, in one way or another, is uncomfortable about their handling of their assets. But, after a client gets past being uncomfortable, makes an appointment, and executes their will or trust; they often will say to me "you made that so easy", or "that wasn't as bad as I thought it would be", or "that was easy".

Finally, when someone tells me their uncle's estate was a mess, I find that it is usually not a problem with the trust itself, but with the administration of the trust by their uncle or problems created by family members after the uncle's death.

A will or trust won't stop greedy family members from causing problems, but without the will or trust, the problems will always be much, much worse.

MISTAKE #2:

RELYING ON JOINT TENANCY

Very often, people who don't want to go to a lawyer (for reasons given above in Mistake #1) will set up joint tenancies as their estate planning method.

Two of the common cases go like this:

1. Married Men: "I've set up everything so when I die, everything will go to my wife".

There are lots of mistakes in this thinking. Men often think they will die before their wives. While statistically more likely, there are many men who find themselves as widowers asking "now what do I do?"

The biggest problem is that after one spouse passes away, the whole estate ends up as an "intestate" probate case in court when the surviving spouse passes away.

2. Widows, Widowers, Single Persons: "I've put my oldest daughter (son) on all my accounts and on the house, and when I die my daughter (son) will divide up the property with their siblings"

This arrangement has so many problems that I will only highlight a few of the worst.

First, every year, thousands of contested cases end up in court all over the U.S., because after mom or dad died, the daughter (or son) on title as joint tenant refused to divide the property up with their brothers and sisters.

Joint tenancy creates an automatic transfer of ownership from the deceased joint tenant to the surviving joint tenant. To use an old saying: "they get the whole enchilada".

The daughter (or son) on title with mom and dad automatically become the sole owner of the property BY LAW.

When the daughter (or son) keeps the house and the money for themselves, their brothers and sisters sue them.

The court will most often decide in favor of the joint tenant daughter (or son), and against the rest of the siblings.

Why? Because the court will look at the written deed and bank account papers that mom or dad signed, and the court will conclude that mom or dad must have intended that just the one child was to get the property and the money. The only evidence the other family members usually bring is "oral testimony" that "mom said……"

You might say to yourself as you read this, my daughter or my son would never do that. But, in all of the thousands of cases that end up in court, the mom or dad in those cases never believed that either, or they never would have made that arrangement.

Even if the daughter or son is honest and divides up the estate, since the property is now in their name when they give it to their brothers and sisters, the daughter or son --- not the parent --- is deemed to be giving the gift; and if that gift is more than the gift tax exclusion amount (currently $13,000), then the donor child will have to pay a hefty tax to the federal government known as the "Gift Tax".

Well, you might say, the solution is to put all of the kids on the deed with mom or dad.

This leads to another pitfall. When a person puts their children on the deed to the home or on their bank accounts; those children are owners of the property and the money.

A judgment creditor of one of the children or the IRS (if the child owes back taxes) can lien or attach the property and the bank accounts, and in an instant, money can be swept out the bank account, and the title on the real estate clouded and made unmarketable.

Joint Tenancy has its place in certain limited circumstances, but should NEVER, NEVER be used as a complete estate plan method.

A living trust is always superior to joint tenancy.

MISTAKE #3:

USING UNQUALIFIED ADVISORS

Again, this problem stems from people being leery of lawyers and/or afraid they will have to pay exorbitant attorney's fees.

At the heart of estate planning is the consultation and advice of what is the best way to achieve the client's goals and objectives. This makes estate planning the practice of law.

In spite of this, there are plenty of "snake oil salesmen" around touting cheap trusts to unwary people.

Always go to an experienced attorney for estate planning legal services. By an experienced attorney, I mean a licensed attorney in your state, who prepares estate plans on a regular basis, and estate planning consists of a major part of their law practice.

Estate planning represents approximately one-half of my practice year to year; with the other half devoted to corporate, business, real estate, nonprofit, and transactions.

The various unqualified purveyors of cheap, and usually unsuitable and badly written trusts include:

- ✓ **Life insurance agents using self-given titles like "Certified Estate Planner"**
- ✓ **So-called "paralegals", "accountants", "tax preparers", "financial advisors", and other quasi-professionals working in the financial industry**
- ✓ **Internet sites**
- ✓ **Lawyers who rarely prepare estate plans**

In recent years, some life insurance agents (known as "Life Agents" under California) law have used the ploy of offering estate plans to elderly people as a "lead in" to sell life insurance products, especially annuities.

They give themselves titles, and place them on their business cards, saying they are a "Certified Estate Planner". There is no such thing in California where I practice law.

The trusts they produce are boiler-plate, flawed, and unfunded; and worse they often sign up the elderly person to an annuity which is unsuitable.

The trust is free or costs very little, because the life insurance agent is getting a generous commission on the sale of the annuity. In the financial planning world, the commissions paid to agents on annuities are higher than all other products including insurance and mutual funds.

There are other non-lawyers who work in the financial planning industry who offer to do living trusts, but lack the training and licensing to practice law. More often than not, the trusts they produce are inappropriate, and are unfunded or underfunded.

No one who watches cable television can escape the ads for an internet site that offers trusts and wills for amazingly cheap price. If you visit the website and look carefully, they claim that although the website is owned by lawyers, they are not giving legal advice, and you should not rely on the information or products on their site as legal advice.

Wow!! So what's the point of going to their website? On top of that, their front man in the ads is a former criminal law attorney. Criminal law attorneys know just about as much about estate planning as I know about criminal law.

This leads me to the last of group of unqualified estate planners, lawyers who really practice in some other area of law.

Just like doctors, lawyers tend to focus their practices in specific areas of expertise. You wouldn't go to a foot doctor for open heart surgery. So why would you go to a criminal attorney or bankruptcy lawyer to set up your living trust?

The bottom line: Look for a qualified estate planning attorney in your community to help you. Ask for referrals at work or church, from family members and friends, or from other associates.

Local bar associations will often have referral panels in specific areas of practice, including estate planning. Or contact me at detlaw@juno.com

MISTAKE #4:

FAILING TO FACE FAMILY REALITIES

Only you know your family. Be realistic and honest with your estate planning attorney when you meet with him or her.

Most families have problems, and it is important to understand that communicating the facts to your lawyer is essential.

The 2 big decisions made by clients in forming a will or a trust is the selection of a personal representative, and who will be the beneficiaries and what will they get.

In living trusts, the personal representative is called the "Successor Trustee". It is not by mistake that trusts are called <u>trusts</u>.

In a trust, the person named to be the Successor Trustee will manage the trust and settle the trust without court supervision in private.

The trustee you name has to be trustworthy. It is a mistake to name the oldest son as the trustee just because he is the oldest son, especially if he has been in jail for theft-related crimes or has a bankruptcy on his record, or is known to have money problems.

Clients are often afraid to offend someone or to violate traditions, or worse, they turn a blind eye to the drinking and drug problems of one of their adult children.

Many families face the same difficulties. However, you want your estate to be handled honestly and efficiently.

Truthfully evaluate your family and pick the best trustee. If there are no suitable family members as trustee, talk to your attorney about it, as there are alternatives.

Trustees not only have to be honest but capable. All of us have family members who are extremely honest, but are not good managers. You want to select a trustee who is honest and can handle your affairs when your pass away.

An experienced estate planning attorney will be of great help to you in evaluating your estate plan options.

MISTAKE #5

FAILING TO FUND LIVING TRUSTS

To be effective, a living trust must be fully funded, that is, title to the estate's property and assets should be in the name of the trust.

I like to compare a living trust to a bucket because a bucket can contain things, but it is open at the top allowing for things to put into the bucket and taken out of the bucket.
In a similar way, a trust can hold title to the assets, and at the same time assets may be transferred into and out of the trust.

The transfer of property into a trust is referred to as "funding". A fully funded trust avoids probate because the owner really doesn't own anything at his or her death, the trust owns the property.

And because the trust is not human being, it survives the death of its creator. This is how a trust estate avoids probate.

Many of the trusts made by non-lawyers (Mistake #3 above) are unfunded or underfunded, which results in the estate going through probate, even though the decedent had created a living trust.

This is sometimes the scenario that we hear when someone says "my uncle's trust was a mess".

It is not enough to just sign a trust. The next steps are to transfer property to the trust --- put them in the bucket.

Experienced attorneys who regularly handle estate planning matters know the procedures for funding trusts.

MISTAKE #6

FAILING TO REVIEW THE ESTATE PLAN & KEEPING IT UP TO DATE

Even if the trust is properly prepared with the assistance of a qualified attorney, and fully funded, it is very important to periodically review the trust provisions, and the funding of the trust.

Major life changes should remind the client to look at the trust or will to see if it is up to date and that if the plan involves a trust, that it is fully funded.

The major life changes that should trigger a review of the trust or will are:

- ✓ **Birth of children, grand-children, etc., including adoptions**
- ✓ **Death of spouse, children, grand-children, etc.**
- ✓ **Sale and/or purchase of real estate**
- ✓ **Opening or closing of a business**
- ✓ **Significant increases in wealth, e.g., receiving a large inheritance, winning the lottery, etc.**
- ✓ **Changes in relationships with guardian nominees or successor trustees**
- ✓ **Children now old enough to be the successor trustees**
- ✓ **Changes in relationships with family members**

- ✓ **Marriage or divorce**
- ✓ **Moving out of the state**
- ✓ **Re-financing of properties**
- ✓ **New retirement accounts**
- ✓ **Purchase of life insurance or annuities**
- ✓ **Health issues effecting ability to manage one's affairs**

Even if a major life change has not occurred, a review of the trust or will should take place every three (3) years.

I do not charge for a review of a trust or will that I have prepared for my clients, and many other lawyers do not. If the client elects to amend the trust or will, or there are funding issues that need my attention, then attorney's fees are involved.

However, if after the review we determine that an amendment is not necessary, and no funding issues are at stake, then no fee is charged.

The important thing is to keep the plan up to date through life's changes, and a periodic review avoids surprises in the future.

MISTAKE #7

TAKING PROPERTY OUT OF THE TRUST BY ACCIDENT

The most common cause of this mistake is re-financing of real estate properties.

Let me say at the onset, I am NOT advising that you should not re-finance real estate properties.

But, an unintended consequence of re-financing is that the property will be likely taken out of the trust.

The reason for this is that lenders want the name on title to the property to match the name of the borrowers. Because the escrow officer really works for the lender; when the owner meets with the notary to sign the documents that escrow has prepared, buried in the 6-inch stack of papers is very often a deed which transfers the property out of the trust.

Sometimes this is pointed out by the lender or escrow agent, but other times the deed is hidden in the stack of mortgage papers and signed without notice by the owner.

More and more lenders are loosing up and allowing the property to stay in the trust, but most are requiring the property to come out of the trust.

Here's the danger: If the owner re-finances, and the property is taken out of the trust, and then the owner passes away, the property will likely have to go through probate, wiping out the whole purpose of the trust to begin with.

RULE OF THUMB: WHENEVER YOU RE-FINANCE A PROPERTY, CALL YOUR ESTATE PLANNING LAWYER, AND TELL HIM OR HER THAT YOU HAVE RE-FINANCED.

It is a simple matter for the attorney to correct, and you will maintain the integrity and effectiveness of your living trust estate plan.

This also applies for new purchases of property with a mortgage. They will likely not allow you to take title under the trust. Just let your lawyer know, and he or she will be able to correct the problem.

CONCLUSION:

These seven mistakes are easily avoided by working with and establishing an on-going relationship with an experienced estate planning attorney.

I personally work with hundreds of clients to ensure that the appropriate plan is developed and maintained.

I can be contacted at: detlaw@juno.com or 714 385-0044