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The do's and don'ts of estate planning

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A recent article in *Consumer Reports* disclosed a shocking statistic, namely, 57% of American households have $25,000 or less in assets exclusive of their principal residence and their retirement plan. These people face a tremendous challenge of figuring out how they can retire. However, the point of this article goes beyond "retirement." It addresses the Woody Allen issue of what do you do and what happens when you die.

The goal of a well-designed estate plan is to see that your property passes to those whom you wish to receive it, in the manner in which you want them to receive it, and at a minimum cost (administration expenses, court costs, attorney fees, and death taxes). The make-up of a well-designed estate plan includes the preparation of a will, and, in many cases, a living trust.

A person who dies without a will dies "intestate." The decedent's property will be administered through the Probate Court and the property will be distributed according to the law of the state of the decedent's residence. If you don't have a last will, the state creates your estate plan, and sometimes with unintended consequences. The laws of intestate succession may surprise you.

The simplest estate plan is created through the execution of a last will and testament. This form of last will is typically an all-to-spouse plan. However, what happens if the decedent has children, especially minor children?

If assets are payable to a minor child, a guardianship of the property of the minor needs to be established, not to speak of the need for a guardian of the person of the minor child. The guardian is appointed by the Probate Court and is subject to the continuing jurisdiction of the Probate Court.

The "solution" to this problem is for the testator to have not merely a will, but also, at least a contingent trust for minor children. In other words, the estate plan is all-to-spouse, but if there is no surviving spouse, then to the children (typically in equal shares), but if the child is under a stated age (at least until a child is an adult), the assets are held for the benefit of the child in trust.

There are two types of trusts that could be created: a testamentary trust, which is found within the last will and testament; or preferably, a living trust, which is a separate, independent document. While the living trust creates larger upfront legal costs for an individual, it has the advantage of being private (with no reporting to the Probate Court and no disclosure of assets to the public) and more flexible. The trustee is accountable not to the court, but to the beneficiaries.

Among the advantages of a revocable living trust are the following:

• The trust can be amended or revoked at any time during the lifetime of the grantor (the creator).

• The grantor retains control over all trust-owned property. At the time of the grantor's incapacity, a guardianship over the trust-owned property of the grantor is avoided.

• The property continues to be managed by the successor trustee.

• At death of the grantor, the trust property avoids probate and passes according to the grantor's designed wishes.

• The cost, delay, and publicity of probate is avoided.

Regardless of whether a trust is needed, the client needs to know who will take care of a minor child if both parents have died. That is, who will be their guardian / caretaker? The client needs to name someone who is suitable, and has the desire, the strength, and the resources to rear young children.

Then we have the issue of estate taxes. As of January 1, 2013, Ohio repealed its estate tax. Ohio residents are in the same estate tax position as Florida residents. Previously, Ohio retirees, well aware that Florida has no estate tax, frequently moved to Florida.

Federal estate tax is always a consideration for people of financial means. In 1960 the federal estate tax exemption was $60,000. The federal estate tax exemption is indexed at $5 million with the year 2013 federal estate tax exemption $5.25 million. The Internal Revenue Service recently announced that for 2014 the exemption will be $5.34 million. That means that a married couple could have combined assets of in 2013 of $10.5 million and not be subject to federal estate tax.

In addition, we now have "portability" for federal estate tax purposes. That means that if the wife dies first in 2013 and has an estate of $1.25 million, the wife's unused $4 million estate tax is no longer wasted. Instead, the unused exemption of the wife is added to the husband's $5.25 million exemption so that he now has an estate tax exemption of $9.25 million.

A trust can provide asset protection from creditors of a beneficiary. If the beneficiary is a special needs child, the trust assets can be designed to be protected from Medicaid reimbursement.

If the trust is funded with individually-owned assets during lifetime of the client, probate can be avoided or minimized, thus reducing attorney fees and creating a lower cost administration of the assets of the decedent with confidentiality from the public.

However, comprehensive estate planning at any asset level includes the need for other documents, including the following:

• A durable power of attorney for financial affairs should be signed. It is merely an agency agreement that authorizes an agent to act for the client to manage property or assist the owner (called the principal). The power of attorney is "durable" meaning it survives the incapacity or disability of the principal and can be used when it is really needed. In the absence of a durable power of attorney, a disabled client will need a court-appointed guardian.

• Then, there is the issue of advance directives. A living will states that if you become terminally ill or comatose, you do not want any extraordinary death-delaying medical procedures administered to you. In a healthcare power of attorney you grant authority to another person, typically a spouse or child, to make medical decisions for you, but only if you cannot make an informed decision for yourself.

This article is an introductory article to sensitize readers to the need and advisability of creating an estate plan, whether a small estate, a moderate estate, or a substantial estate. Failing to plan is planning to fail.