

# THE MOST COMMON ESTATE PLANNING MISTAKES PEOPLE MAKE

## IMPORTANT FACTS TO KNOW AND PITFALLS TO AVOID

### **MISTAKE #1- JOINT TENANCY OWNERSHIP OF PROPERTY**

Joint Tenancy is the most common form of co-ownership of property. Transfers of property under Joint Tenancy are very popular because they avoid probate. However Joint Tenancy causes many problems and is not good planning:

- Disinheritance: If you have 3 children, but only name one as the co-owner to avoid probate, then you have just disinherited the other 2 children, regardless of any Will or Trust to the contrary.
- Loss of Control: You must have consent from the co-owner to sell/refinance/transfer your property. If they disagree, you may end up in court.
- Exposure to Unintended Creditors: If your co-owner has creditors, gets sued or gets divorced; your property may be exposed to those claims
- Tax Consequences: (gift/income tax issues)

Remember- "you can always give something away, but you can't always get it back."

### **MISTAKE #2- WAITING UNTIL SOMEONE IS INCAPACITATED TO GET A POWER OF ATTORNEY**

Failing to plan for incapacity is one of the most common problems I hear about. A lot of people associate "planning" with "death," but it's very important to have things in order when you become incapacitated so that someone you trust will have the proper legal authority to handle your affairs on your behalf. A Power of Attorney can only be signed by a competent person. Therefore, waiting until someone is ill or incompetent is too late.

### **MISTAKE #3- THINKING THAT A WILL AVOIDS PROBATE**

If you only have a Will, then your titled assets (assets with your name on them) may have to go through probate, and be subject to the high costs and long delays of probate, before your heirs can inherit. A Will DOES NOT avoid probate.

**MISTAKE #4- NOT FUNDING A LIVING TRUST**

A Living Trust protects assets that it owns from probate. To establish Trust ownership, you must retitle assets in the name of the trust, also known as “funding the trust.” An unfunded trust is like an empty box- it doesn’t protect or control anything. Therefore, no matter how great the written Trust document is, it is ineffective if it’s not funded.

**MISTAKE #5- FAILING TO UPDATE BENEFICIARY DESIGNATIONS ON RETIREMENT ACCOUNTS AND LIFE INSURANCE**

Sometimes named beneficiaries die before you, no longer have a relationship with you or become incapacitated. If you don’t update your beneficiary designations accordingly, then your assets may pass to unintended individuals.

**MISTAKE #6- FAILING TO UPDATE DOCUMENTS/ESTATE PLAN**

Your documents should always reflect your current circumstances; otherwise, they don’t serve their purpose. Good times to review and/or update estate planning documents are life changes such as: diagnosis of serious illness/incapacity; relocation; children reaching age of majority/maturing; termination of close relationship; relocation of named fiduciaries to a far-away place; death.

**MISTAKE #7- CHOOSING WRONG PERSON(S) TO HANDLE AFFAIRS/ESTATE**

Who you choose to be in charge of your affairs is one of the most important decisions you will make. You will rely on these individuals while you are ill and incapacitated to have everything in order as they take care of your needs. Therefore, naming someone because they are the “oldest,” or “went to business school,” or because you “don’t want to hurt someone’s feelings,” is a bad idea. I often advise clients to consider with whom they have a close

relationship, whether the person is kind and compassionate and will “show up” when needed. I also don’t recommend naming joint decision-makers. If everyone gets along, then it doesn’t matter who’s first, second, etc. - they will all work together to make decisions on your behalf. However, if there is conflict, then forcing people who don’t get along to act together becomes problematic and often, ineffective.

**MISTAKE #8- CONTROLLING FROM THE GRAVE**

Many people put off doing estate planning because they’re worried about their loved ones. “What will happen if”...and because there are too many “what ifs” to consider and plan for, people tend to become overwhelmed and discouraged. Delaying distributions until someone is 60 years old; disinheriting a child because they may be influenced by their spouse; Withholding distributions because a beneficiary may “blow it all at once,” are some examples that people get stuck on. However, having nothing in writing is worse than all of these.

**MISTAKE #9- FAILING TO ESTABLISH COMPETENCY AT TIME OF SIGNING (TO PREVENT CHALLENGES LATER)**

It’s often a good idea to have an elderly person confirm their competency at the time they execute their important documents. The established capacity may prevent problems and litigation later if someone tries to contest.

**MISTAKE #10- NOT SEEKING LONG TERM CARE BENEFITS BECAUSE YOU OWN A HOME**

In California, if someone needs Medi-cal long term care benefits, a home is considered an exempt asset so long as they establish a subjective intent to return home. There are even steps you can take to avoid recovery of the home post death. However, many people don’t seek the assistance they need because they believe that property ownership automatically disqualifies them.

**MISTAKE #11- OVERLOOKING HIPAA AND ITS IMPACT ON OUTDATED MEDICAL DIRECTIVES**

The Health Insurance Portability and Accountability Act (HIPAA) has to do with the privacy and confidentiality of medical records. Even if the designations of agents in your prior medical directives are still valid, they may not be able to make informed medical decisions on your behalf since they may not have access to your confidential medical records. Therefore, it's important to make sure that the Advance Directive for Health Care is accompanied by the necessary releases, enabling your trusted individuals to review your medical records and make informed decisions.

**MISTAKE #12- RELYING ON OTHERS FOR IMPORTANT INFORMATION THAT TURNS OUT TO BE WRONG**

Even the most well-intentioned advice from the wrong source may cause problems and confusion:

- The CPA who advises a client to cash-out an IRA to qualify for Medi-cal (not knowing that IRAs are exempt)
- The bank representative that tells a customer that a new Power of Attorney must be signed every 6 months in order to be valid
- The neighbor who tells you to put your house in your kids' names so the government can't take it.

Please always get information from an appropriate and well-qualified source to be sure you are doing everything correctly.

**MISTAKE #13- OMITTING AN HEIR**

Not naming an heir and failing to acknowledge their existence will backfire as California law protects omitted or "forgotten" heirs. Therefore, if you want to exclude someone and make sure they receive nothing from you, you have to name them and then, specifically exclude them in your documents.

**MISTAKE #14- CHANGING DOCUMENTS TO APPEASE OTHERS**

Your documents should protect your interests and reflect your wishes. Do not crumble to pressure from other family members if they have a conflicting opinion about the decisions you've made. Furthermore, allowing yourself to be influenced by others may create evidence of undue influence in the future, showing that you're unable to make independent decisions on your own.

**MISTAKE #15- FAILING TO REMOVE A DECEDENT FROM TITLE**

When someone dies, it's important to take the proper steps to clean up title to their property in a timely manner. This usually involves recording something with the County Recorder and updating the records of the County Assessor. Failure to do this may cause property to be subject to probate and reassessment.

**MISTAKE #16- PROCRASTINATING/DOING NOTHING**

This speaks for itself- Waiting until it's too late or until a crisis occurs is the biggest mistake people make. It's so important to take control of your affairs while you are in good health and have a clear mind.