TYPICAL MISTAKES IN ESTATE PLANNING AND ELDER LAW

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https://nelf.org/search/newsearch.asp?txt_state=Georgia

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In the comprehensive **360 DEGREE ESTATE PLANNING AND ELDER LAW CONSULTATION,** Attorney Keith R. Miles will have a thorough discussion with prospective clients to examine both their family details AND their asset details.

This is to make sure to address the typical mistakes in estate planning that he has seen in his almost 30 years of practice:

Mistake 1: Improper Use of Jointly-Held Property

- Once jointly owned property with right of survivorship has passed to the survivor, the provisions of the decedent's will are ineffective.
- Even when property is jointly owned by spouses, the surviving spouse can give away or at death leave the formerly jointly owned property to anyone the surviving spouse wants; regardless of the desires of the deceased spouse.
- When property is titled jointly, there is the potential for both federal and state gift tax, particularly with non-spouses and non-citizen spouses.
- There is the possibility of double federal estate taxation; if the joint ownership is between individuals other than spouses, the entire property will be taxed in the estate of the first joint owner to die – except to the extent the survivor can prove contribution to the property.
- With non-citizen spouses, the typical rules associated with the marital deduction do not apply, and the client may need to utilize a Qualified Domestic Trust (QDOT) to avoid the immediate imposition of the federal estate tax.

Mistake 2: Improperly Arranged Life Insurance

- The proceeds of life insurance are often payable to a beneficiary at the wrong time (before that person is emotionally, physically, or legally capable of handling it) or in the wrong manner (outright instead of being paid over a period of years or paid into trust).
- Often, no contingent (backup) beneficiary has been named.
- The proceeds of the policy are includable in the gross estate of the insured, because the policy was owned by the insured and either never transferred or was transferred within three years of the insured's death.

Mistake 3: Lack of Liquidity

- Among the expenses that might demand cash from the estate's executor are:
  - ☐ Federal estate taxes
  - ☐ State death taxes
  - ☐ Federal income taxes (including taxes on pension distributions)
  - ☐ State income taxes (including taxes on pension distributions)
  - ☐ Probate and administration costs
  - ☐ Payment of maturing debts
  - ☐ Maintenance and welfare of family
  - ☐ Payment of specific cash bequests
  - ☐ Funds to continue operation of family business, meet payroll and inventory costs, recruit replacement personnel, and pay for mistakes while new management is learning the business
  - ☐ Generation-skipping transfer tax (top estate tax rate)
- Most larger estates will be subjected to almost all of these taxes and costs.

Mistake 4: Choice of the Wrong Executor

- Naming the wrong people to administer the estate can be disastrous. The person who administers the estate must – with dispatch – often without compensation, with great personal financial risk, and without conflict of interest:
  - ☐ Collect all assets
  - ☐ Pay all obligations
  - ☐ Distribute the remaining assets to beneficiaries
- Although this three-step process seems simple, in reality these tasks are highly complex, time consuming, and, in some cases, technically demanding. Is the named executor capable of conducting these tasks?
- Selection of a beneficiary as an executor can result in a conflict of interest. That person may be forced to choose between his personal interest and that of the other beneficiaries.
- Another consideration is whether the executor lives in the state of the testator.

Mistake 5: Will Errors

- One of the greatest mistakes is dying without a valid will. This results in "intestacy," which is another way of saying that the state will force its own will upon the heirs it chooses.
- Too many wills have not been updated. A will should be reviewed at least:
  - ☐ At the birth, adoption, or death of a child
  - ☐ Upon the marriage, divorce, or separation of anyone named in the will
  - ☐ Upon every major tax law change
  - ☐ Upon a move of the testator to a new state
  - ☐ On a significant change in income or wealth of either the testator or a beneficiary
  - ☐ On any major change in the needs, circumstances, or objectives of the testator or the beneficiaries (i.e., disability)

Mistake 6: Leaving Everything to Your Spouse

- Far too many people feel that there will be no federal estate tax because of the unlimited estate tax marital deduction and so they leave their entire estates to their spouses.
- However, upon the death of the surviving spouse, everything that the surviving spouse received (assuming it has not been consumed or given away) is then piled on top of the assets that spouse owns.
- It is then that the "second death wallop" occurs with federal estate tax starting on taxable amounts in excess of $13,610,000 in 2024 (which is anticipated to drop to approximately $6,800,000 on January 1, 2026).
- Leaving everything to a spouse also wastes an opportunity to skip generations and potentially save future generations significant taxes.

Mistake 7: Improper Disposition of Assets

- Equal but inequitable distributions are common. If an estate is divided equally among four children who have drastically different income or capital needs, an equal distribution can be very unfair.
- Think of a family with a child with physical disabilities and three healthy children with no physical problems. Obviously, their needs and circumstances are not the same.
- Upon the death of a primary beneficiary at the same time or soon after the testator, quite often there is no secondary beneficiary named, or the second

beneficiary who is named should not receive the asset in the same manner as the primary beneficiary.
- The solution is to consider a trust or custodial arrangements and to provide in the will or other dispositive instruments for young children and legally incompetent people.

Mistake 8: Failure to Stabilize and Maximize Value

- Many business owners have not stabilized the value of their businesses in the event of the disability or death of key personnel.
- Who will pay for the fixed expenses of the practice or business if the key employee is not there to generate income?
- Buy-sell agreements are essential to a business that is to survive the death of one of its owners.
- Yet many businesses have no such agreement. Or the agreement is not in writing. Or the price (or price setting mechanism) does not reflect the current value of the business.

Mistake 9: Lack of Adequate Records

- Too many people hide assets such as cash in books or drawers, or even under mattresses. Take out a safe deposit box. Tell your executor where it is and make sure your executor has or can get the key and has access to it. Put all your important documents in that box.
- Check with your attorney on the rules that apply at death: some safe deposit boxes are frozen (the state requires that the bank seal the box from entry until the inheritance tax examiner can inventory the contents) and there can be lengthy delays in getting to the papers in the box.

Mistake 10: Lack of a "Master Strategy" Game Plan

- Do-it-yourself estate and financial planning is the closest thing to do-it yourself brain surgery. Few people can do it successfully.

Mistake No. 11: Failure to Complete and Implement Estate Plan

- The best estate plan ever devised is worthless if it is not completed and implemented. Though this seems rather self-evident, many people walk around with incomplete estate plans.
- In other words, these people have started the estate-planning process but have not purchased the necessary life insurance, signed wills or trusts, or otherwise put their estate plans into effect.

Mistake No. 12: Failure to Provide Complete and Accurate Information to Estate Planners

- It is axiomatic that clients must provide complete and accurate information to their estate planners.
- However, the simple fact is that many people neglect, withhold, or refuse to turn over key pieces of information that, had the estate planner been apprised of that information, would have changed the advice or recommendations given.
- Perhaps the client thinks that the information is too embarrassing or will give too much financial information that will alert the taxing authorities. Perhaps the client does not trust the estate planner enough.
- Whatever the reason, it is the wrong approach because all of the information comes out after the client is dead.
- This is due to a number of different factors, including the following:
  - ☐ There may not be enough trust and transparency between two partners who choose to use only one estate planner.
  - ☐ The complexities of the estate-planning process get the couple bogged down, and they choose what they believe is "enough" information as a way to try to streamline the process instead of digging up all the information and data that is needed.
  - ☐ There may be sufficient shame and guilt about past choices and decisions that have one or both partners unwilling or unable to openly share all their sordid details with their advisors.
  - ☐ The estate planners may not have asked enough of the right questions in the right manner and at the right time.

Mistake No. 13: Failure to Coordinate Estate Plan

- People often try to do piecemeal estate planning (e.g., a life insurance policy here, a will there) but have no coordinated estate plan.
- A client's estate planning documents need to be coordinated with all of the client's other estate-planning, whether it is life insurance, lifetime trusts, retirement plans or buy-sell agreements. It is imperative that all of this estate planning be coordinated.

Mistake No. 14: Failure to Communicate about Estate Plan

- Family members and perhaps others have expectations about inheritance from the client, whether or not they should.
- When these expectations are not met after the client's death, many of them leap to some conclusions that may not be true and they may take some actions that were unnecessary.
- These actions can run the gamut from challenging the estate plan in court to simply cutting off communication with certain family members that are perceived to be "on the other side."
- Other possible unnecessary actions that people take after a person's death include resenting some or all of the receivers of power or property as well as litigation in contesting or simply prolonging the matter.

Mistake No. 15: Incomplete or Incorrect Beneficiary Designations

- It cannot be said too much that deficient or even missing beneficiary designations are the culprits for many failed estate plans.
- Too often, people do not give a lot of thought to the ramifications of their decisions about beneficiaries of life insurance, retirement plans, tax deferred annuities and IRAs, even though these constitute the majority of the wealth of most people.
- Estate planners have experienced some horror stories where companies lost the original beneficiary forms, which caused some serious and unfortunate chaos.
- Othe beneficiary designations had not been reviewed for years and a named beneficiary has died (without a back-up being named), the client no longer wants that person as beneficiary, the beneficiary no longer needs the wealth, or the beneficiary is no longer married to or is estranged from the client.

Mistake No. 16: Failure to Keep Estate Plan Current

- Even the best estate plans can go stale if not revisited regularly, sometimes it is due to law changes.
- Usually, though, it is due to life and business changes – both of the client and client's partner – and in the life or lives of the beneficiaries.
- In blended families, there are many situations where a former partner received a large share of the deceased partner's estate (i.e., the decedent), life insurance, or retirement plans because the decedent failed to update the estate plan after the separation.
- Some jurisdictions have laws that automatically drop a spouse as an heir (and also a personal representative) on divorce, but these laws may not apply to life insurance or retirement plans unless the statute specifically covers those assets.

Mistake No. 17: Elections against a Will

- Depending on the client's jurisdiction, a surviving spouse may be able to claim rights in up to one-half of the client's estate unless that right has been properly waived in a valid marriage contract. (NOTE: This is the case in the State of North Carolina but not Georgia.)
- The State of Georgia has a Year's Support action that can be undertaken for spouses and minor children which could potentially result in ALL of the estate being awarded.

Mistake No. 18: Post-Death Will and Trust Challenges

- Few things delay the administration of an estate longer than post-death challenges to the estate plan.
- The vast majority of post-death challenges fall into two basic categories:
  - ☐ Challenges based on a claim that the decedent was not in his or her right mind when he or she made his or her estate plan.
  - ☐ A claim that someone unduly influenced the decedent to make the estate plan the way that it was made.
- It is the latter category that more blended family estate planners have to be concerned about due to the frequency of discord between stepparents and stepchildren.
- This is one reason why many partners in blended families may need to choose to do their estate planning independently of each other and their children.

Mistake No. 19: Too Much Joint-Tenancy Property

- Joint tenancy can be the prime enemy of estate plans because property that is titled as joint tenants automatically passes to the surviving joint tenant on the death of the first joint tenant to die, irrespective of the deceased joint tenant's will or trust.
- In situations where this may not be the client's intention, or if it conflicts with what the client's other estate planning documents provide, it will override them, and they become irrelevant where those assets are concerned.
- This is why it is imperative to review the titles to all real estate and accounts and the latest beneficiary designations in life insurance and retirement plans.

Mistake No. 20: Failure to Properly Plan for Disability

- Just because the client has a living trust or a durable power of attorney does not mean that the client is adequately prepared for disability.
- Assets in a revocable living trust are considered "resources" for purposes of Medicaid. The trust assets may need to be placed back into the individual's owners name for any assets that would be exempt under Medicaid like the principal residence.
- It is important that the power of attorney document, especially if it is a springing power of attorney, clearly describe a procedure for "springing" the power of attorney into effect.
- The same thing is true for the activation of a successor trustee in a living trust. If the document does not do that, the client's loved ones may have to go to court to open a conservatorship or guardianship and must incur that expense and time delay.
- Additionally, if the client has a revocable living trust, the property power of attorney and the revocable living trust must be coordinated with each other.

Mistake No. 21: Overfunding of the Marital Deduction Portion

- If the client has to worry about the federal estate tax and is married, overfunding what effectively passes to the surviving spouse could cause the client to underutilize the client's $13,610,000 (in 2024 which is anticipated to drop down to approximately $6,800,000 on January 1, 2026) estate-tax applicable exclusion amount.

- The law of portability, which allows spouses to transfer unused estate-tax exemptions to the surviving spouse, may save the day, although the law of portability has a number of traps for the unwary.
- One of the biggest traps is what happens in the event that the surviving spouse remarries; this law is somewhat complicated.
- It is strongly advisable for married partners in blended family relationships to each utilize separately their respective estate-tax applicable exclusions because their families often are different.

Mistake No. 22: Relying on Someone to Do the "Right Thing"

- There is a good percentage of people who simply wish to leave it up to someone else to determine who gets what out of their estates.
- For example, they leave their estates to their partners or to one of their children with nonbinding instructions as to how they wish the estate to be divided.
- Most of the time, these people genuinely believe that the designated person will do "the right thing" and divide the estate either equally amongst their heirs, or that they will know and do what the person wanted them to do with the property and simply follow those directions.
- Sadly, this rarely happens, so the designated person often ends up keeping (and sometimes then losing to creditors or a divorcing spouse) the entire estate.

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