To Err is Human But Will Your Heirs Be Divine

By Stephanie Fierro

In An Essay on Criticism, Alexander Pope penned the phrase, “To err is human, to forgive divine.” This oft-truncated quote eloquently recognizes that failing is part of being human. The purpose of this article is not to criticize people for planning errors, but rather to shed light upon the most common errors so that we can learn from them. After all, as George Santayana so aptly observed, “Those who cannot remember the past are condemned to repeat it.” So, here are the most common estate planning errors, all of which should be discussed and addressed during the estate planning process.

Not Creating an Estate Plan. If you have not created an estate plan you are not alone. Recent surveys suggest that more than half of all U.S. adults do not have an estate plan. If you don’t object to the way the law will distribute your assets at death, if your estate will not be subject to tax and if you don’t care whether a probate proceeding will be required then maybe you don’t need a will or trust. But an estate plan is more than just a death plan. Estate plan documents also help govern what will happen to you and your property while you are living. If you are temporarily or permanently incapacitated these documents will guide your care and financial welfare. Not having an estate plan is rarely an informed choice - it is more likely the result of misinformation, procrastination or fear. An estate plan doesn’t need to be complex to provide proper protection. So create an estate plan and update it regularly.

Adding an Adult Child as a Co-Owner. A surprising number of people believe that they can avoid the need for an estate plan by naming an adult child as a current co-owner of their property. In seeking to limit problems, a host of problems are inadvertently created. First, unless an exception applies, retitling assets may generate a taxable gift, a requirement that surprises many people. In 2013, if the value of the gift exceeds $14,000 the gift will need to be reported to the IRS on a gift tax return. This does not necessarily mean that you’ll have to pay gift tax, but proper planning can help minimize surprises. Second, the property is now available to your child’s creditors. Third, if you have other children you need to understand that despite your instructions to the contrary, the co-owner child is not *legally* obligated to share the property after your death. Fourth, what’s worse is that if the co-owner child does honor your wishes to share the property you’ve now created potential gift tax issues for them as the gift will be from them - not you. Another tax implication is that the co-owner child will not receive a “step-up” in basis at the parent’s death. Perhaps most importantly, this plan operates on the assumption that your child will survive you and does not address what will happen to the property in the event that your co-owner child predeceases you.

Ex-Spouse Does Not Equal Ex-Beneficiary. You cannot assume that your divorce will automatically disqualify your ex-spouse as a potential beneficiary of your assets. Once your divorce is final, your ex-spouse is automatically removed as a potential personal representative, trustee, guardian or agent. And, under Arizona Revised Statute §14-2804, your ex-spouse is ***generally*** automatically disqualified as a beneficiary of your assets. But every rule has an exception. In a divorce, Employee Retirement Income Security Act (“ERISA”) plan assets, e.g. pensions, 401(k)s and profit sharing plans, are the exception. For ERISA plan assets, Arizona law is preempted. In *Egelhoff*, the U.S. Supreme Court ruled that, ERISA preempts state law to the contrary and plans must be administered, and benefits paid, in accordance with plan documents. *See Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). In other words, the plan administrator will pay the last named beneficiary of the plan, regardless of divorce. Although this beneficiary designation discussion is couched in the context of divorce, not updating beneficiaries in general can create real problems and costly legal battles.

Failure to Plan for Contingencies. Most people hope that it will be many years - if not decades - before their estate plan will need to be administered. With that in mind, it is important that any estate plan allow for a certain amount of flexibility to address the unknown. As a result, over-planning can be just as problematic as under-planning. Over-planning can result when people wish to impose rigid distribution requirements. Although they may seem “reasonable” at that time the estate plan is established, when it comes times to administer them, those requirements may be completely impractical. On the other end of the spectrum, under-planning such as not planning for alternate fiduciaries and contingent beneficiaries can be equally problematic. Beneficiaries or fiduciaries may predecease you or die in an unanticipated order and your estate plan should ideally address what will happen under those circumstances.

You are going to die – it is an unfortunate inevitability - so get over it! You can’t control when or how that will happen but you can control the disposition of your property. While you still enjoy this world, take the opportunity to control what you can and plan for your family.

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