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Demystifying the Estate Planning Process

We find that, for most people, the basic estate planning process can be fairly straightforward and somewhat painless. The anticipation of it seems to be much worse than the reality and it is something clients are relieved to check off their lists once they get it addressed.

By **Rebecca Rosenberger Smolen and Amy Neifeld Shkedy** | March 01, 2021



Rebecca Rosenberger Smolen, left, and Amy Neifeld Shkedy, right, of Bala Law Group.

We find that, for most people, the basic estate planning process can be fairly straightforward and somewhat painless. The anticipation of it seems to be much worse than the reality and it is something clients are relieved to check off their lists once they get it addressed. There's no question that it's something every adult should engage in, at least once, and as far in advance of the time when the plan will be needed, as may be possible.

The core process involves making decisions about where your assets go at death (i.e., deciding who gets what) and who will be in charge of getting them safely to your beneficiaries (i.e., selecting fiduciaries). It also involves planning for your potential incapacity or unavailability, and deciding who will have authority to make decisions for you about health care and financial matters, as your agent, when you remain living but unable to handle such affairs on your own, for one reason or another. If you have children under 18, an additional key matter to address is identifying a guardian of the person to raise your children if both parents die before a child attains the age of majority, which currently remains age 18.

Once decisions are made, they are implemented through the drafting and execution of a will, general power of attorney and living will/advance directive and health care power of attorney. Many times, a revocable trust is also involved as a will substitute, to which the will would “pour over” your probate assets on your death. The only other key component of an estate plan is making sure that assets are titled and beneficiaries are designated for accounts/benefits requiring such designations, in a manner that is consistent with the estate plan.

Estate plans should be updated any time you change your mind about who should receive your assets at death, who should be in charge of handling your assets at death or in the event of your incapacity/unavailability, or who should make health care decisions in the event of your incapacity. We find that many clients never create more than one estate plan, and most others never update their plans more than once or twice during their lifetimes.

Failure to engage in the estate planning process means that the default statutory provisions (i.e., intestacy laws) for the state where you live at death will control how your assets pass at death, subject to any beneficiary designation forms that may have been completed to dispose of some assets at death. It also means that if you are incapacitated during life, in order for someone to have the power to handle your financial or medical decisions for you, a court supervised guardian will need to be appointed for your person and estate.

Another layer to the estate planning process involves deciding whether to leave assets to your selected beneficiaries in or out of trust. Certainly, it is typical for parents to want to have a trust structure in place for children who are under the age of 35, without which the children would have control of the inheritance upon attaining the age of 18. Another scenario where trusts are regularly used is in second marriages where one or both spouses have children with a co-parent not in the marriage. In such circumstances it is common to leave the assets in a trust structure for the benefit of the surviving spouse so that whatever assets remain on his/her death will revert to the children of the first spouse to die rather than beneficiaries selected by the surviving spouse. Trusts are regularly implemented in other situations as well to protect assets for beneficiaries, and sometimes for tax planning purposes.

A final layer to the estate planning process involves tax planning, which can involve asset allocation between spouses, various specialized structures for trusts, and strategic gifting plans.

In the 1990s, when the exemption from the federal estate tax was \$600,000, and rates went up to 55% for estates over \$3 million, planning around minimizing this tax was a key issue for many families. Currently, the exemption from this tax is more than \$11 million, and the rate is 40%, so, planning for it is limited to a much smaller segment of the population than in the past. However, stay tuned, because there is a wide expectation that the exemption will be reduced in the future, although it does not yet seem to be a focus of any currently pending legislation in Congress. While a key indicator of the future is that Biden’s tax plan while running for office involved a reduction to \$3.5 million for the exemption, that is only a guidepost, not a definitive proposal. The only somewhat definitive marker on the horizon is that, in 2026, the exemption is currently scheduled to be reduced to \$5 million indexed for inflation.

Other taxes to be considered include the Pennsylvania inheritance tax, which is imposed at the rate of 4.5% on lineal descendants, and up to 15% on others (except for spouses and charities, where the rate is 0%). It is rare that planning is engaged in with a focus on this tax, but, it is a key part of the landscape. For the higher net worth clients, who are focused on the federal estate tax, oftentimes there is also consideration given to planning for the federal generation skipping transfer tax as well, which comes into play when assets pass to grandchildren or more remote descendants—whether in trust or outright. Like the federal estate tax, the generation skipping transfer tax is currently imposed at the 40% rate, and there is an available exemption of more than \$11 million.

While estate planning can be a straightforward process (with the proper professional guidance, of course), it can also have multiple layers. Regardless of an individual's net worth, there is significant value for everyone to engage in implementing an estate plan with at least the basic estate planning documents. For individuals with a high net worth or with particularly challenging family dynamics, an estate plan may be more complex and involve tax planning and/or tailored trust planning.

In any event, proper estate planning (from the simple plans to the more complicated plans) is crucial to be assured that things will run as smoothly as possible, and in accordance with your wishes. Otherwise, your estate plan will simply occur by happenstance, when you are unable to address things on your own—whether permanently or temporarily—the first of which circumstances is inevitable, and both of which are often unpredictable, as we all well know.

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