The Legal Intelligencer

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

EXPERT OPINION

Revisiting the Fundamentals of Estate Planning

Yes, there is a financial cost for a properly developed estate plan. But the cost is very minor compared to the annual costs everyone must pay for basic things in life—such as health insurance, car insurance, cellphone service, cable TV and streaming services, as just a few examples. And, over and over again we see that "haste makes waste." Leaving the design and implementation of a plan until the last minute can be particularly costly and can easily result in perceived or actual mistakes (which can trigger very expensive litigation).

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Trusts and Estates

By Rebecca Rosenberger Smolen
By Amy Neifeld Shkedy

It has been a while since we covered the basic focus of estate planning, which is something that affects everyone. Whether as a parent, a child, benefactor or beneficiary. It may even impact those without much, or anything, to leave behind when they die.

Yes, there is a financial cost for a properly developed estate plan. But the cost is very minor compared to the annual costs everyone must pay for basic things in life—such as health insurance, car insurance, cellphone service, cable TV and streaming services, as just a few examples. And, over and over again we see that "haste makes waste." Leaving the design and implementation of a plan until the last minute can be particularly costly and can easily result in perceived or actual mistakes (which can trigger very expensive litigation). Most importantly, delay will many times result in the failure to complete the process so the intended goals of the decedent will be thwarted.

Sometimes estate planning involves trying to minimize taxes at death. Under the current tax structure, however, that is a minor part of the

process for the vast majority of people, given that the federal estate tax exemption is now close to $14 million per person. Tax planning was a more significant factor when that exemption was only $600,000 in the 1990s. The Pennsylvania inheritance tax is imposed at 4.5% for transfers to descendants, and up to 15% for transfers to other beneficiaries. It is rare that taxation at the state level is a factor in planning since that tax on transfers to descendants is often less than one year of investment return on assets and transferring appreciated assets before death can cost more than 20% capital gains tax due to the loss of basis step up that is available for inherited assets. In most cases for individuals who are leaving assets behind to beneficiaries other than children, they are not at all motivated to factor tax savings into their estate plans.
Moreover, even when an inheritance will be left for descendants, it is nearly universal that folks are not ready to part with most of their assets until they are sure they will not need them. Further, they typically do not want to risk "spoiling" the next generation with surplus wealth until they no longer have a choice in the matter. Ultimately, a typical mindset of a client is to retain the right to determine who gets what until the last possible moment.

Because life is uncertain, it's important to resist the temptation to delay creating a comprehensive estate plan until the last possible moment. Estate plans are best prepared when all is somewhat settled with health and family situations. A typical time for creating a first plan is when a first child is born, or on the way. The goal being to make sure assets will be structured to be available to keep the child well supported until the child can be self-sufficient. A failure to plan results in the court determining who will manage the inheritance for a child and the child gaining control of the full inheritance at age 18—the age of adulthood under long-standing Pennsylvania law. In contrast, a typical estate plan would not give a child full control over inherited assets until age 35, or later. And, in many cases it will make sense to create a lifelong trust so assets not needed by the primary beneficiary will be protected for a succeeding

generation. Similarly, it is common to create a trust for the benefit of the surviving spouse for the same purpose—to preserve assets not needed by the surviving spouse for the desired remainder beneficiaries (rather than relying on the surviving spouse following the dispositive objectives of the first spouse to die which, more often than one might expect, may not be a safe bet).
The fundamental purpose of an estate plan is to organize one's affairs for the certain day of incapacity or death. We can't know when that will happen, but we all know that one or both circumstances are inevitable for all of us.

When that day comes, it is much better to have a plan in place that specifies who you trust to handle your affairs upon incapacity or death, and who should benefit from your accumulated assets, than to let things work themselves out. For families with minor children, it is also important to identify who would serve as guardian of the children if both parents would die before the children reach the age of 18.

By doing nothing, state laws would give your assets to your next of kin—spouse, children, parents, cousins, etc. Further, without guidance from a testator of a will, a court would appoint the person in charge to disburse the inherited funds, as well as to raise any minor children. For folks without children, it can be particularly important to create a proper estate plan unless it is desirable to have assets at death pass to closest living family members, which often is not the case for one reason or another.

As previously noted, tax planning is no longer a key focus as has been the case in the past. When the exemption from the federal estate tax was "only" $600,000, anyone who was purchasing a $1 million life insurance policy had reason to plan to manage that exposure, with the rates topping out at 55%. Now the top federal estate tax rate is lower, "only" 40%. And the tax doesn't become an issue unless an individual has more than $14 million—or $28 million for a married couple. Under current law those exemptions are scheduled to be reduced by 50% by the end of

2025. It is widely anticipated that the Trump administration will manage to pass legislation to avoid that from happening, or potentially even repeal the tax entirely. We are in wait and see mode with that. However, the pendulum could always swing back in the future, so we all need to be mindful that it remains possible that the federal estate tax will continue in some form in the future, and the historically high exemptions could be reduced down the road.
A typical estate plan includes a Will (and often a revocable trust), general power of attorney (for financial affairs) and health care power of attorney and advance directives (a “living will”) for medical matters. For Pennsylvania residents, the revocable trust is not generally used for titling assets during lifetime unless it makes sense to title real estate owned in another jurisdiction (like Florida) where trying to avoid the probate process is a worthwhile endeavor.

When embarking on the process, it’s important to have a general idea of who you would trust to handle your affairs when you cannot do so yourself, and who you will want to be the “objects of your bounty.” With that in mind, a seasoned estate planning attorney can walk you through the options for structuring your estate plan and help you implement an appropriate plan to meet your particular circumstances. Once a plan is in place, in our experience, for most folks there may never be a need for an update other than to replace aging fiduciaries or add the next generation to those roles when the time is right.

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