TOP TEN ESTATE PLANNING MISTAKES

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Disclaimer

- This is an overview – not a complete statement of the law and is not to be considered legal advice

- If you have any questions, please contact Bridget Eichinger at (914) 666-5600 for a complimentary initial consultation

Overview of Presentation

- Many misconceptions in estate planning
- Perpetuated by well-meaning friends and professionals
- Always review your specific circumstances with an experienced attorney

Mistake Number 1

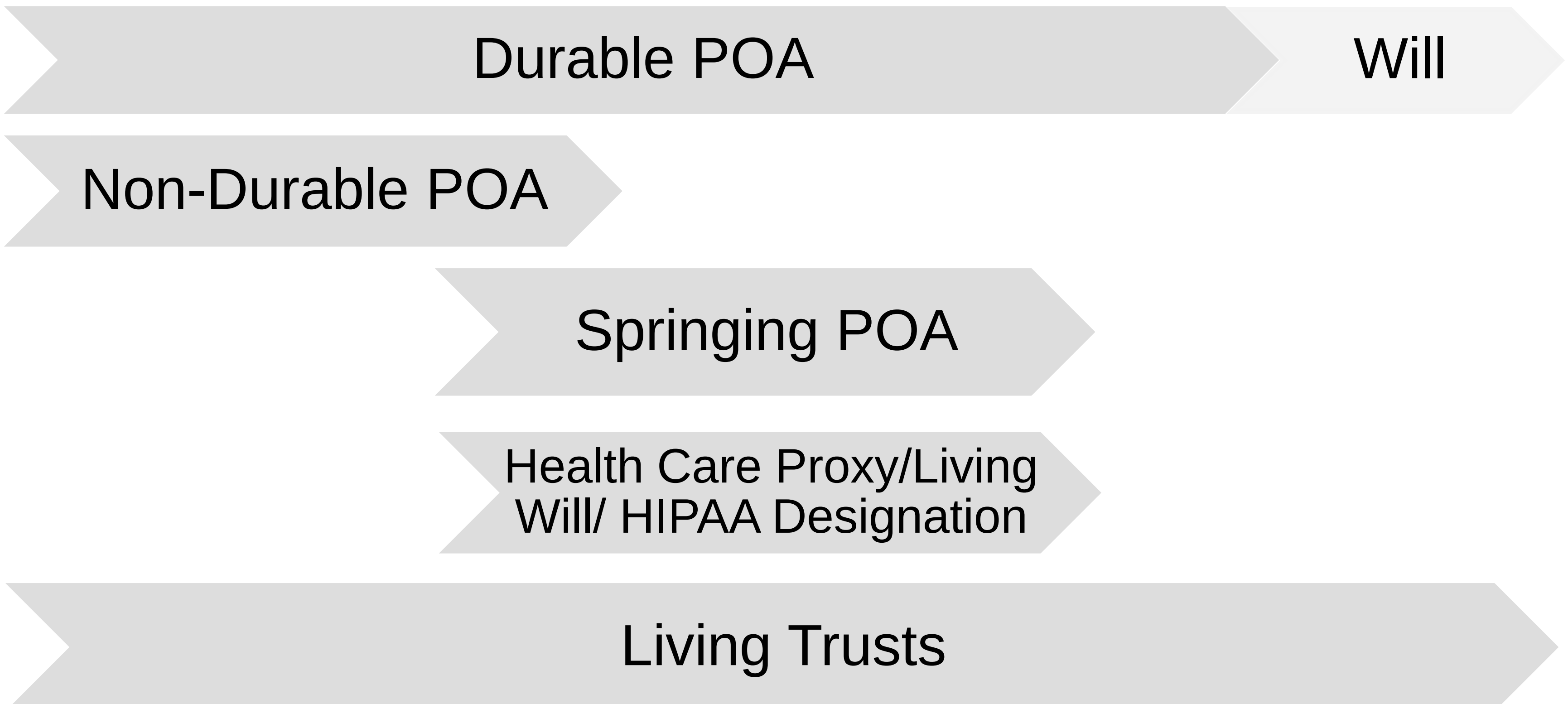
- Failing to do any planning at all

NY Advance Directives
Types and Effectiveness

Effective Immediately Upon Signing

Effective Upon Disability or Loss of Competence

Death



Mistake Number 2

- Adding a child as a co-owner on bank accounts

Accounts Co-owned for Convenience

- Use a Power of Attorney instead of co-owning bank accounts with one or more of your children

- Avoids sibling issues with respect to the funds remaining in the convenience account upon the death of the parent

Mistake Number 3

- Updating your Will, but not your designated beneficiary forms

Probate/Administration Assets

- Financial Assets
  - titled only to the decedent
- Real Property
  - titled only to the decedent or held as tenants-in-common
- Tangible Personal Property
- Business Interests
  - LLC interests, C or S Corp. shares, general partnerships and sole proprietorships
  - **Note:** Business agreements with co-owners may dictate valuation and transfer upon death or disability

Non-Probate Assets

- IRAs or Qualified Retirement Accounts
- Life Insurance
- Annuities (Qualified or Non-Qualified)
- Certain Bank Accounts
  - JTWROS, POD OR TOD
- Real Property
  - Tenancy by the Entirety
  - Joint Tenancy with Rights of Survivorship
  - Life Estate
- Trust Assets
- Any other assets with a “Designated Beneficiary”

Mistake Number 4

- Naming your estate as a beneficiary of a qualified retirement account

IRS RULES REQUIRE ASCERTAINABLE BENEFICIARY

- An ascertainable beneficiary (or a designated beneficiary) needs to be an individual or a trust with very specific provisions; these trusts are commonly referred to as conduit or accumulation trusts.

- If name (1) an “estate” or (2) a trust with a charitable beneficiary, beneficiaries may owe all income taxes within five years of the date of death

Mistake Number 5

- Believing life insurance and retirement accounts are not part of your taxable estate

Taxable Estate

- Generally comprised of your probate **and** your non-probate assets, including insurance and retirement accounts owned or controlled by decedent

Estate Tax Exemptions in 2023

- Federal: $12,920,000, 40% tax on amounts above $13,921,000
- State "Cliff" Tax: If exceed exemption by more than 5%, tax imposed on entire estate.
  - Exemption is $6,580,000 as of January 1, 2023
  - Over cliff if estate more than $6,909,000

Mistake Number 6

- Gifting: annual exclusion and capital gains tax missteps
- Current Federal annual exclusion is $17K

Interplay between Gift & Estate Taxes

- Example:
  - Mrs. Smith gifts $217,000 to her niece
  - Mrs. Smith will need to file a gift tax return to report the amount in excess of the annual exclusion
  - Mrs. Smith’s federal estate tax exclusion amount will be reduced by $200,000 – bringing her exclusion amount down from $12.92MM to $12.72MM

Income Tax Treatment

- **Gift:** Cost basis for gift recipient is the original cost basis of the donor
- **Estate:** Cost basis for estate beneficiary is the date of death value of the asset. Capital gains tax only paid if asset sold at a higher price than the date of death value

Illustration of Capital Gains Treatment

Lifetime Gift

- $750,000 FMV House
- $50,000 original cost basis
- Gift Recipient pays capital gains tax if later resells for any **gain above $50,000**

Inheritance at Death

- $750,000 FMV House
- $50,000 original cost basis
- Beneficiary pays capital gains tax if later resells for any **gain above $750,000**

Mistake 7

- Thinking Medicare will pay for long term care

- **Medicaid** is the government program which covers significant long term care expenses

Medicaid Eligibility

- Available to seniors who are “impoverished”
- Law allows seniors to voluntarily impoverish themselves to qualify
- Income will not disqualify a senior from Medicaid, only assets
- Five year “look back” for gifts currently only applies for nursing home care, not home care

Mistake Number 8

- Leaving assets outright to legally incompetent beneficiaries

Name trust as beneficiary for minor or disabled beneficiaries.

Mistake Number 9

- Creating a Trust, but not funding it

What Is A Trust?

- A **relationship** among:
  - <u>Grantor</u>: trustor, grantor or donor
  - <u>Trustee</u>: the fiduciary and manager of all trust assets
  - <u>Beneficiaries/Remaindermen</u>: designated recipients of income and principal

Why Use a Revocable Trust?

- Avoid Probate and Accounting in Surrogate's Court

- Allow for immediate transfer of assets upon death
  - Note: Power of Attorney no longer valid upon death of principal

Why Use an Irrevocable Trust?

- To protect assets from the cost of long-term care

- To potentially qualify for Medicaid

- To protect against estate tax liability

Trust Funding

- Schedule “A”
- Deeds to Real Property
- Change of Ownership of Brokerage Accounts
- DO <u>NOT</u> transfer retirement accounts to a trust during your lifetime

Mistake Number 10

- “I love you wills” between spouses:
  - A great expression of love; terrible tax planning

Credit Shelter Trust

- Preserves the first spouse’s estate tax credit
- Prevents assets in the trust from being taxed upon the death of the second spouse, in essence allowing a married couple to double their estate tax exemption
- Allows first spouse to designate the ultimate beneficiaries or to delegate that decision to the second spouse

Funding a Credit Shelter Trust

- **Option 1:** Up to maximum amount allowed by Federal law (i.e. $12.92 million)

- **Option 2:** Up to maximum amount without owing any State estate taxes (i.e. $6,580,000 or more depending on year of death)

- **Option 3:** Disclaimer Trust:
  - Most flexibility
  - Allows for post-mortem tax planning
  - Very important with estate tax exemption changes

Non-tax Reasons for Trusts

- **Protect Assets from Costs of Long Term Care for Surviving Spouse:**
  - Can trigger into a Supplemental Needs Trust for the surviving spouse
  - Assets in trust then not available if surviving spouse needs to qualify for Medicaid

- **Disabled Beneficiaries:**
  - Can make sure that a disabled beneficiary continues to receive government assistance

- **Protect Spendthrift Beneficiaries:**
  - Trust assets used for beneficiary
  - Creditors cannot reach trust assets

Conclusion

- Our laws and tax structure reward advance planning
- It is important to review your individual situation with an attorney who understands both estate tax and asset protection rules.
- Hollis Laidlaw & Simon P.C. offers a free initial consultation to help families assess their estate planning needs

Thank you

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