

Why 95 Percent of All Estate Plans Fail

Brian Lee

Estate plans can fail. Some common failures that become apparent at death, such as having assets become subject to probate or having a non-citizen spouse not qualify for the unlimited marital deduction, have immediate and costly consequences. These are very easily linked to a defective estate plan. However, a client's heirs may face a multitude of issues and negative consequences that might not be so clearly linked to the estate plan, but can easily be avoided with proper planning.

Thirty-five years ago I (Lee) made a personal resolution to devote a substantial portion of my practice to estate planning. I studied written materials and attended a multitude of estate planning seminars. To gain personal experience, I volunteered to deliver death claims to beneficiaries of orphan policy holders. This put me into direct contact with families who had just lost a family member, many of whom used estate planning. With each visit I would politely ask if there was anything I could do for the family and a few would ask for information about settling their estate. To find answers to their questions I worked with local attorneys and CPAs. I felt I was providing an important service, while at the same time gaining insight that I could never have obtained from a textbook.

However, the true value of proper estate planning often became apparent several years after the death of the spouse, parent, child, or business partner. Surviving family members would often show the emotions of hate, greed, suspicion, distrust, and disloyalty towards each other, which I doubt the decedents had envisioned. The more families I visited, the clearer it became that in almost every situation, conflict could have been prevented with proper planning. Some common designs, while seemingly effective and definitely benign, could have been structured differently to prevent serious

problems. These problems were sometimes more intense in smaller estates and more complex in larger ones due to the assets involved.

Examples of some common family situations illustrate the kinds of preventable problems that are not generally linked to defective estate plans.

1) Partition sales/sibling rivalry: After a husband and wife passed away and left the family home to their three adult children equally, the middle son wanted his sister and brother to buy him out. When the siblings balked, he went to court for relief. The court granted a partition, sale, and distribution of the home sale proceeds, even without the other siblings' consent. If the estate plan is designed to transfer real estate to children, the client should understand that one child can force the sale of the entire property if the other siblings do not buy out that child's interest.

2) Poor choice of trustee/lack of accountability. A family with three young children lost their father. The father left his family with a two-million-dollar insurance policy. Within six months of receiving the death benefit, the wife invested all of it with an individual she had met who promised a "guaranteed" return of fifteen percent. This individual is currently serving time in a federal prison for embezzling the wife and others out of their life savings. The husband and wife made the right decision to protect their family with insurance, but the estate plan failed to make any arrangements to provide accountability to the surviving spouse and protect the proceeds from herself and others, during one of the most vulnerable times of a person's life.

3) Lack of planning for the family business. The daughter and son of a very successful businessman worked at their father's business until he died. The father's intention, although never formally provided for in his estate plan, was for the family to continue

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the business after his death. He assumed that this would happen since his children were heirs to the entire estate. Unfortunately, his then wife, who was only twelve years older than his eldest daughter, did not share the same vision. Within a year and a half of her husband's death, she sold the business, remarried, and moved away. The new owners had no obligation to use the family as workers and their jobs were lost. What was not thought through was the fact that the second wife had to pass away before the children could receive anything.

How to Prevent Failure

When meeting a client for the first time, it is preferable that the client already has done some planning so that he/she has a standard of reference for comparison. However, no client has ever been able to tell me about his/her plan with any type of coherence. The vast majority of clients believe that their trusts accomplish goals that are not even addressed—goals that clients assure me are essential to their estate plans. Failure can be explained as something not performing to expectations. Failure can also be the nonperformance of something due, required, or expected and sometimes even a subnormal quality or insufficiency. Upon exposing their plans' deficiencies, all of these clients expressed disappointment at the failure to provide what was important to them. Failure of an estate plan can generally be traced back to either the design of the plan or its administration.

Estate Plan Design

Taking time. Many estate plans are completed in two meetings taking a total of about three hours. The same clients probably spend more time planning family vacations or researching schools for their children. A client must be fully informed of what his/her estate plan can and cannot accomplish. To

design an effective plan, an advisor must ask the right questions and truly gain an understanding of the client's situation. Then time must be taken to think through the responses and run through possible scenarios, because sometimes a decision at its onset may look different after time has passed.

Proper education. A client needs proper perspective and clear explanations of options, so that he/she can make informed decisions. Without proper knowledge, a client may develop a false sense of security regarding his/her trust. For example, a common misconception is that because assets are titled in the name of a trust, the assets are magically protected from any kind of future judgment. This is just one area that can cause confusion and a false sense of security if the client becomes involved with some kind of litigation. The planner needs to manage a client's expectations, but at the same time present options and customize the plan to accomplish what is important to the family situation.

Estate plans are personal. After first understanding the purpose of the estate plan, the client should be given options as to how that plan can be customized for his/her particular situation and accomplish his/her goals. Posing the right questions will induce a series of responses from the client that result in important provisions and features in the estate plan. However, some of these customizations may be neither practical nor feasible.

The client needs a competent advisor. Most clients are not well versed in taxes, law, or finance. Whatever education an advisor provides may be all that they know. Thus, if the advisor is not very well versed, then the client will be even less educated on what he/she has or what an estate plan can accomplish. Unfortunately, most plans are created using an attorney's or advisor's preconceived design for the client, and the advisor's knowledge and experience.

While there are many tax and legal aspects of

a trust, there are personal provisions of the trust that can either cause or prevent problems such as the examples cited earlier. These nontechnical personalized provisions accomplish the wishes and goals of a family. Beyond having the technical expertise to provide all the tax and legal benefits available, competent advisors should ask questions to draw out items important to the family and incorporate them into the estate plan. The plan should also be coordinated with the client's business and his/her retirement strategy, and provide any possible asset protection. Each of these areas can affect the other pieces of the estate plan.

Administration of the Plan

Although a competent advisor can spend time with the client and design personalized, comprehensive plans, the client can still sabotage the estate plan by administering it incorrectly. Defective administration can take many forms depending upon the plan. It may be as simple as not titling a piece of real property in the name of the trust. Periodic reviews and a good line of communication with clients are necessary to ensure that life's changes are reflected when necessary in the estate plan.

Conclusion

Estate planning is a multifaceted process that encompasses many different areas. A plan can be defective from the beginning or fail at some point in its administration. Fortunately, many defects can be repaired. Trusts can be amended and restated; qualified plans can be modified; beneficiaries can be removed or added; titles of assets can be changed; or a new plan can be created. When a competent advisor reviews a plan with a client to identify defects based upon the client's priorities, the plan can become one of the few destined to succeed. ●

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